



Put Into Practice: Risk Management Tips for Your Firm

OCTOBER 2, 2014 - GREENSBORO

OCTOBER 3, 2014 - CONCORD

NOVEMBER 20, 2014 - ASHEVILLE

NOVEMBER 21, 2014 - CLEMMONS

JANUARY 23, 2015 - CARY

JANUARY 29, 2015 - GREENVILLE

JANUARY 30, 2015 - NEW BERN

FEBRUARY 6, 2015 - WRIGHTSVILLE BEACH



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Put Into Practice: Risk Management Tips for Your Firm

AGENDA

Registration

Are You Doing Your Ethical Due Diligence?

Recent ethics opinions and disciplinary decisions put the onus on attorneys to regularly check their websites, monitor on-line reviews and social media connections, counsel clients about social media, and know exactly what's going on with their trust accounts. Find out what you need to know and get some practical tips for staying out of hot water with State Bar.

(1 hour Ethics CLE)

Break

Planning Ahead: Protecting Your Clients' Interests in the Event of Death or Disability

While lawyers are trained to help their clients avoid disaster, most solo and small firm practitioners avoid planning for their own crisis. However, accidents, unexpected illness, debilitating mental conditions, and untimely death often occur. Have you made adequate plans to assure your clients' interests will be protected?

Join us as we discuss designating an "assisting attorney", recognizing the signs of depression and other mental illnesses, practice management tips for a smooth transition in the event of an emergency and the use of forms and checklists as effective risk management.

(1 hour Ethics CLE)

Break

Malpractice Landmines and How to Avoid Stepping on Them

Who better to offer risk management advice than a panel of defense attorneys who have handled hundreds of malpractice cases? Topics include:

- No More Mr. Nice Guy
- Bankruptcy Land Mines
- Please Don't Dabble, Don't Put Beans in Your Ears, and Other Obvious Lessons
- Engagement Letters and Staying Within Your Engagement
- Low Budget Cases Don't Permit A Lower Standard of Care.

(1 hour General CLE)



Are You Doing Your Ethical Due Diligence?

CONTACT INFORMATION

MANUSCRIPT



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ARE YOU DOING YOUR ETHICAL DUE DILIGENCE?

Advertising and Marketing

I. Blogs Related to Advertising and Marketing

Seven Dirty Words in Lawyer Advertising

By Deanna Bocker

OK, so the words are not really dirty, indecent, or obscene, and their use won't get you arrested — a la George Carlin. But there are certain words or phrases a NC attorney should be wary of when creating a webpage or an advertisement. These are words or phrases that can get you in trouble unless you are careful about how you use them and, in some cases, unless you include disclaimer language. By the way, this is not an exclusive list, but it does include some of the usual language that trips up attorneys.

1. **Specialize/Specialist** – Most everyone knows that Rule 7.4 prohibits the use of the word “specialist” or a variant of that term unless you are certified as a specialist by the State Bar or an organization approved by the State Bar or the ABA. Be careful about advertising on third party or social media sites that use the term specialist.
2. **Guarantee/Promise** – It is a bad idea to promise anything. You can't promise results because it creates unjustified expectations in violation of Rule 7.1. Nonetheless, if there is something (not results) than you can assure will happen 100% of the time, then you could guarantee it. For example, “I guarantee that if you are not satisfied, I will return your fee.” It must be true 100% of the time, no exceptions. Otherwise, don't say it.
3. **Get/Obtain** – these seem like a fairly innocuous words, but the word “get” gets attorneys into lots of trouble, especially when coupled with the word “results” (See #4 below). If you are saying you will “get” anything for the client having to do with results, then you are creating unjustified expectations. Rule 7.1((a)(2). It sounds too much like a promise or guarantee. Use qualifiers. For example, instead of saying “we will get you _____,” say “we will try to help you get _____.”
4. **Results** – This is a tricky one. I've seen it in slogans: “Experience, Dedication, Results.” That appears to be OK because it doesn't imply a specific result. But to talk about the actual results you will obtain for *future* clients, “we will obtain money for your injuries” or “our firm can

get you a quick settlement" is not permitted as creating unjustified expectations. Rule 7.1(a). It is questionable whether a disclaimer will help the language in either example because both include the word "get" coupled with specific results. *Past* results or successes, ("we've successfully represented hundreds of clients") or a verdict/settlement record, can be advertised if truthful, but you must include disclaimer language consistent with 2009 FEO 16. To sum up, don't talk about specific results you will obtain for future clients; past results must include disclaimer language.

5. **Most/Best/Top** – These words should not be used to describe your services. If you are saying you are the most, the best, or the top anything, then be ready for a Bar complaint. This is a comparison of your services with others, and it cannot be factually substantiated. Rule 7.1(a)(3). Can you say you are "one of the *leading* attorneys in the State," or "one of the *premier* law firms in the state"? Well, even saying you are "one of" the attorneys who possess those qualifications is risky. You must be able to factually substantiate that claim. It's safer to leave those kinds of descriptions out of your advertisements.
6. **Deserve** – This one is also a bit ticklish. There is no specific rule which prohibits the use of the word. To use it in the following way, however, can potentially cause problems: "We help clients obtain the money they deserve." Staff counsel at the State Bar takes the position that using "deserve" in this way is misleading because it implies a promise to do something and implies that everyone deserves to recover something. You may be able to use deserve when discussing past results without implying that everyone deserves to recover monetary damages – "we've helped clients recover the money they deserved," – but any discussion of results (past or future) should include a disclaimer. Adding more qualifiers may eliminate the need for disclaimer language: "We've helped clients seek to recover the money they deserved."
7. **Expert** – This is another word that is not specifically prohibited by the Rules and there is no ethics opinion which says you can't use the word to describe your services. But be careful because its use may be deemed misleading. You need to be certain that, at a minimum, you have sufficient experience in the practice area before using this term. I would not recommend saying you are an expert because you may be called upon to substantiate that claim.

The words "always" and "never" did not make the list but deserve mention. Stay away from absolutes. They are too much like promises or guarantees.

Are we picking nits here? Absolutely. Will your marketing professionals like it? Absolutely not. Heck, this is legal advertising folks. If your ad is slick, novel, cute, interesting, flashy, catchy, or witty, you've likely violated some Rule of Professional Conduct. But hopefully, these quick tips will help you avoid a Bar complaint.

Are You Checking Your LinkedIn Endorsements?

By Deanna Bocker

At its quarterly meeting in July 2014, the Ethics Committee adopted a proposed opinion about the propriety of making and accepting both invitations to connect and endorsements on LinkedIn. The proposed opinion first holds that an attorney may ordinarily accept an invitation to connect from a judge. The opinion warns that if the attorney is currently in proceedings before the judge at the time of the invitation, however, the Rules of Professional Conduct *may* require the lawyer to decline the invitation at that time. The lawyer must at the time of the invitation determine whether acceptance of the invitation during the pendency of a case will impair the lawyer's ability to comply with the Rules against *ex parte* communications (Rule 3.5) and prohibiting conduct that is prejudicial to the administration of justice (Rule 8.4), among others. Ultimately, the opinion directs lawyers to be mindful of their obligation to protect the integrity of the judicial system and to avoid creating an appearance of judicial partiality. The same criteria apply when deciding whether *to send* an invitation to a judge to connect.

Although there does not appear to be a hard and fast rule prohibiting it, my advice, based upon this proposed opinion, is to wait to connect with a judge until you are not appearing before that judge, if possible.

The next part of the opinion dealing with endorsements was an education for me. I didn't really know how the LinkedIn endorsements worked. Apparently, you have an option to display your "skills & expertise" on your profile page. Your connections can then endorse a skill or expertise for you. Then you will get a notification of the endorsement. If you do nothing, and the endorsement is for a skill you have selected to show, then that endorsement automatically will appear on your profile page. You may also edit the "skills & endorsements" section to "hide" selected endorsements or skills. Why is all of this important? The proposed ethics opinion says that it is OK to endorse a judge for skills or expertise (assuming you are not currently appearing before them). Likely, this is permitted because it is really no different than sponsoring a judicial campaign or being listed publicly as a donor. The proposed opinion goes on to say that an

attorney may not, under any circumstances or at any time, *accept* an endorsement from a judge. Further, if a person that you had previously accepted an endorsement from then becomes a judge, you are required to remove the endorsement from your profile. And, this prohibition applies to any social media website that allows public displays of endorsements or recommendations.

Ack! I'm not checking my LinkedIn for people that I have connected with who may have become judges and might have endorsed me at one time! Perhaps I should know or remember which of my connections have become judges, but heck, I sometimes have trouble remembering what I ate for breakfast. Before you panic, know that this opinion is being published for comments which if received by the Bar, will be considered by the Ethics Committee at its next meeting in October 2014. If the opinion does become final as is, hopefully you don't have too many endorsements to check. This can be one time that I count myself lucky not to know very many people.

Case Results on Your Website? The Line between Creating Unjustified Expectations and Good Marketing

By K. Brooke Ottesen

Under the Rules of Professional Conduct, a law firm's website is considered a form of advertisement and is regulated by the State Bar. Most attorneys are mindful of this, but as with everything, the devil is in the details. For example, you have just obtained an exceptional and hard-won settlement for your client. Can you use this result on your website and other social media to market your legal skills to potential clients?

You can and you should because potential clients are using the internet to research products and services; law firms are judged and selected by their online presence. However, the Rules provide, "A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services." *N.C. Rules of Prof'l Conduct, Rule 7.1 (2003)*. Further, a communication is considered false or misleading if it "is likely to create an unjustified expectation about results the lawyer can achieve..." *N.C. Rules of Prof'l Conduct, Rule 7.1(a)(2) (2003)*.

The State Bar Ethics Committee has determined that advertising specific settlements and verdicts can create unjustified expectations about the results attorneys can achieve. How then do you avoid creating these "unjustified expectations" about the results you can achieve for potential clients? In the past, the State Bar required that the lawyer list both favorable and unfavorable results on their websites. However, the Bar now

permits a lawyer to advertise that he or she has argued and won numerous cases before a specific court or has successfully handled cases in a specific area of law, without noting any unsuccessful cases or losses.

In 2009 FEO 16, the N.C. State Bar specifically addresses favorable case results: The opinion rules a website may include successful verdicts and settlements as long as it is factually accurate and contains an appropriate and “prominently displayed” disclaimer:

...The disclaimer must be sufficiently tailored to address the information presented in the case summary section. The disclaimer must be displayed on the website in such a manner that it is reasonable to expect that anyone who reads the case summary section will also read the disclaimer. Depending on the information contained in the case summary section, an appropriate disclaimer should point out that the cases mentioned on the site are illustrative of the matters handled by the firm; that case results depend upon a variety of factors unique to each case; that not all results are provided; and that prior results do not guarantee a similar outcome.

The opinion provides that an appropriate disclaimer would preclude a finding by the Bar that the website is likely to lead to unjustified expectations that the same results can be obtained for a potential client.

The use of websites, including case results, to attract potential clients is a wise and essential use of marketing dollars; just make sure you are not overstepping the line between unjustified expectations and good marketing. Likewise, keep abreast of ethical developments in the rapidly changing arena of online marketing and advertising to avoid potential grievances from the Bar.

Social Media Ethics: Part 1

By K. Brooke Ottesen

Although it began as a tragic personal injury case where a concrete truck crossed the center line and tipped over the car of a newly married 25-year-old woman, the case effectively ended the career of Mathew Murray, a Virginia lawyer and managing partner in one of the largest personal injury firms in Virginia. So what went so wrong to end the career of this experienced and prominent attorney?

The case, *Isaiah Lester, Individually and as Administrator of the Estate of Jessica Lynn Scott Lester v. Allied Concrete Company, et al.*, involved a

personal injury action where Mr. Murray represented Isaiah Lester, the husband of the woman who died in the crash with the Allied Concrete truck. Mr. Murray's problems began after he received a discovery request from Allied Concrete, the defendant. Through an email from his paralegal, Mr. Murray instructed Mr. Lester to "clean up" his Facebook page after Allied Concrete's attorneys sought Facebook screenshots, pictures, profile, message board, status updates and messages. Following his lawyer's advice, Mr. Lester deleted sixteen photos including one where he wore a T-shirt exclaiming "I (heart) hot moms" while holding a beer can. Mr. Murray also instructed Mr. Lester to deactivate his Facebook accounts so that he could respond to the discovery request that no such account existed.

Ultimately, the judge in the personal injury case ordered Mr. Murray and Mr. Lester to pay \$722,000 in sanctions where the judge found an "extensive pattern of deceptive and obstructionist conduct." Mr. Murray was further disciplined by the Virginia State Bar and received a five year suspension for violating ethics rules that govern candor toward the tribunal, fairness to opposing party and counsel, and misconduct. There are also reports that Mr. Murray resigned from the firm and is retiring from practicing law.

There is no doubt social media evidence will become more prevalent in the future. To provide competent representation, lawyers likely already have a duty to address social media evidence as it can be a powerful investigative tool. However, social media can also be a minefield of ethical issues. As the *Lester* case illustrates, lawyers need to be cognizant of how they counsel their clients regarding social media evidence.

Clearly, the advice to turn off or deactivate Facebook, so that the lawyer could deny the existence of such an account in discovery violates Rule 3.3(a)(1) (making a false statement to the tribunal) and Rule 8.4(c) (engaging in conduct involving dishonesty or misrepresentation). But even a casual statement to a client to "clean up" their social media accounts or profiles, whether discovery is pending or not, is insufficient direction to the client. A lawyer must anticipate when social media will be relevant in the client's case, and must be careful not to suggest that the client do anything to their social media account that would amount to spoliation of evidence.

In the firm's next blog, Deanna will address social media discovery, highlighting the new State Bar proposed opinion on this issue, and discuss other social media ethical questions including: (1) May an attorney view the publicly available portions of social media to gain information; (2) May an attorney "friend" an individual to gain access to non-public information; (3) May the attorney direct a third party to gain access on their

behalf- whose name the non-client may not recognize-by requesting the third party “friend” the individual.

Social Media Ethics: Part 2

By Deanna Bocker

The State Bar Ethics Committee has decided that competent representation includes advice about a client’s social media postings to the extent they are relevant and material to the representation. 2014 FEO 5. The opinion goes on to say that a lawyer may have a duty to advise a client about social media and its possible effect on litigation both before and after a lawsuit is filed, may advise the client to change privacy settings on social media sites, and may only instruct a client to remove postings so long as it does not amount to spoliation or otherwise violate the law.

If removing postings does not constitute spoliation and is not otherwise illegal or a violation of a court order, the lawyer may instruct the client to remove existing postings on social media. If the lawyer advises the client to take down postings on social media, where there is a potential that destruction of the postings would constitute spoliation, the lawyer must also advise the client to preserve the postings by printing the material, or saving the material to a memory stick, compact disc, DVD, or other technology, including web-based technology, used to save documents, audio, and video. The lawyer may also take possession of the material for purposes of preserving the same. Advice should be given before and after the law suit is filed.

This result is intuitive as e-discovery is commonplace these days. But there are other social media-type discovery questions that remain unanswered. In the last blog, we posed three of those questions. The first is whether an attorney can view publicly available portions of social media to gain information about the opposing party for litigation. The answer is yes, as there is no ethical impediment to gathering information about the opposing party through publicly available sources.

The second question is whether an attorney may “friend” an opposing party to gain access to non-public information. Although there is no opinion in NC on this issue, I believe that this is problematic, at least where the opposing party is represented by counsel. Under that circumstance, Rule 4.2 prohibits communications with a represented person “about the subject of the representation.” There is no question that sending an invitation to “friend” someone on Facebook is a communication, but is it “about the subject of the representation.” A good argument can be made that it is not, without more, because it does not touch upon the subject of the

representation, or any subject at all. As long as the attorney makes the request under his actual name, does not communicate any false or misleading information, and does not try to elicit any information from the opposing party through social media, should this be a problem under the Rules of Professional Conduct? My guess is that because the attorney's motivation for making the friend request is to find information about the opposing party which would relate to the representation and is not otherwise in the public domain, there is also the argument that the communication is ostensibly "about the subject of the representation." Even a "friend" request to an unrepresented party may be problematic, as Rule 4.3(b) requires that when the lawyer reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer has the obligation to try to correct the misunderstanding. Keep in mind that the Ethics Committee has not opined on this issue, so I would be careful and seek ethics advice before proceeding in this fashion.

The third question is whether the attorney can direct another person, perhaps his firm administrator or a relative for example, to "friend" the individual to gain access on the attorney's behalf. In this situation, it is more likely the opposing party may not recognize the name of the person making the friend request. In addition to the Rule 4.2 issue, I have more trouble with this, as the entire purpose of asking a third person to make the "friend" request is the hope that the opposing party won't know from whom they are receiving the request, and would not view the person as a threat. This approach could be considered misleading under the Rules, and a likely violation of Rule 8.4(c).

Bottom Line: To be safe, if you want to view non-public portions of an opposing party's Facebook page, represented or not, use ordinary discovery methods, or ask the State Bar first. It might be time for the Bar to look at this issue and weigh in on it.

The Ethics of Ghost Blogging and Astroturfing

By K. Brooke Ottesen

In today's marketplace, having a strong social media presence is essential. For example, in addition to a firm website and blog, our firm has a presence on LinkedIn, Google +, Twitter, and Facebook. While an on-line presence can translate into positive business development, it also means more ethical considerations-even in areas the N.C. State Bar has yet to address. Two trends in online marketing, which seem to be particularly problematic for attorneys, recently caught my attention: ghost blogging and astroturfing.

Ghost Blogging. Ghost blogs are created by writers who are hired to pen content for their client's blog anonymously. Although many different professions and markets utilize ghost bloggers in an effort to increase their credibility and market development, lawyers, because of our advertising rules, should tread carefully. Although the Rules do not specifically prohibit -nor does an ethics opinion address- ghost blogging, the Rules do prohibit false and misleading and deceptive communications to the public about our legal services. Rule 7.1. Despite the fact that the Bar has not specifically addressed this issue, it seems clear to me the State Bar can, and eventually will, make a good case that this practice can be misleading and deceptive where ghost writing, at the heart of it, is hiring someone who is pretending to be you. What is not clear is whether the Bar, when it tackles this issue, will determine whether a disclaimer that the blog was written by another is enough.

Astroturfing. Astroturfing is defined as "the act of trying to boost one's image online with fake comments, paid-for reviews, made-up claims and testimonials." Although it may be tempting to have an employee post a positive or flattering review or testimonial of your legal services, and there are many companies who will do this for hire, you should never post false reviews. For example, Yelp, an online business review site, sued a San Diego law firm for allegedly causing false postings regarding their legal services to be posted to the Yelp site. Yelp alleged the positive reviews were actually posted by employees of the firm. And in New York, following "Operation Clean Turf," the Attorney General announced 19 companies were heavily fined for writing fake online reviews to promote products and services where the companies were hiring employees to post positive online reviews for their clients.

Although I have not yet seen any astroturfing cases with the N.C. State Bar, there is no doubt this practice is unethical for attorneys (Rules 7.1 and 8.4(c)) and could lead to a grievance. As Gyi Tsakalakis in his *Lawyerist* article states: "Many of the rules governing what attorneys can and can't do are vague, confusing and unduly restrictive. But this one's pretty reasonable and clear: Don't mislead potential clients with false testimonials, endorsements, reviews, etc."

One last point: Some lawyers may want to leave their social media presence in the hands of others for reasons including a lack of time or expertise. However, lawyers still have an ethical duty to supervise the non-attorneys who provide content on their social media to ensure the content complies with the Rules. Regardless of whether an attorney approved of the social media message related to the legal services he or she is providing, the

Bar can ultimately hold the attorney responsible if there is a violation of the Rules.

Effectively Managing Online Client Reviews

By K. Brooke Ottesen

I recently read a blog by AVVO's General Counsel, Josh King, regarding online client reviews. His article caught my attention because AVVO publishes online lawyer ratings, reviews, and disciplinary records for lawyers. I grew even more interested (read: fearful) when I discovered ratings and comments can be posted **without my consent or knowledge**. In his blog, Mr. King addresses the fact that lawyers are averse to being simply a product consumers can review when he said,

"I've heard every possible concern from attorneys: clients in my area are psychos, they can't evaluate legal work, they have unreasonable expectations, etc. It's the 'lawyers are different' mantra. But you're not.

You're a toaster.

Or a luxury hotel. Is that better?"

Mr. King is likely right. Like it or not, lawyers and their services are being evaluated and reviewed by their clients. So what do lawyers do about it? Some of the best practices for handling online client reviews are:

- Request that happy clients post reviews. By encouraging positive reviews, they will outnumber any negative ones. But you may need to provide some guidance about ethical limitations for testimonials. See 2012 FEO 8.
- Be proactive and communicate often with your clients to increase the number of happy clients. A client that feels valued and important is less likely to post a negative review.
- Regularly review all online client feedback.
- Respond to any negative client reviews by apologizing for their dissatisfaction and offering to personally speak with him/her to find a resolution to the matter. A professional response can go far.
- Stay away from reviews-for-hire. It's a growing industry but an ethical violation.
- Never respond to a negative client review by breaching client confidentiality. The last point is an important one. Last month, an Illinois attorney stipulated to a public reprimand for violating client confidentiality where she responded to her client's negative review on AVVO. [The disciplinary complaint is at <http://www.iardc.org/13PR0095CM.html>]. The client, a

former flight attendant with American Airlines, retained the attorney to secure unemployment benefits where the client had been terminated for allegedly assaulting a co-worker. The client was denied unemployment benefits, terminated the attorney, and posted an unfavorable review. The attorney retorted online, "I feel badly for him but his own actions in beating up a female coworker are what caused the consequences he is now so upset about." By failing to craft a professional response, the attorney was reprimanded by the Bar and let an opportunity pass.

So instead of fighting (or fearing) online client reviews, use them to your advantage. The positive reviews by your happy clients may generate new clients, and the negative ones can be a chance to improve your professional services.

Have You Looked at Your Website Lately?

By Deanna Brocker

As professionals, we may not like to think about marketing, except as a necessary evil. If you have a website, and you should, don't ignore it. Because websites can be changed at any time, the information there tends to be more time sensitive and may go out-of-date if you're not paying attention. It's not only a good idea to pay attention to your website from a marketing perspective, but also from an ethics perspective. A poor website (think unprofessional looking) can damage your on-line reputation but a website that is ignored may run afoul of the ever-changing advertising rules. Here are some tips:

- **Fix out-of-date information.** This gives the impression that you do not pay attention to detail. It may also get you in trouble with the State Bar. For example, if you had your only Board Certified Specialist leave your firm, but your website continues to say that a certified specialist can help you, then you just violated Rule 7.5, even if it was inadvertent.
- **Fix ethics issues.** The advertising ethics opinions are ever changing. Know how to use testimonials and what disclaimers are required. 2012 FEO 1. There are also very specific rules about disclaimers when you discuss verdicts and settlements, or anytime you discuss being "successful" on your website. 2009 FEO 16. Embedded videos should comply with TV advertising rules. Familiarize yourself with the Rules and ethics opinions pertaining to advertising and keep abreast of new developments.
- **Make a good first impression.** Your website is your first impression for the vast majority of your client base. It's the first place people go to see who you are. Have your website done by a professional. Use professional photos or videos. Spend the money upfront, because you only have one chance to make a good first impression.

- **Plan to invest time in your website.** Once your website is launched, don't just forget about it. Ask yourself what you want your website to do for you. Perhaps you should link to social media platforms. Should you start a blog? Think about search engine optimization. Ask how you can better attract clients to your site, and having done that, ask what your website can do to bring those clients to your door.

Here's one more piece of advice. Give away information on your website. Tell about your practice area. If you're a real estate attorney, give an overview of the closing process, list the things a buyer or seller need to think about, list common mistakes or assumptions people make, and of course, tell why it is a good idea to hire an attorney. By giving away this information, you let people know that you know your stuff, and you give them greater insight about why they not only need an attorney, but why they need you.

Soliciting Facebook "Likes"

By Deanna Bocker

What does it mean when someone "likes" your firm on its Facebook page? Does it mean they like your firm, the people in your firm, or the artwork on your Facebook page? I don't know what it means exactly, but regardless of what the person intended when they "liked" your page, N.C. State Bar staff take the position that "liking" a firm/lawyer on Facebook is akin to a referral. Rule 7.2(b) states that a "lawyer shall not give anything of value to a person for recommending the lawyer's services...." If a Facebook "like" is like a referral, then Rule 7.2 may prohibit lawyers from requesting "likes" if they promise anything in exchange for doing so. What that means is that you can't solicit "likes" in exchange for "liking" something or someone else on Facebook. You should not request "likes" in exchange for a donation to charity. You also should not request "likes" in exchange for entering persons in a giveaway or drawing. In sum, there can be no *quid pro quo*.

If you don't have a firm Facebook page and never intend to have one, this probably does not mean much to you. But, if you do have one, be careful how you go about soliciting "likes." Someone at the Bar may not "like" the way you do it.

Some "Expert" Advice

By Deanna Bocker

I often get the question of whether attorneys can advertise that they are "experts" or have "expertise" in a particular practice area. The question likely stems from the fact that the State Bar prohibits attorneys from saying

they are “specialists” or that they “specialize” in any practice area unless the attorney is certified as a specialist by either the State Bar, a board the State Bar has recognized or one that the ABA has accredited. There is, however, no specific prohibition against use of the term “expert” or any of its variants. Nonetheless, the description of yourself as an expert must not be misleading under Rule 7.1.

For example, a newbie attorney, fresh out of law school, should not describe themselves as an expert in anything. I would avoid using the term to describe your services unless you have several years practice under your belt. If you say you are an expert in a specific area, make sure that a fair portion of your practice has been devoted to that area of practice. So, if you primarily practice in District Court, and have done so for several years, but you have handled only one or two wills in that time frame, I would not recommend that you describe yourself as an expert in estate planning. My guess is that the State Bar would consider that description misleading.

Can you say you are “highly skilled” or have “substantial experience” in your field? Sure, but the same rules apply. The question to ask yourself is what do *you* think when someone describes themselves as an expert, highly skilled or highly qualified. Make sure the description fits, because you may be called upon one day to substantiate that claim.

Final Word on Testimonials

By Deanna Bocker

The Ethics Committee adopted a final opinion on the use of testimonials in advertising in 2012 FEO 1. I think this opinion strikes the right balance and permits the use of client testimonials that describe a client’s satisfaction not only with the lawyer’s services, but also with the result. The opinion requires that an appropriate and conspicuous disclaimer appear with any testimonial that refers to results, and it prohibits any client endorsements which include statements about specific dollar amounts. This opinion represents a loosening of the requirements with respect to testimonials in advertising. Previously, only “soft endorsements,” or testimonials about the attorney’s level of service, attentiveness, responsiveness, etc. could be included in advertisements. Testimonials describing a client’s satisfaction with the result (“He did a good job”), or the nature of the results (“I was able to get my social security benefits”) had been prohibited. Now, a lawyer may post these kinds of client comments on their websites and in other forms of advertisement with an appropriate disclaimer. See, for example, the disclaimer on our testimonials page of our website. www.brocklawfirm.com. It has been approved by the State Bar.

Another opinion, 2012 FEO 8, states that a lawyer may request that a client post a recommendation or testimonial on the lawyer's profile page of a third-party networking site, such as LinkedIn. In such case, because the attorney has control over the content included (he can accept or reject the client comment), the recommendation or testimonial must comply with Rule 7.1 of the Rules of Professional Conduct and the testimonial opinion, 2012 FEO 1, cited above.

II. NC Rules of Professional Conduct Related to Advertising and Marketing

N.C. Rules of Prof'l Conduct R. 7.1	Communications Concerning a Lawyer's Services
N.C. Rules of Prof'l Conduct R. 7.2	Advertising
N.C. Rules of Prof'l Conduct R. 7.3	Direct Contact with Potential Clients
N.C. Rules of Prof'l Conduct R. 7.4	Communication of Fields of Practice and Specialization
N.C. Rules of Prof'l Conduct R. 7.5	Firm Names and Letterheads

III. Recent State Bar Ethics Opinions on Advertising and Marketing

2014 FEO 5	Advising a Civil Litigation Client about Social Media
2012 FEO 8	Lawyer's Acceptance of Recommendations on Professional Networking Website
2012 FEO 1	Use of Client Testimonials in Advertising
2009 FEO 16	Including Information on Verdicts, Settlements, and Memberships on a Website
Proposed 2014 FEO 8	Accepting an Invitation from a Judge to Connect on LinkedIn

Trust Accounting

I. Blogs Related to Trust Accounting

Checking Under the Hood of Your Trust Account

By Doug Bocker

Are you doing the ethical equivalent of checking under the hood and kicking the tires of your trust account? If not, you better make some time to do so, and soon. Over the last several years, the State Bar has made a concerted effort to step up enforcement concerning supervision of trust accounts, or lack thereof. It primarily has done this by aggressively pursuing disciplinary action against attorneys who fail to satisfy what it considers to be adequate supervision and oversight of trust accounts.

A significant number of attorneys have received public discipline, including active or stayed suspensions. Many of these individuals were experienced, well-respected attorneys with previously unblemished disciplinary records and in many instances very impressive credentials. If you believe you are immune because you're in a large or well-established firm or because you're not the partner or principal directly responsible for the trust account, think again. This is an issue that potentially affects any lawyer in North Carolina whose firm handles trust funds. The most common reasons that lawyers have gotten caught in this disciplinary net is either because: (1) they placed too much faith in a trusted employee, who betrayed it, or (2) they abdicated, rather than delegated, their responsibilities concerning the trust account to an employee or outside bookkeeper or accountant.

It is not possible in this format to provide an exhaustive list of the potential issues or pitfalls on this subject. Instead, I will cover three of the most common areas that have ensnared some very good lawyers over the last several years. There also is an e-publication available on our Firm website that addresses these issues entitled, "Tips for Safeguarding Client Trust Funds."

<http://brockerlawfirm.com/wp-content/uploads/2014/02/Trust-Funds.pdf>

First, all the lawyers in a firm must ensure that they have an adequate system in place to comply with the trust account rules, including adequate supervision of non-lawyers. In the last few years, if trust funds were stolen or even just misapplied by employees or other non-lawyers and there was an inadequate system in place concerning trust account supervision (or none at all), the State Bar has obtained a stayed or active suspension against at least one of the lawyers in the firm in many cases.

Second, even when there is a system in place, if funds are misused or misappropriated by an employee, the State Bar has issued public disciplinary action against one or more lawyers in the firm. Public discipline has been imposed even when the lawyers discovered the theft, self-reported it to the State Bar as required, and took all other possible corrective remedies after the discovery, including full reimbursement to the client and pursuing criminal charges against the embezzler. In essence, the State Bar has taken a strict liability approach to trust account violations concerning misuse of the funds.

Third, the State Bar has taken the position that supervising attorneys are required, at least periodically, to review the trust account bank statements, checks, deposit slips, wire transfers and other source documents. Although this requirement is not specifically set forth in the Rules, Comments or Formal Ethics Opinions to my knowledge, the Bar consistently has taken the position in recent years that such review of source documents is required as part of a lawyer's duty to adequately supervise non-lawyers with respect to trust accounts. According to the State Bar, it is not sufficient for an attorney merely to review trust account summaries prepared by a non-lawyer without crosschecking or confirming the information in the summaries with the corresponding source documentation, at least periodically.

In other words, the State Bar expects that lawyers will go beyond just merely observing if things appear to be running smoothly and requires them to check under the hood of their trust account, at least periodically. A good place to start for a DIY approach is the State Bar's Trust Account Handbook, which is available on its website. Our Firm also offers customized trust account procedural assessments for law firms and lawyers who need outside assistance. However you decide to do it, it is past time to roll up your sleeves and get your hands dirty.

Interview with an Auditor

By Deanna Bocker

I had a chance to interview Tim Batchelor, the State Bar's interim auditor*, about himself, the State Bar's audit program, and what he sees as the biggest problems for attorneys. Here were his responses:

1. *How long have you been with the State Bar and what did you do before that?*

I came to work for the Bar as a staff investigator in 2003. Prior to that I was a Special Agent for the SBI for 26 years, retiring in 2003.

2. What do you see so far as the biggest problem with trust account compliance?

I began working with Mr. DeMolli (former auditor) in November 2012 and accompanied him on audits during the final quarter of 2012. It quickly became apparent that the most significant and reoccurring problems founds are consistently: (1) trust account balances of funds belonging to all clients are not reconciled with the current bank statement at least quarterly, (2) reconciliations of the monthly trust account bank statement are not properly documented or not done in a timely manner, (3) failure to identify the client on the face of the trust account checks, deposit slips and wire confirmations, and (4) failure to escheat abandoned or unidentified funds in the trust account.

3. What should an attorney do now, if they want to do a self-audit or ensure compliance?

If the lawyer is currently uninvolved in the mechanics of the trust account reconciliation process, become involved and understand what your staff is doing. Review the rules to understand what is required. Share that information with staff and immediately make corrections and improvements in the current process where needed. Document findings and actions taken. Self report serious problems discovered. Periodically review the trust account bank statements and reconciliation documents your staff produces. Assure staff receives proper training, updated information and adequate supervision. Having checks and balances within the office is a good business practice.

4. What should someone do in preparation for a visit from you?

The State Bar auditor is looking for a complete trust account audit trail. A lawyer's internal trust accounting records should be reconciled with the monthly trust account bank statements. Every credit and debit in a trust account should be attributed to a specific client and a ledger maintained for each current client. Reconciling the general ledger/checkbook register with the monthly bank statement, coupled with the required quarterly reconciliation, will ensure a proper audit trail and will reveal any discrepancies in a timely manner. Document any unusual activity. Retain all trust account records and assure they are readily retrievable. Backup and secure accounting records offsite.

Specifically in preparation for the auditor's visit, gather the most current 12 months bank statements for each trust account. Attach all internal monthly reconciliation documentation and the quarterly reconciliation documentation. Assure canceled checks (front and back) or digital images are provided as well as all deposit slips, wire confirmation and credit card receipts. Make your general ledger/checkbook available. Client ledgers should also be available for the auditor's review. Your copy of the Bank directive for each trust account should be provided for the auditor's review. Be prepared to pull client files, especially real estate files for the auditor as needed. Have the person who daily handles the trust account activity available to explain the process used.

Whew! That sounds like a lot of work. My advice: avoid the last minute scramble. Set aside some time to get your trust account records in order and to make them readily accessible before you get that dreaded letter from the State Bar auditor. It will save you a whole lot of heartburn down the road.

*Anne Parkin is the current State Bar Auditor

The Devil is in the Details: Common Trust Accounting Issues

By K. Brooke Ottesen

Recently at a NCBA Law Practice Management & Technology Section Council meeting, Peter Bolac, the Trust Account Compliance Counsel at the State Bar, presented "Common Trust Accounting Issues." The presentation was exceptionally beneficial to both small and large firms and focused on several areas: employee theft, check scams, reconciliations and outstanding checks on trust accounts. Although it is essential to have a comprehensive reconciliation and accounting procedure in place with checks and balances, Peter provided several easy ideas to add to that procedure. From his presentation, I derived some easy-to-implement and smart accounting practices to safeguard your trust accounts and your law license:

1. Always, always, always be vigilant; as we all know, lawyers have a professional duty to supervise their non-lawyer staff and can be disciplined by the Bar for failure to do so;
2. Have well-documented and sound accounting procedures in place that are followed consistently. Consult an expert if you are unsure of what those procedures should look like;
3. Write a letter to your bank stating that the principals or partners are the only ones who are authorized to transfer or withdraw money. Although the Rules permit non-lawyers to be signatories on

trust accounts, best practices dictate that non-lawyers should not be signatories;

4. Reconciliations are still the number one problem with attorney trust accounts. Although quarterly 3-way reconciliations are required, it is a better practice to do them monthly. The 3-way reconciliation compares the sum of the individual client ledgers to the firm's general ledger and to the bank statement. Peter provided a Trust Account Reconciliation Sheet to our group and gave us permission to share. Feel free to call us for a copy;
5. Implement a system so that different employees do different functions, such as:
 - (a) The person who opens and reviews the trust account statements should not also reconcile the accounts;
 - (b) The person who issues checks should not complete the reconciliations;
 - (c) The employee completing the reconciliations should not be the only person to review the reconciliations.
6. An attorney needs to carefully review the reconciliations and periodically spot check the source documents (account statements, checks and deposit slips);
7. Consider Positive Pay. It is an anti-fraud service offered by banks and protects companies against altered checks and counterfeit check fraud. After a firm cuts checks, the firm transmits to their bank a list of the checks they issued with the check number, date and dollar amount. The bank imports the list into their computers. When checks are presented to the bank for payment, the bank will match each check presented to the firm's previously transmitted lists. If a check does not match, it will not clear;
8. A lawyer may only take funds remaining in the trust account if the funds can be conclusively documented as the lawyer's money;
9. Regarding outstanding checks on trust accounts, if the check is over five years old, the funds may qualify for escheatment according to N.C.G.S. 116B-53. Make sure you have a process in place and each year review the trust accounts to determine which funds should be escheated.

Miscellaneous items: (a) Make sure the account is set up as an IOLTA account; (b) When you meet with your bank, go with your NSF directive; (c) Bank statements must include copies of canceled checks; (d) SIZE does matter (when it comes to check copies from the bank) and the rules are very specific; (e) Specify clients, bank name, and check number on all trust account deposit slips and keep a copy; (f) Keep records for 6 years; and (g) Words not to use with trust accounts are "borrow, adjustment," and "auto-reconcile."

Last great tip derived from the presentation: Peter Bolac is now on Twitter and you can follow him @TrustAccountNC for attorney scam alerts and other news affecting attorneys and their trust accounts.

You've Got to Know When to Hold 'Em - Disbursements Against Cashier's Checks

By Crystal Carlisle

Have you ever received an email from a potential client asking you to collect a debt owed to them by an ex-spouse, a corporation, or other person or entity? Did the email offer to pay you a hefty percentage of the amount collected? Many of us have received similar emails. More often than not, such requests are scams which involve fraudulent cashier's checks. Some emails are easily identifiable as scams due to spelling and grammatical errors, but some are fairly sophisticated. Cashier's checks have had the reputation of being reliable in the past, but these schemes are making attorneys a bit more wary of immediately distributing against them, and rightfully so.

RPC 191 permits attorneys to immediately disburse funds from a trust account upon the deposit of a financial instrument specified in the Good Funds Settlement Act ("Act") (N.C. Gen. Stat. Chapter 45A). Certified checks, cashier's checks, teller's checks, and official bank checks drawn on an FDIC insured bank are all listed under the Act. Attorneys are allowed to immediately disburse against the provisional credit extended to these kinds of instruments because they are considered extremely reliable and have a low risk of noncollectibility. Due to the increasing scams involving cashier's checks and the NC Court of Appeals decision in *Lawyers Mutual v. Mako*, should attorneys still be allowed to immediately disburse against these instruments?

In *Lawyers Mutual v. Mako*, a firm received an email from a prospective client asking for assistance in collecting \$350,000 owed by his former employer in a workers' compensation matter. 756 S.E.2d 809 (2014). The firm agreed to accept the case on a contingent fee basis of 20%. The firm received the first cashier's check for \$175,000 and deposited it into the trust account, but the firm was unable to wire the client his money or collect the contingent fee due to an error in the account information provided. The firm then received a second cashier's check for \$175,000, deposited it into the trust account, immediately wired \$140,000 to the Japanese account and

retained the \$35,000 contingent fee. The bank later notified the firm that both checks were dishonored. *Id.* at 810-11.

The firm made a claim under its policy with Lawyers Mutual. Lawyers Mutual denied the claim stating that pursuant to the language of the policy, it was not obligated to cover losses for instruments that were not irrevocably credited to the trust account. Defendants argued that the “irrevocably credited” language of the insurance policy was ambiguous. They stated that they understood this term to mean that losses from forged cashier’s checks would be covered, as such checks are irrevocably credited upon deposit. Lawyers Mutual ultimately brought an action for declaratory judgment asserting that the cashier’s checks were not irrevocably credited, and it was not required to provide coverage. *Id.*

The Wake County Superior Court granted summary judgment on behalf of Lawyer’s Mutual and the Court of Appeals affirmed the decision. The opinion explained that “pursuant to N.C.G.S. § 25-3-104(f), a cashier’s check is treated the same as a traditional check. A traditional check cannot be deemed fully credited until its provisional settlement period has elapsed without action by the bank to reject the check; the same is true for a cashier’s check. Therefore, the provisional settlement period that accompanies traditional checks must also apply to cashier’s checks.” *Id.* at 811-12.

The purpose of allowing attorneys to disburse against the instruments listed in the Act is to avoid delay and inconvenience, but is the inconvenience worth it? It is likely much more inconvenient to replace the amount of any failed deposit which is required under RPC 191. The safer course of action may be to ensure that any funds received have been irrevocably credited before distributing, even though the rules may permit otherwise.

Quicken: Not for Trust Accounting

By Deanna Bocker

Quicken may be great for some things like tax submissions and payroll, even general accounting, but not for lawyer trust accounting. Why? Because Quicken doesn’t alert you when you disburse more than you have on account for a particular client. In Quicken, you create subaccounts for each client within your trust account. But suppose you have \$500 in the trust account for Joe Smith, and \$400 in the trust account for Bob Jones. At the conclusion of the representation, you are supposed to disburse \$400 for your legal fee from the trust account for Bob Jones. Through a key stroke error, your assistant prints a check for your legal fee as \$500 instead of \$400, and

the check is deposited into your operating account. Quicken never warns you that you are writing a check for more than you have on account for Bob Jones because there is enough in the trust account as a whole to cover it. Yikes. If you have some money in the trust account to cover administrative fees or bank charges, then you might not have disbursed against another client's funds. But you can't keep too much in the account to cover accounting errors.

I strongly suggest that if you are using Quicken for your trust accounting, you look into software specifically designed for lawyers' trust accounts. Most of the time this software is a time/billing and general accounting software as well. Many times, such software comes with a conflicts checking capability, another plus. The biggest advantage from a trust accounting perspective is that the software forces you to associate each transaction in the trust account with a client and it will not allow you to over-disburse against a client's funds. Accounting is not my thing, so I need all the help I can get. I happen to use PCLaw for time keeping, billing, accounting and trust accounting, but there are many other programs out there as well. Shop around to find what suits your practice. You can probably continue to use Quicken for some things — but if you continue to use it for your trust account, you need to be extra diligent. It just may save you from having to answer some tough questions from the State Bar.

II. NC Rules of Professional Conduct Related to Trust Accounting

N.C. Rules of Prof'l Conduct R. 1.15-1	Definitions
N.C. Rules of Prof'l Conduct R. 1.15-2	General Rules
N.C. Rules of Prof'l Conduct R. 1.15-3	Records and Accountings

III. NC State Bar Ethics Opinions on Trust Accounting

2013 FEO 13	Disbursement against Funds Credited to Trust Account by ACH and EFT
2013 FEO 3	Safekeeping Funds Collected from Client to Pay Expenses
2011 FEO 13	Retaining Funds in Trust Account to Pay Disputed Legal Fee

*Rules and ethics opinions can be found at www.ncbar.gov.



Planning Ahead: Protecting Your Clients' Interests in the Event of Death or Disability

STACEY PHIPPS, ATTORNEY AT LAW, PC

LAWYERS MUTUAL CLAIMS ATTORNEY PANEL



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Agenda

- Item 1 What Could Possibly Happen to Me?
- Item 2 Who Steps In If I Can't Work?
- Item 3 How Can I Get Help?
- Item 4 Planning For The Worst.
- Item 5 Arrange an audit/consult.

It Can't Happen to Me

- Death – your own
 - Death – your family
 - Illness – your own
 - Illness – your family
 - Disbarment/disciplinary proceedings
- All of these events can take you out of active work status and leave your clients wondering what to do.



What Happens If I Can't Work?

It depends.



The Superior Court (Chief Judge), via the State Bar, may appoint a Trustee for a Missing, Incapacitated, Disabled, or Deceased ("MIDD") Attorney. The Trustee is empowered to perform tasks to protect clients.

Petition and Order
Enumerated Tasks
Handbook for guidance

Authority generally includes access to bank accounts, client files.



What Happens If I Can't Work?

Court-appointed Trustee

- Trustee reports to Bar and Court, and is paid by Bar on an hourly basis, at the court-appointed rate.
- Primary purpose of court-appointed Trustee is to facilitate return of client files and assist them with finding new counsel.
- May also be involved with securing records (such as Trust Account records) in connection with disciplinary proceedings.
- Bar reluctant to appoint if there are other options.
- Attorney may have to reimburse Bar for Trustee payments.



What Happens If I Can't Work?

LM Assisting Attorney/HELP

- Handling Emergency Legal Problems – HELP Team
 - Resources/downloads on LM website.
- Assisting Attorney (Emergency Attorney) can handle designated tasks similar to what a Trustee does.
- Paid by Lawyers Mutual at an hourly rate.



How Can I Get Help?

Lawyer Assistance Program



NCLAP
NORTH CAROLINA
LAWYER ASSISTANCE PROGRAM

- Anxiety
- Stress, Burnout and Balance
- Depression, Suicide
- Anger Management
- Compassion Fatigue
- Substance Abuse
- Process Addictions
- Grief and Loss
- Over-Functioning



How Can I Get Help?

Lawyer Assistance Program

- Confidential
- Via State Bar, but separate from DHC
- Clinical Staff and Volunteer Lawyers
- Resources and Referrals
- Support Groups
- Workshops



How Can I Get Help?

BarCares

- Confidential.
- Benefit of your local Bar Association membership.
- Generally provides three free sessions with a qualified professional therapist or psychiatrist.



Planning For The Worst

• Checklist

1. Language in fee agreements
2. Office procedures manual
3. Deadlines/calendar system/SOL
4. File status/case mgmt
5. Time and billing records
6. Return client originals
7. Select “assisting attorney”
8. Check bank procedures
9. Give assisting atty a tour
10. Inform office staff/introduce



Planning For The Worst

• Checklist - continued

11. Inform family, significant others what to do
12. Inform Lawyers Mutual •
13. Update annually.



Planning For The Worst

Make a list of common tasks on the business side and the client side.

WEEKLY - FISCAL

- Bank deposits
- Accounts payable
- Accounts receivable
- Client Cost/advance tracking

MONTHLY - FISCAL

- Bank reconciliation
- Trust audit/reconciliation
- Credit card reconciliation
- Payroll tax deposits
- Info to CPA
- Client billing/statements
- Auto drafts, auto renewals



Planning For The Worst

Make a list of common tasks on the business side and the client side.

WEEKLY - CLIENT

- Litigation calendar
 - Schedule depositions, mediation etc
 - Tickler system
 - E-calendars
 - SOL watch
- Medical Record Tracking
- Medical Lien Tracking

MONTHLY - CLIENT

- Status update letters



Where is your data stored?

Maintain a printed list as well as whatever software-based system you use.

If no one can access the info online, can someone at least locate a recent printout of client names, addresses, phone numbers, emails and case status?



Where is your calendar data stored?

Maintain a printed list as well as whatever software-based system you use.

Do you pull files for the next month's court dates and put them in a vertical file?



What is your Filing System?

Make a "map."



- Inactive files are stored in the basement in boxes labeled by year, alphabetically.
- Active civil files are in the large filing cabinet in my office, alpha by last name.
- Active criminal files are in the 2-drawer cabinet by my desk, in order of court date.
- Extra large files (Smith, Jones, Duncan) are in boxes in the storage room.
- There is a box of misc items that need to be put in closed files.



Planning Ahead: Protecting Your Clients' Interests in the Event of Death or Disability

by Stacey A. Phipps, Attorney at Law, P.C.

- I. What could possibly happen to me?**
- II. Who steps in if I can't work?**
 - a. LM "Assisting Attorney" or "Emergency Attorney"
 - b. State Bar/Court-Appointed Trustee
- III. How can I get help?**
 - a. Lawyer Assistance Program
 - b. BarCares
- IV. Planning for the worst.**
 - a. Checklist
 - i. Language in your retainer agreement to allow Assisting Attorney
 - ii. Office procedures manual
 - iii. Deadlines/calendar system/SOL alert
 - iv. File status/case management
 - v. Time and billing records
 - vi. Return originals
 - vii. Select an "Assisting Attorney" designee
 - viii. Check bank procedures
 - ix. Give Assisting Attorney a tour
 - x. Inform office staff/introduce
 - xi. Inform family, significant other what to do
 - xii. Inform LM
 - xiii. Update annually
- V. Arrange an audit/consult**

Planning Ahead: Protecting Your Clients' Interests in the Event of Death or Disability

Stacey Phipps, Esq. and Lawyers Mutual Claims Attorney Panel, Camille Stell, Vice President of Client Services, Lawyers Mutual

While lawyers are trained to help their clients avoid disaster, most solo and small firm practitioners avoid planning for their own crisis. However, accidents, unexpected illness, debilitating mental conditions, and untimely death often occur. Have you made adequate plans to assure your clients' interests will be protected?

Join us as we discuss designating an "assisting attorney", recognizing the signs of depression and other mental illnesses, practice management tips for a smooth transition in the event of an emergency and the use of forms and checklists as effective risk management.

Planning for Retirement

Every lawyer's career is going to come to an end either because of a career change, retirement, health, or death. A surprising number of these lawyers will reach that end unprepared. Every lawyer needs a plan in place to prepare for the day they will leave or close down their practice.

Here is a list of questions a lawyer and his or her law firm should consider before it becomes necessary to close one's practice.

1. **What if I am suddenly incapacitated?** Have I prepared for this scenario by arranging for an Emergency Attorney to close my practice? What should my clients know about such preparation? Are my client files organized and billing records current? Will the Emergency Attorney be able to ascertain file deadlines and issues that need immediate attention? How does the Emergency Attorney get paid? Have I worked with an attorney on my own will and estate planning?
2. **Who will serve as my Emergency Attorney?** Have I considered who would be willing to step in to close down my practice? Have I considered offering to serve as the Emergency Attorney for a close friend or colleague? What are my responsibilities? Any legal documents or authorizations that need to be completed?
3. **What role will my staff play in winding down my practice?** Have I made my staff aware of my emergency preparations? Who has all my key technology information such as critical passwords, email addresses, etc.? Will my staff get paid while my practice is winding down? How? Are my trust account and operating account secure?
4. **Should my family have any role in winding down my practice?** Does my next of kin know who to contact in case of an emergency? Does my next of kin have any idea about my emergency preparations? Have I made my next of kin aware of the obligations that my estate will be responsible for? Does my spouse have Power of Attorney or the like? Are my bank accounts secure?
5. **What role if any should the State Bar take in winding down my practice?** When does the State Bar have a trustee appointed to take over the winding down of a practice? Only sole practitioners? When? What about small offices with only 2 or 3 attorneys? View the State Bar

Handbook for a Trustee of the Law Practice of a Missing, Incapacitated, Disabled, or Deceased (MIDD) Attorney.

6. **Who is responsible for the firm's future liabilities?** Attorneys who have assisted in closing a practice often complain that the funds available to pay for the orderly closing of a law practice are insufficient. Consider the funds necessary to close your practice: salary for staff, rent, and utilities. Also consider taxes, unpaid vendor bills, or loans payments. There are some insurance and financial products that can help with these finances and we'll discuss those in a future article.
7. **What about my malpractice coverage after I retire?** Does my partnership agreement address this issue? What happens if my old firm takes me off its policy or switches carriers after I leave? Who will pay for "tail coverage" – my old firm or me? Will the "tail coverage" cover just me or the entire firm? Who will pay the deductible if I'm sued? Who will pay the deductible if my old firm is sued for something that occurred while I was still practicing?
8. **What should I do in case of an emergency?** Call the State Bar, my local bar or malpractice provider? The State Bar can assist solo attorneys in certain situations. The North Carolina Bar Association has a task force studying many of the issues surrounding retirement and leaving a law practice. The NC Bar Association often offers programs addressing these very issues. Lawyers Mutual offers a program called HELP – Handling Emergency Legal Problems – particularly those problems that arise out of a sudden death or medical emergency. Call us at 800.662.8843.

Resources

There are several resources that will help answer some of these questions. Check out Lawyers Mutual risk management resource, "Closing a Law Practice: Through Retirement, Moving to a New Firm, or Death of a Fellow Lawyer", which includes checklists, sample form letters, references to ethics opinions and emergency attorney agreements. Another risk management resource, "Disaster Planning and Recovery" also provides checklists that may gather much of this information (such as the technology component, passwords, etc.) into one place.

The North Carolina Bar Association has a publication "Turning Out the Lights" which is available on the www.ncbar.org website as a free PDF download. Also, the North Carolina Bar Association has formed a "Retiring with Dignity" Committee that is working on many of the issues associated with a failure to plan for retirement. Recommendations will come from the committee when they complete their work.

"The Lawyers Guide to Buying, Selling, Merging or Closing a Law Practice" is an ABA publication available at a discount to members of the ABA Senior Lawyers Division. "Lawyers at Midlife: Laying the Groundwork for the Road Ahead" by Michael Long, John Clyde and Pat Funk is a personal and financial retirement planner for lawyers. You can borrow these publications from the Lawyers Mutual Lending Library resource on our website, www.lawyersmutualnc.com.

The New York State Bar has a publication available online, "Planning Ahead: Establish an Advance Exit Plan to Protect Your Clients' Interests in the Event of Your Disability, Retirement or Death," http://www.nysba.org/Content/NavigationMenu/Publications/ForSolosPlanningAheadGuide/PlanningAheadGuide_FINAL_PRINTED_VERSION_OCT_2005.pdf.

Jay Foonberg has a "Checklist for Closing or Selling a Law Practice" that is available at <http://www.seniorlawyers.org/checklist.htm> and Ed Poll has one at http://www.lawbiz.com/bottom_linevol-26-5.html.

Lawyers spend their careers helping others. Planning for retirement is often neglected. Having an exit strategy not only protects you, it protects your business partners, your staff and your family.

Insurance Products

As lawyers are forced to consider closing their offices due to a career change, retirement, health, or death, there are some insurance products that can provide financial assistance in case of emergencies.

Consider the following:

- **Individual Disability** – Protects personal income in the event of disability. In particular, the NCBA Disability Insurance program includes a Compassionate Disability feature that will pay insureds a monthly benefit if they lose income while taking time away from work to care for a loved one who has a serious health condition. This feature is inclusive of the policy, so no additional rates apply.
- **Business Overhead Expense** – Can your business survive in the event of a prolonged injury or sickness? Business Overhead Expense (BOE) coverage is disability insurance for your law practice. Despite your disability, business operating costs will continue to accumulate. Besides covering the ordinary expenses, you may also include coverage that will provide a salary to an attorney that can come in and take over your cases while you are out on claim. In your absence, BOE helps maintain your profitability and sustains your business operations either until you return to work or decide to close your law practice if you are unable to return.
- **Disability & Life Buy-Out** - If your business partner became permanently disabled or deceased, would you want their family members making decisions for the business? Doesn't it make sense to arrange purchase agreements in the event of an unforeseen tragedy? These products provide for the purchase of a business owner's share of the business in the event an owner becomes totally disabled and is no longer able to work in the business - or for Life Buy-out, becomes deceased. Buy-out plans are designed to fund a business' buy/sell agreement.
- **Critical Illness** – Many people are unaware of this insurance coverage. It will provide a lump sum benefit if you are diagnosed with one of the critical illnesses listed in the policy (heart attack, cancer, stroke, coronary artery bypass surgery, and many more). The benefit could be used to help pay for the costs of care and treatment, pay for recuperation aids, replace any lost income due to a decreasing ability to earn, or fund for a change in lifestyle – just to name a few.
- **Business Income/Interruption** – This covers the loss of income that a business suffers after a disaster while its facility is either closed due to, or in the process of rebuilding, after the loss. It pays for the profits that would have been earned, fixed costs & operating expenses, the cost to move and operate from a temporary location, and any other reasonable expenses that aid in the continuation of the business while your property is being restored. It is designed to put a business in the same financial position it would have been in if no loss occurred.

Ethical Issues

In addition to the issues already mentioned are also ethics issues that arise as lawyers consider closing their offices due to a career change, retirement, health, or death or disability.

Consider the following:

1. **What kind of notice or duties do I owe to my current clients when I close my practice?** North Carolina RPC 48 discusses law firm dissolution and issues such as continuity of service, right of clients to counsel of their choice, obligation of partners to deal honestly with each other, no involvement of clients in partner disputes and protection of files and property of clients. Who should send the notice of retirement – my old firm or me? What should the notice say? Who pays for it?
2. **What happens to my client files after I leave practice?** Who will pay for copying files for clients or the storage costs of the files? Could I be held responsible for the costs of storing files of other partners who are unwilling to pay their fair share of the storage costs? Do all client files of the firm need to be treated the same? Pending proposed North Carolina ethics opinion 2012 Proposed Opinion 13 rules that partners and managerial lawyers remaining in a firm are responsible for the safekeeping and proper disposition of both the active and closed files of a suspended, disbarred, missing, or deceased member of the firm.
3. **What about my malpractice coverage after I retire?** Does my partnership agreement address this issue? What happens if my old firm takes me off its policy or switches carriers after I leave? Who will pay for “tail coverage” – my old firm or me? Will the “tail coverage” cover just me or the entire firm? Who will pay the deductible if I’m sued? Who will pay the deductible if my old firm is sued for something that occurred while I was still practicing?
4. **What should I do in case of an emergency?** Call the State Bar, my local bar or malpractice provider? The State Bar can assist solo attorneys in certain situations. Lawyers Mutual is in the pilot program stage of a program called HELP – Handling Emergency Legal Problems.
5. **Am I still a lawyer?** The State Bar has authorized Emeritus Pro Bono status for attorneys taking inactive or retired status. The purpose of the new status is to facilitate and encourage retired lawyers to assist in meeting the great need for legal services to low-income North Carolinians through legal aid or other non-profit organizations.

Retire, Reset or Reinvent?

The ABA estimates there are 400,000 lawyers in the U.S. who are 62 years of age or older. Many of those lawyers will die with their boots on, but others will choose a different exit strategy: they will plan for their eventual transition out of the active practice of law.

There are many things to consider as one begins the process of retiring or transitioning from the active, day-to-day practice of law. Personal financial planning and succession planning for your law firm are essential to a successful transition. But so is readying yourself for life, and perhaps work, after decades spent in a law practice. It is this piece that I want to focus on.

Many of us would prefer a “soft” retirement, continuing some sort of work after leaving the active practice of law. In a Merrill Lynch retirement study of those 45 years of age or older, 7 out of 10 respondents would include some work in their “retirement”. 51% of those respondents saw retirement as career reinvention.

Assuming you want to include some work in your retirement, what steps can you take now to get ready for the next phase of your life as a lawyer? How will you reinvent yourself?

Start planning now.

Most experts agree you should start planning your transition by age 60, if possible. If you are older than 60, don’t despair; just get started now. For most of us, there’s a lot to do before we are ready to leave the practice. A year or two may not be enough time to do it right. While preparation must start long before you actually intend to retire, continual assessment of your satisfaction level with work may help you know when the time is right to actually retire.

Retiring is refocusing your priorities.

What are you passionate about? What is your avocation? School yourself on the business aspects of your passion or avocation. By doing so, you may be able to turn your hobby or your passion into for-pay employment.

Play to your strengths.

Do you know where your strengths lie? If not, here are a few self-assessment tools that will help you assess your aptitudes, interests or personal strengths, with the goal of developing satisfying and productive work and life choices.

- The Myers-Briggs Type Indicator – www.myersbriggs.org.
- Strengthsfinder 2.0 – <http://strengths.gallup.com>
- The Highlands Ability Battery – www.highlandscs.com/battery
- Strong Interest Inventory – www.cpp.com/products/strong
- The MAPP Career Assessment Test – www.assessment.com

[Attend a retirement workshop to gain valuable information and create a sense of optimism and adventure about the next phase of your life. The](http://olliasheville.com/retirement-workshops) Osher Lifelong Learning Institute at the University of North Carolina Asheville conducts retirement workshops that might be of interest to you.
[http://olliasheville.com/retirement-workshops.](http://olliasheville.com/retirement-workshops)

Give back to your profession.

There are many ways to give back to the profession that has given you so much satisfaction over the years. Here are some examples, but I am sure you can come up with others.

- Mentor a new lawyer or law student.
- Coach a high school or college mock-trial team.
- Teach a CLE course on all the things you learned along the way to a successful transition so those coming behind you don’t have to make the same mistakes.
- Get involved in the NCBA or the NCAJ or the NCADA or any number of other local, state and national legal organizations that are sorely in need of volunteers.

- Write articles for any one of the myriad of legal publications whose readers would benefit from your wisdom and expertise gained over the decades of your practice.
- Lend your expertise to a non-profit or startup organization.
- Volunteer as a child advocate or guardian ad litem in your county.

The list of ways to give back to your profession and your community is limited only by your imagination and creativity.

Pursue another degree.

If your desire is to pursue another degree in your retirement, consider funding a 529 tax-advantaged plan. Taxes aren't paid on withdrawal so long as the funds go to qualified expenses incurred at higher educational institutions that qualify for federal student aid. More information about 529s is available at the U.S. Securities and Exchange Commission's 529 website:

<http://www.sec.gov/investor/pubs/intro529.htm>

Die with your boots on or plan your exit strategy. Which route will you choose?

NC Bar Association Transitioning Lawyers Commission

- 1. What do I do when I notice a senior partner in my firm isn't as sharp as he used to be?** Or a senior lawyer in town often fails to show up for court for his clients? The NC Bar Association created the Transitioning Lawyers Commission to help lawyers deal with these difficult questions. Through an Intervener training program, you can assist lawyers in your firm or your community who need help transitioning into retirement. Or you can reach out to a trained Intervener who can assist you in this difficult discussion.
- 2. Is there a program for cognitive testing to help determine when one should consider retirement?** The NC Bar Association Transitioning Lawyers Commission has partnered with HRC Behavioral, the same psychologists who provide care in the BarCARES program, will be providing interveners instruction as well as assisting in the assessment process.
- 3. Do I need to be a member of the NC Bar Association to take advantage of this process?** No. The program will be available to all attorneys licensed in North Carolina.
- 4.** Here's a scary question, what do I do after retirement?

Conclusion

Walking away from your law practice through retirement or an emergency situation isn't easy. Having an exit strategy not only protects you, it protects your business partners and your family.

Additional Resources:

Mayo Clinic (depression) Expert Blog Posts

From the Lawyers Mutual website HELP Team <http://www.lawyersmutualinc.com/risk-management-resources/help-team>

Closing a Practice Through Retirement, Moving to a New Firm or Death of a Fellow Lawyer

Disaster Planning and Recovery

File Management, Retention and Destruction

“Planning Ahead: Protecting Your Clients’ Interests in the Event of Your Disability or Death”

From Start to Finish: What to Expect When You’re Expecting to Retire

NCBA Transitioning Lawyers Commission: An Overview

ABA: Alzheimer’s and the Practice of Law

Florida State Bar: Pre-Need Inventory Attorney Agreement Consent to Close Office

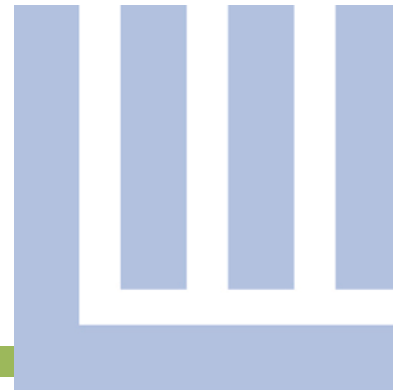
New York State Bar Association: Planning Ahead: Establish an Advance Exit Plan to Protect Your Clients’ Interests in the Event of Your Disability, Retirement or Death

NCBA: Turning Out the Lights

NCBA: Transitioning Lawyers Commission Website

NCBA: Transitioning Lawyers Commission: Model Protocol for Assisting Lawyers Approaching the End of a Career

Washington State Bar Association: Planning Ahead: A Guide to Protecting Your Clients’ Interests in the Event of Your Disability or Death



Malpractice Landmines and How to Avoid Stepping on Them

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NORTH CAROLINA LEGAL MALPRACTICE LAW

**A FEW WORDS ABOUT THE
LAW OF ATTORNEY PROFESSIONAL LIABILITY
IN
NORTH CAROLINA**

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September 2014**

I. THE BASIS OF LIABILITY, MALPRACTICE AND OTHERWISE.

A. Malpractice.

1. The Elements of the Cause of Action.

In a legal malpractice action based upon an attorney's negligence, the plaintiff must allege and prove "(1) that the attorney breached the duties owed to his client . . . and that this negligence (2) proximately caused (3) damage to the plaintiff." *Rorrer v. Cooke*, 313 N.C. 338, 355, 329 S.E.2d 355, 366 (1985). "An attorney who acts in good faith and in an honest belief that his advice and acts are well founded and in the best interest of his client is not answerable for a mere error of judgment or for a mistake in a point of law which has not been settled by the court of last resort in his State and on which reasonable doubt may be entertained by well-informed lawyers. Conversely, he is answerable in damages for any loss to his client which proximately results from a want of that degree of knowledge and skill ordinarily possessed by others of his profession similarly situated, or from the omission to use reasonable care and diligence, or from the failure to exercise in good faith his best judgment in attending to the litigation committed to his care." *Hodges v. Carter*, 239 N.C. 517, 520, 80 S.E.2d 144, 146

(1954) (citations omitted). When an attorney agrees to prosecute an action on behalf of his client he impliedly represents that he:

1. Possesses the requisite degree of learning, skill and ability necessary to the practice of his profession and which others similarly situated ordinarily possess;
2. Will exert his best judgment in the prosecution of the litigation entrusted to him; and
3. Will exercise reasonable and ordinary care and diligence in the use of his skill and in the application of his knowledge to his client's cause.

Hodges, 239 N.C. at 519, 80 S.E.2d at 145-146.

2. The Existence of an Attorney-Client Relationship and Exceptions.

In a legal malpractice action, a plaintiff must show an attorney-client relationship existed before liability can be established. *Chicago Title Ins. Co. v. Holt*, 36 N.C. App. 284, 244 S.E.2d 177 (1978). As the Court of Appeals held, “before the attorney can be made liable, it must appear the loss for which he is sought to be held arose from his failure or neglect to discharge some duty which was fairly within the purview of his employment. Moreover, *an attorney is liable* for negligence in the conduct of his professional duties *to his client alone*, that is, to the one between whom and the attorney the *contract* of employment and service existed, and not to third parties.” *Id.* at 287, 244 S.E.2d 177, 180 *citing* 7 C.J.S., *Attorney and Client*, § 140, p. 978. (emphasis in original); *Piraino Bros. v. Atl. Fin. Group, Inc.*, 211 N.C. App. 343 (2011) (“the Burris Defendants represented Atlantic, not Plaintiff, and owed Atlantic, not Plaintiff, a fiduciary duty.”) *See also*, the unpublished Court of Appeals decision in *Hammitt v. Pettit*, 2006 N.C. App. LEXIS 381 at *9, (“[The] respondents represent a party whose interest in the real property in question is adverse to petitioners’ interest in the property. This alone precludes respondents from having a duty to act in the best interest of petitioners as this would be contrary to the best interest of their own client to whom they unquestionably owe fiduciary duties. Accordingly,

respondents owed no fiduciary duty to petitioners and, therefore, could not have breached such a duty.”).

Professional negligence claims against opposing counsel are particularly disfavored. *Cullen v. Emanuel & Dunn*, 731 S.E. 2d 274, 2012 N.C. App. LEXIS 1039 (2012); *Piraino Bros*, *supra*. Moreover, it is now well established that legal malpractice claims may not be assigned from the former client who engaged the defendant lawyer’s legal services to another. *Revolutionary Concepts v. Clements Walker*, 744 S.E. 2d 130, 2013 N.C. App. LEXIS 482 (2013).

Although later cases have extended the attorney’s professional duties to certain non-client third parties, this extension has been limited to a class of entities such as a title insurance company that has an aligned interest with the buyer-client regarding the attorney’s opinion on title. Where the attorney is representing the buyer, a conflict typically would not arise by the attorney’s fulfilling duties to the title company when the attorney could reasonably foresee that the title company would rely on the attorney’s opinion on title. *See United Leasing Corp. v. Miller*, 45 N.C. App. 400, 263 S.E.2d 313 (1980), *petition denied*, 300 N.C. 374, 267 S.E.2d 685 (1980), *appeal after remand*, 60 N.C. App. 40, 298 S.E.2d 409 (1982), *petition denied*, 308 N.C. 194, 302, S.E.2d 248 (1983); *Commonwealth Land Title Ins. Co. v. Walker & Romm*, 883 F. Supp. 25 (E.D.N.C. 1994), *aff’d*, 43 F.3d 1465 (4th Cir. 1994), *reported in full*, 1994 U.S. App. LEXIS 33537 (4th Cir. 1994). *See, also*, opinion #3 to RPC 210 of the North Carolina State Bar.

Under North Carolina law, an attorney-client relationship “may be implied from the conduct of the parties, and is not dependent on the payment of a fee, nor upon the execution of a formal contract.” *The North Carolina State Bar v. Sheffield*, 73 N.C. App. 349, 358, 326 S.E.2d 320, 325, *cert. denied*, 314 N.C. 117, 382 S.E.2d 482, *cert. denied*, 474 U.S. 981, 106 S.Ct. 385,

88 L. Ed. 2d 338 (1985), *citing E. F. Hutton & Co. v. Brown*, 305 F. Supp. 371 (S.D. Tex 1969). *See also, Harris v. Ballantine*, 2014 N.C. App. LEXIS 901 (August 19, 2014); *Cornelius v. Helms*, 120 N.C. App. 172, 461 S.E.2d 338 (1995), *review denied, review dismissed*, 342 N.C. 653, 467 S.E.2d 709 (1996), *reconsideration dismissed*, 342 N.C. 894, 467 S.E.2d 909 (1996); *Broyhill v. Aycock & Spence*, 102 N.C. App. 382, 402 S.E.2d 167 (1991), *review denied*, 329 N.C. 266, 407 S.E.2d 831, *aff'd*, 330 N.C. 438, 410 S.E.2d 392 (1991).

3. Expert Testimony.

It is generally held that a deviation from the appropriate standard of care must be established by expert, competent testimony, *Progressive Sales v. Williams, Williford*, 86 N.C. App. 51, 356 S.E.2d 372 (1987), by someone familiar with the applicable standard of care in the locality, unless there is “no discernible difference” in the standard of care by localities. *Miller v. Orcutt*, 725 S.E. 2d 923, 2012 N.C. App. LEXIS 671. Judge Ben Tennille for the Business Court observed about a witness offered by plaintiff to establish a departure from the applicable standard of care, “He has not been licensed to practice law for over twenty-five (25) years, and he has never been licensed to practice law in North Carolina. He has never conducted any real estate transactions as a lawyer or represented any individual, partnership, joint venture, LLC or corporation in any real estate transaction. He does not consider himself to be an expert in the practice of real estate development or the practice of law related to real estate developments. He does not know everything that a real estate lawyer does in representing a developer, putting together deals and seeing them through to closing. . . .” The Court concluded the proffered expert “lacks the qualifications to give a competent opinion as to whether” the lawyer defendant departed from the applicable standard of care. (citations to the record omitted.). *Inland American Winston Hotels v. Winston*, 2010 NCBC 19, 2010 NCBC LEXIS 21.

4. Proximate Cause.

Rorrer v. Cooke, 313 N.C. 338, 329 S.E. 2d 355 (1985), the seminal authority on proximate cause in North Carolina legal malpractice cases, has been relied upon nearly 200 times in reported decisions by North Carolina state and federal courts. Justice Harry Martin held, for a unanimous court, that the essential elements of a cause of action for legal malpractice are that the defendant attorney entered into an attorney-client relationship with the plaintiff; that the defendant attorney deviated from the applicable standard of care; and that the attorney's alleged negligence was the proximate cause of the damages sustained by the plaintiff. *Rorrer*, 313 N.C. 338, 359. (“[W]here the plaintiff bringing suit for legal malpractice has lost another suit allegedly due to his attorney's negligence to prove that but for the attorney's negligence plaintiff would not have suffered the loss, plaintiff must prove that: (1) that the original claim was valid; (2) it would have resulted in a judgment in plaintiff's favor; and (3) the judgment would have been collectible.”) Applying these principles to the facts, the Court affirmed summary judgment for defendant because plaintiff's expert's affidavit did not aver that but for the defendant-attorney's negligence, plaintiff would have prevailed in the underlying case, and did not contain specific facts suggesting how plaintiff's outcome at trial would have been better had defendant handled the matter differently. 313 N.C. 338, 361, 329 S.E.2d 355, 369. Accord, *Bryant/Sutphin Props v. Hale*, 758 S.E. 2d 902, 2014 N.C. App LEXIS.

Said another way, a legal malpractice plaintiff is required to prove the viability and likelihood of success of the underlying case as part of the present malpractice claim. This has been referred to as obligating the plaintiff to prove “a case within a case.” *Kearns v. Horsley*, 144 N.C. App. 200, 211, 552 S.E.2d 1, 8 (2001). In *Young v. Gum*, 185 N.C. App. 642, 649 S.E.2d 469 (2007), the plaintiff alleged that her attorneys' negligence in failing to properly

advise her and in handling her equitable distribution claim caused her to settle the claim to her detriment. The Court of Appeals upheld the trial court's grant of summary judgment in favor of the defendants-attorneys on the basis that even if the defendants-attorneys negligently failed to advise the plaintiff or value the plaintiff's estate properly, the plaintiff failed to show proximate cause because she could not forecast evidence that but for her attorneys' negligence she would have received a higher distributive award and that it would have been collectible. The plaintiff bears this burden even if the allegedly negligent actions of the attorney resulted in a total foreclosure of the underlying case being heard on its merits. *See, Kearns*, 144 N.C. App. at 211-212, 552 S.E.2d at 8-9 (even where a defendant-attorney allows a plaintiff-client's claim to become time-barred, to meet her burden in a malpractice claim, the plaintiff-client must establish she would have recovered in her underlying claim if the claim had been filed within the statute of limitations.)

The plaintiff must shoulder these burdens regardless of how he alleges the lawyer's misfeasance. In *Bamberger v. Bernholz*, 326 N.C. 589, 391 S.E.2d 192 (1990), the plaintiff alleged claims against his former lawyer for negligence, fraud, breach of fiduciary duty and breach of contract. The Superior Court granted summary judgment for the lawyer-defendant on all claims. The Court of Appeals reversed in a divided decision. The author of the two-person majority seemed to be impressed that claims in addition to a claim for professional negligence had been asserted. Judge Jack Lewis dissented, observing that the requirements of *Rorrer v. Cooke* applied "whether we consider the causes of action brought here by the defendant in negligence, fraud, breach of fiduciary duty or breach of contract, and, thus, the plaintiff had to prove the original claim against [the original tortfeasor] was valid. Judge Lewis concluded that although the quality of the defendant's representation was "certainly unflattering, ... that is not

the main point in this case; the law is clear as to the requirement for success of a legal malpractice action and in this case the first hurdle cannot be cleared.” 96 N.C. App. 555, 564, 386 S.E.2d 450, 455. The Supreme Court reversed for the reasons stated in Judge Lewis’ dissenting opinion, 326 N.C. 589, 391 S.E.2d 192 (1990).

This same analysis applies to transactional legal work as well. *See, e.g., Summer v Allran*, 100 N.C. App. 182, 394 S.E.2d 689 (1990)(client asserting claim for malpractice against attorney who drafted separation agreement must meet the requirements of *Rorrer* by showing but for the negligence of her attorney, she would have suffered no loss. This case is discussed in more detail *infra* p. 16-17.)

B. Breach of Fiduciary Duty.

Claims against an attorney for breach of fiduciary duty are tantamount to claims for legal malpractice, the statute of limitations for which is N.C. Gen. Stat. 1-15(c). *See, e.g., NationsBank v. Parker*, 140 N.C. App. 106, 535 S.E.2d 597 (2000)(breach of fiduciary duty is a species of negligence or professional malpractice); *Sharp v. Teague*, 113 N.C. App. 589, 592, 439 S.E.2d 792, 794 (1994)(claims arising out of the performance of or failure to perform professional services based on negligence or breach of contract are in the nature of malpractice claims, governed by N.C. Gen. Stat. § 1-15(c)); *Carlisle v. Keith*, 169 N.C. App. 674, 682, 614 S.E.2d 542, 548 (2005); *Heath v. Craighill, Rendleman, Ingle & Blythe*, 97 N.C. App. 236, 244, 388 S.E.2d 178, 183 (1990)(breach of fiduciary duty is a species of negligence or professional malpractice.); *Childers v. Hayes*, 77 N.C. App. 792, 795, 336 S.E.2d 146, 148 (1985)(breach of fiduciary duty claim is essentially a negligence or professional malpractice claim).

C. Fraud.

Our Supreme Court has held the essential elements of actionable fraud to be: (1) a false representation or concealment of a material fact; (2) reasonably calculated to deceive; (3) made with intent to deceive; (4) and which does, in fact, deceive; and (5) to the hurt of the injured party. *Vail v. Vail*, 233 N.C. 109, 63 S.E.2d 202 (1951).

Although “equity raises a presumption of fraud when the superior party [to a fiduciary relationship] obtains a possible benefit,” the “superior party may rebut the presumption by showing, for example, that the confidence reposed in him was not abused, but that the other party acted on independent advice. Once rebutted, the presumption evaporates, and the accusing party must shoulder the burden of producing actual evidence of fraud.” *Watts v. Cumberland County Hospital System*, 317 N.C. 110, 116, 343 S.E.2d 879, 884 (1986) (citation omitted) (plaintiff's history of seeking second opinions from several other specialists dispelled presumption of reliance and intentional deceit that arises from the fiduciary relation itself; dismissal of constructive fraud claim proper.) *See, also, Lackey v. Bressler*, 86 N.C. App. 486, 358 S.E.2d 560 (1987) (plaintiff's treatment by numerous other physicians and medical facilities constituted the seeking of independent advice and prevented plaintiff from contending that she relied solely upon plaintiff to inform her of her condition and its causation. Accordingly, evidence was sufficient to rebut the presumption of reliance and intentional deceit arising out of the fiduciary relationship and dismissal of the constructive fraud claim was proper.)

When the plaintiff knows in advance of material facts about which he claims to have been deceived, he cannot establish that his reliance was reasonable. *See, e.g., Jay Group, Ltd. v. Glasgow*, 139 N.C. App. 595, 601, 534 S.E.2d 233, 237 (2000) (plaintiffs' knowledge, in advance of acquisition of business, of problems with business' trademarks was fatal to their

claims for constructive fraud inasmuch as such advance knowledge rebutted inference that plaintiffs were deceived by, or reasonably relied upon, the alleged misrepresentations by defendants.)

Courts closely scrutinize fraud claims against attorneys to ensure that fraud is not pled simply as a means of avoiding the statute of limitations set forth in 1.15(c), *infra*, p. 10. For example, in *Fender v. Deaton*, 153 N.C. App. 187, 571 S.E.2d 1 (2002), *review denied*, 356 N.C. 612, 574 S.E.2d 680 (2002), the Court of Appeals considered an appeal by a plaintiff whose case was dismissed under the malpractice statute of limitations who asserted that he was suing his former lawyer not for malpractice, but “for fraud claims.” After reviewing the plaintiff’s allegations, the court affirmed dismissal, holding, “the plaintiff’s allegations of fraud are in essence claims of legal malpractice which are governed by the three-year statute of limitations under N.C. Gen. § 1-15(c).” 153 N.C. App. 187, 190-191, 571 S.E.2d 1, 3.

D. A Claim Under General Statute § 84-13.

Section 84-13 of the General Statutes provides, “If any attorney commits any fraudulent practice, he shall be liable in an action to the party injured, and on the verdict passing against him, judgment shall be given for the plaintiff to recover double damages.” The North Carolina Court of Appeals in *Estate of Wells by & Through Morley v. Toms*, 129 N.C. App. 413, 415, 500 S.E.2d 105, 107 (1998), held that § 84-13 only applies after a jury has reached its verdict or at the conclusion of a bench trial upon a finding of fraud. The language of § 84-13 and the holding in *Estate of Wells* stand for the proposition that by including a request for double damages under § 84-13, a plaintiff does not allege a cause of action independent from or in addition to the purported violations of the rules of professional conduct.

E. Constructive Fraud.

Constructive fraud differs from active fraud in that the intent to deceive is not an essential element, but it is nevertheless fraud though it rests upon presumption arising from breach of fiduciary obligation rather than deception intentionally practiced. *Miller v. First Nat'l Bank*, 234 N.C. 309, 67 S.E.2d 362 (1951).

In North Carolina, a claim for constructive fraud requires a showing that the plaintiff and the defendant were “in a relation of trust and confidence which led up to and surrounded the consummation of the transaction in which defendant is alleged to have taken advantage of his position of trust to the hurt of plaintiff.” *Barger v. McCoy Hillard & Parks*, 346 N.C. 650, 666, 488 S.E.2d 215, 224 (1997), quoting *Rhodes v. Jones*, 232 N.C. 547, 549, 61 S.E.2d 725, 726 (1950).

The *Barger* court added:

Implicit in the requirement that a defendant ‘[take] advantage of his position of trust to the hurt of plaintiff’ is the notion that the defendant must seek his own advantage in the transaction; that is, the defendant must seek to benefit himself.

Id.

A showing that the defendant sought to “benefit” himself is an essential requirement to prove such a claim. *See, Walker v. Sloan*, 137 N.C. App. 387, 402, 529 S.E.2d 236, 246-247 (2000)(constructive fraud claim dismissed as to certain defendants because no allegation those defendants sought to benefit themselves); *Sharp v. Gailor*, 132 N.C. App. 213, 216, 510 S.E.2d 702, 704 (1999)(constructive fraud claim properly dismissed absent allegations that defendant “took advantage of her position of trust for the purpose of benefiting herself”); *State ex rel. Long v. Petree Stockton*, 129 N.C. App. 432, 447, 499 S.E.2d 790, 799 (constructive fraud claims properly dismissed because no allegations “that defendant sought benefit to themselves”), *rev. dismissed*, 349 N.C. 240, 558 S.E. 2d 190 (1998).

The promise of a continued business relationship or the receipt of payment for professional services is not sufficient to satisfy the element of “benefit” to the defendant. In *Barger, supra*, the North Carolina Supreme Court rejected the plaintiffs’ contention that the defendants benefited from their alleged misrepresentations because they enjoyed a continuing relationship with plaintiffs, holding that this fact was insufficient to establish the benefit requirement in a claim of constructive fraud. *Id.* In *NationsBank v. Parker*, 140 N.C. App. 106, 535 S.E.2d 597 (2000), the Court of Appeals affirmed summary judgment in favor of the defendant, holding the fact that the attorney received a fee for notarizing forged loan documents was insufficient to establish the “benefit” required to state a claim for constructive fraud. 140 N.C. App. at 114.

Despite some confusion in earlier decisions, it is now clear that the statute of limitations for constructive fraud claims in three years pursuant to N.C.G.S. § 1-52, which accrues upon discovery of the underlying facts. *Carlisle v. Keith*, 169 N.C. App. 674, 614 S.E.2d 542 (2005).

F. Civil Conspiracy.

In North Carolina, a civil conspiracy is: “(1) an agreement between two or more persons; (2) to do an unlawful act in an unlawful way; (3) which agreement resulted in injury to the plaintiff.” *Boyd v. Drum*, 129 N.C. App. 586, 592, 501 S.E.2d 91, 96 (1998). To create liability on a theory of civil conspiracy, a plaintiff must show “an overt act committed by one or more of the conspirators pursuant to a common agreement and in furtherance of a common objective.” *Dickens v. Puryear*, 302 N.C. 437, 456, 276 S.E.2d 325, 337 (1981).

A claim for civil conspiracy is subject to the three-year statute of limitations set forth N.C. Gen. Stat. §1-52(5). *See, e.g., Norlin Industries, Inc. v. Music Arts, Inc.*, 67 N.C. App.

300, 306, 313 S.E.2d 166, 170 (1984), *cert. denied*, 311 N.C. 403, 319 S.E.2d 273 (1984)(civil conspiracy claims governed by three-year statute of limitations in G.S. § 1-52(5)).

II. COMMON DEFENSES IN ATTORNEY PROFESSIONAL LIABILITY ACTIONS.

A. The Statute of Limitations.

It is familiar North Carolina law that statutes of limitation are inflexible and unyielding. A plaintiff must initiate litigation within the prescribed time or not at all. Statutes of limitation operate inexorably without reference to the merits of plaintiff's cause of action. *Congleton v. Asheboro*, 8 N.C. App. 571, 174 S.E.2d 870 (1970); *Hackos v. Goodman, Allen*, 745 S.E. 2d 336, 2013 N.C. App. LEXIS 679. A defendant has a vested right to rely on the statute of limitations and a court does not have discretion to extend the statute of limitations period for a plaintiff to file her action. *Id.*; *see also, Callahan v. Rogers*, 89 N.C. App. 250, 365 S.E.2d 717 (1988). When a statute of limitations defense is pleaded by a defendant, the burden is on the plaintiff to show that her cause of action accrued within the applicable time period. *State v. Cessna Aircraft Corp.*, 9 N.C. App. 557, 176 S.E.2d 796 (1970).

Although generally North Carolina General Statute § 1-52(16) allows a plaintiff three years to file an action alleging personal injury with a ten-year statute of repose, that same statute provides an exception for causes of action that are referred to in North Carolina General Statute § 1-15(c), which includes legal malpractice actions.

North Carolina General Statute § 1-15(c) provides:

Except where otherwise provided by statute, a cause of action for malpractice arising out of the performance of or failure to perform professional services shall be deemed to accrue at the time of the occurrence of the last act of the defendant giving rise to the cause of action: Provided that whenever there is bodily injury to the person, economic or monetary loss, or a defect in or damage to property which originates under circumstances making the injury, loss, defect or damage not readily apparent to the claimant at the time of its origin, and the injury, loss, defect or damage is discovered or should reasonably be discovered by the

claimant two or more years after the occurrence of the last act of the defendant giving rise to the cause of action, suit must be commenced within one year from the date discovery is made: Provided nothing herein shall be construed to reduce the statute of limitation in any such case below three years. Provided further, that in no event shall an action be commenced more than four years from the last act of the defendant giving rise to the cause of action

(emphasis added)

Thus, section 1-15(c) provides an outside limit or a statute of repose of four years for a legal malpractice case. *See Black v. Littlejohn*, 312 N.C. 626, 325 S.E.2d 469 (1985). This provision only comes into effect when the discovery of an injury is reasonably delayed until the third year of the statute of limitations. *See Mathis v. May*, 86 N.C. App. 436, 358 S.E.2d 94 (1987), *cert. denied*, 320 N.C. 794, 361 S.E.2d 78 (1987); *Foss v. McGuire, Wood & Bissette*, 758 S.E. 2d 482, 2014 N.C. App. LEXIS 296.

In *Teague v. Isenhower*, the Court of Appeals examined the portion of 1-15(c) cited above in a legal malpractice case where the related cases involved equitable distribution, alimony, divorce and child support. 157 N.C. App. 333, 579 S.E.2d 600 (2003). Mr. Teague sued his former lawyers after discharging them in January 2000 alleging a failure to meet the standard of professional practice in their representation of him on his equitable distribution and alimony claims. The Court of Appeals determined that Mr. Teague's claims were barred by the statute of limitations, holding:

[a]lthough defendants were not discharged until January 2000, plaintiff became aware or should have become aware of the defendant's alleged negligent acts by 22 May 1998 and 6 August 1998 when the equitable distribution and alimony judgments were entered. By those dates, plaintiff should have known defendants had allegedly failed to raise certain defenses, present certain information, or challenge his ex-wife's evidence because of the findings of fact in the judgments.

See also, Fender v. Deaton, supra, (statute of limitations accrued and began to run when plaintiff discovered his attorney voluntarily dismissed his action.);

In legal malpractice actions (and in other claims against lawyers determined by the court to be “in essence claims of legal malpractice,” *Fender v. Deaton*, *supra*) accrual of the claim occurs when the last act of negligence is committed. *Sharp v. Gailor*, 132 N.C. App. 213, 510 S.E.2d 702 (1999); *Thorpe v. DeMent*, 69 N.C. App. 355, 359, 317 S.E.2d 692, 695 (1984), *aff’d*, 312 N.C. 488, 322 S.E.2d 777 (1984)(legal malpractice action accrued on last day attorney could have filed wrongful death claim with estate even though attorney continued to represent plaintiff for some twelve more months). *See, also, Small v. Britt*, 64 N.C. App. 533, 535, 307 S.E.2d 771, 773 (1983)(cause of action against attorneys based upon negligent representation in death penalty prosecution accrued on date of entry of guilty verdict where no act of negligence was alleged after that even though attorneys continued representation through sentencing). A determination of what constitutes the “last act” of a defendant is necessary to establish whether a plaintiff’s claims are time-barred. In *Sharp v. Gailor*, the last act of the defendant was the filing of a brief with the Court of Appeals. “Once the brief in the [underlying case] was filed, nothing could be done to ‘correct’ it; the matter was out of defendant’s hands.” *Id.* at 216, 510 S.E.2d 702, 704. *See also Ramboot Inc. v. Lucas*, 181 N.C. App. 729, 640 S.E. 2d 845 (2007) (three-year statute of limitations began to run when clients signed release of claim on allegedly bad advice and accepted settlement moneys, not when lawyer subsequently filed dismissal). *Carle v. Wyrick Robbins*, 738 S.E.2d 766, 2013 N.C. App. LEXIS 220, *disc. review denied*, 367 N.C. 236, 748 S.E. 2d 320 (2013); *but see, Podrebarac v. Horack Talley*, 752 S.E. 2d 661, 2013 N.C. App. LEXIS 1243.

For a time, North Carolina law appeared to hold out some possibility that a doctrine of continuing representation might delay the accrual of a legal malpractice cause of action until the termination date of a particular representation. *See, e.g., Southeastern Hosp. Supply Corp. v.*

Clifton & Singer, 110 N.C. App. 652, 654, 430 S.E.2d 470, 471 (1993). However, as noted in *Sharp v. Teague*, in *Southeastern Hospital Supply*, the negligence continued until termination of the representation. 113 N.C. App. 589, 595; 439 S.E. 2d 792, 795-96 (1994). Today, it is clear that the “continuing treatment” doctrine, which holds open the statute of limitations in medical malpractice cases applies only to those cases and not to any other types of professional negligence. *Delta Env'tl. Consultants, Inc. v. Wyson & Miles Co.*, 132 N.C. App. 160, 510 S.E.2d 690 (1999), *rev. dismissed*, 350 N.C. 379, 536 S.E.2d 71 (1999), *rev. den.*, 350 N.C. 379, 536 S.E.2d 70 (1999); *Carlisle v. Keith*, 169 N.C. App. 674, 684; 614 S.E.2d 542, 549 (2005); *Ramboot Inc. v. Lucas*, *supra* (“[T]he statute plainly states that a malpractice action accrues from the date of the ‘last act of the defendant,’ not from the date when the attorney-client relationship either begins or ends.”) 181 N.C. App. at 733, 640 S.E.2d at 847. *Chase Dev. Group v. Fisher, Clinard & Cornwell*, 710 S.E. 2d 218 (2011); *Babb v. Hoskins*, 733 S.E. 2d 881, 2012 N.C. App. LEXIS 1184; *Button v. McKnight*, 2011 N.C. App. LEXIS 748.

Equitable doctrines cannot estop a defendant from asserting a statute of repose defense in legal malpractice cases. *Goodman v. Holmes & McLaurin*, 665 S.E.2d 526, 2008 N.C. App. LEXIS 1622 (2008), (“G.S. §1-15(c) contains a four year statute of repose, and equitable doctrines do not toll statutes of repose”), citing *State ex rel. Long v. Petree Stockton, L.L.P.* 129 N.C. App. 432, 445, 499 S.E.2d 790, 798 (1998).

B. Election of Remedies.

In North Carolina, a plaintiff is deemed to have made an election of remedies and is estopped from suing a second defendant if she has sought and obtained final judgment against the first defendant and the remedy granted in the first judgment is repugnant to or inconsistent with the remedy sought in the second action. *Lamb v. Lamb*, 92 N.C. App. 680, 685, 375 S.E.2d

685, 687-688 (1989). Settlement of or judgment on the first action is inconsistent with suit in the second action when the relief demanded in the second action is a continuation of relief sought in the first action, *Stewart v. Herring*, 80 N.C. App 529, 531, 342 S.E.2d 566, 567 (1986); *Douglas v. Parks*, 68 N.C. App. 496, 498, 315 S.E.2d 84, 86 (1984), *review denied*, 311 N.C. 754, 321 S.E.2d 131 (1984); *Davis v. Hargett*, 244 N.C. 157, 163, 92 S.E.2d 782, 786 (1956), or if relief sought in the first action can redress the damage claimed in the second action. *Pritchard v. Williams*, 175 N.C. 319, 322, 95 S.E. 570, 571 (1918). A second action is a continuation of the first action when the plaintiff seeks to recover some alleged deficiency in the settlement or judgment of the first action. *Stewart*, at 531, 342 S.E.2d at 567; *Douglas*, at 598-599, 315 S.E.2d at 86; *Davis*, at 163, 92 S.E.2d at 786. When a plaintiff accepts settlement, or judgment is rendered on his demand in the first action, such acceptance or judgment is a final redress of that action, regardless of whether the amount of relief is what plaintiff requested. *Stewart*, at 531, 342 S.E.2d at 567.

In *Summer*, the plaintiff separated from her husband and retained the defendant-attorney to prepare a separation agreement. After signing the agreement, the plaintiff instituted an action to have it set aside and for divorce, alimony, child custody and support, and equitable distribution. Before trial, the plaintiff settled her equitable distribution claim against her former husband; the remainder of her claims were dismissed at trial. The plaintiff then sued the defendant and his law firm, alleging the lawyer committed malpractice in drafting the separation agreement, for which she blamed lost alimony, insufficient child support, and an inadequate share of the marital property. Directed verdict was entered in favor of the attorney-defendant and against the plaintiff; she appealed. In affirming the trial court, the Court of Appeals held the plaintiff could not sustain claims based on lost alimony and child support since she could not

meet the *Rorrer* requirement that a plaintiff must prove she would have been successful in the underlying case and those claims had been dismissed in the trial of the underlying action. The court also dismissed the claim for damages arising out of the alleged deficiency in the property distribution, holding that “by entering into the consent order disposing of her property claims against her former husband, plaintiff lost her right to assert a negligence claim against defendants concerning distribution of marital property.” *Summer*, 100 N.C. App. at 185, *citing Stewart v. Herring*, 80 N.C. App. 529, 342 S.E.2d 566 (1986).

This principle is still the law in North Carolina. *Danius v. Rodgers*, 217 N.C. App. 641, 720 S.E. 2d 460 (2011); *Armstrong v. Rhodes*, 176 N.C. App. 407, 626 S.E.2d 876 (2006), *dis. review denied*, 636 S.E.2d 803, 2006 N.C. LEXIS 1096 (2006).

Contributory Negligence.

Contributory negligence by the client is an absolute defense to a professional liability claim against an attorney. *Hahne v. Hanzel*, 161 N.C. App. 494, 588 S.E.2d 915 (2003), *disc. review denied*, 358 N.C. 543; 599 S.E.2d 46 (2004); *Marion Partners v. Weatherspoon & Voltz*, 215 N.C. App. 357, 716 S.E. 2d 29 (2011); *State Employees Credit Union v. Hendryx*, 2009 N.C. App. 2350; *Piraino Bros. v. Atlantic Fin.*, *supra*.

In a negligence action, summary judgment for defendant is proper where the evidence fails to establish negligence on the part of defendant, establishes contributory negligence on the part of plaintiff, or establishes that the alleged negligent conduct was not the proximate cause of the injury. *Williams v. Carolina Power & Light Co.*, 36 N.C. App. 146, 147, 243 S.E.2d 143, 144 (1978), *rev'd on factual grounds*, 296 N.C. 400, 250 S.E.2d 255 (1979). Our Supreme Court has explained the doctrine of contributory negligence as follows:

Every person having the capacity to exercise ordinary care for his own safety against injury is required by law to do so, and if he fails to exercise such care, and

such failure, concurring and cooperating with the actionable negligence of defendant contributes to the injury complained of, he is guilty of contributory negligence. Ordinary care is such care as an ordinarily prudent person would exercise under the same or similar circumstances to avoid injury.

Clark v. Roberts, 263 N.C. 336, 343, 139 S.E.2d 593, 597 (1965).

D.

In Pari Delicto

In *Whiteheart v. Waller*, 199 N.C. App. 281, 681 S.E. 2d 419 (2009), the North Carolina Court of Appeals for the first time recognized *in pari delicto* (in equal fault) as a complete defense to legal malpractice actions in North Carolina. There the plaintiff accused business competitors of being “bitches and bastards,” and he brought legal actions against them later determined to be feckless. He managed to get himself sued by those whom he defamed and wrongly sued. A jury returned a substantial verdict, he paid the judgment, and he then sued his lawyer alleging malpractice on the basis that his lawyer knew what he was doing. The trial court granted a motion to dismiss under Rule 12(b)6, and the Court of Appeals affirmed on the basis of *in pari delicto*, holding plaintiff had to know his actions that lead to the underlying action were wrong and actionable, and the courts of this state are not open to allocate consequences of tortuous conduct between someone established as an intentional tortfeasor and a party alleged to be a negligent one. See, *Royster v. McNamara*, 723 S.E. 2d 122, 2012 N.C. App. LEXIS 218.

Failure to Mitigate.

It has long been the law in North Carolina that an injured plaintiff has a duty to mitigate his damages. “The law commands that a person injured by the wrongful and negligent act of another is required to use ordinary care and prudence to protect himself from loss, or as sometimes stated in the decisions, to minimize the loss.” *First National Pictures Distrib. Corp.*

v. Sewell, 205 N.C. 359, 360, 171 S.E. 354, 355 (1933). The law imposes this duty to mitigate on the plaintiffs regardless of whether their claim arises in tort or in contract. *Stimpson Hosiery Mills, Inc. v. Pam Trading Corp.* 98 N.C. App. 543, 392 S.E.2d 128 (1990), *review denied*, 327 N.C. 144, 393 S.E.2d 909 (1990) (“The doctrine of avoidable consequences or the duty to minimize damages requires that ‘an injured plaintiff, whether [its] case be tort or contract, must exercise reasonable care and diligence to avoid or lessen the consequences of the defendant[s]’ wrong”). If a Plaintiff fails to mitigate, he is precluded from recovering any damages that he could have avoided by acting as a reasonably prudent person. *Id.* at 551, 392 S.E.2d 128 at 132.

III. OTHER ISSUES.

A. The Role of the Rules of Professional Conduct

Rule of Professional Conduct 0.2[6], 27 N.C.A.C., Chapter 2A, provides that:

Violation of a rule should not give rise to a cause of action, nor should it create a presumption that a legal duty has been breached. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability Accordingly, nothing in the Rules should be deemed to augment any substantive legal duty of lawyers or the extradisciplinary consequences of violating such a duty.¹

North Carolina appellate courts have repeatedly held that a purported violation of the Rules of Professional Conduct does not give rise to a cause of action against an attorney. *Baars v. Campbell Univ., Inc.*, 148 N.C. App. 408, 421, 558 S.E.2d 871, 879 (2002); *Webster v. Powell*, 98 N.C. App. 432, 439, 391 S.E.2d 204, 208 (1990); *McGee v. Eubanks*, 77 N.C. App. 369, 374, 335 S.E.2d 178, 181 (1985). Furthermore, the Court of Appeals in *Webster v. Powell*

¹ These Rules were originally developed over a number of years by the American Bar Association. They were subsequently adopted by the North Carolina State Bar and approved by the North Carolina Supreme Court to govern the conduct of North Carolina lawyers. *See*, N.C. Gen. Stat. § 84-23; Rule 0.1, 27 N.C.A.C., Ch. 2.

held that evidence offered to show that a defendant lawyer violated certain rules of professional conduct was correctly *excluded* by the trial court. 98 N.C. App. 432, 439, 391 S.E.2d 204, 208.

In *Baars*, the Court of Appeals held, ““a breach of a provision of the Code of Professional Responsibility is not ‘in and of itself . . . a basis for civil liability’” *Id.* at 421, 558 S.E.2d 871, 879 citing *Webster v. Powell*, 98 N.C. App. 432, 439, 391 S.E.2d 204, 208 (1990), *aff’d*, 328 N.C. 88, 399 S.E.2d 113 (1991)(quoting *McGee v. Eubanks*, 77 N.C. App. 369, 374, 335 S.E.2d 178, 181 (1985), *disc. review denied*, 315 N.C. 589, 341 S.E.2d 27 (1986)).

In *Laws v. Priority Tr. Servs. of N.C., LLC*, 2009 LEXIS 26748 (W.D.N.C. 2009), *aff’d*. 2010 U.S. App. LEXIS 8815 (4th Cir 2010) the U S District Court held not only that the Rules of Professional Conduct are not appropriate as a part of a determination whether a lawyer has deviated from the applicable standard of care, but neither are the interpretative gloss put on the Rules by State Bar Ethics Opinions. The Court held that the plaintiff’s claims “were based entirely on purported violations of the North Carolina State Bar Ethics Opinions, which, as a matter of law, cannot be used as a basis for civil liability. It is clear that the North Carolina Rules of Professional Conduct are not designed to be a basis for civil liability.” 2009 U.S. Dist. LEXIS 26748 at *4.

An attorney’s reliance on the requirements of the Rules of Professional Conduct may, however, constitute a defense to a claim of improper behavior. In *Noblot v. Timmons*, 2006 N.C. App. LEXIS 861, 628 S.E.2d 413 (N.C. Ct. of App., 2006), the plaintiffs contended that the lawyers representing the adverse parties in a rent dispute had a duty to notify the plaintiffs of the actions of the lawyers’ clients. The lawyers-defendants relied upon advice received from the North Carolina State Bar and Rules 1.15-2(m) and 1.6(a) of the Rules of Professional Conduct that the lawyers were required to pay and deliver to their client funds belonging to the client, and

they must keep confidential the client's business under the Rules' general confidentiality provision that "a lawyer shall not reveal information acquired during the professional relationship with a client" The Court of Appeals held, "in accordance with Rule 1.15-2(m), defendants were obligated to disburse to the Timmonses [the defendants' client] funds to them upon request. The money belonged to the Timmonses. Because the defendants' clients were the Timmonses, the defendants were also obligated to comply with Rule 1.6 to not disclose the Timmonses' confidential information to plaintiffs." 628 S.E.2d 413, 416.

In *Wilkins v. Safran*, 185 N.C. App. 668, 649 S.E.2d 658 (2007), the defendant-attorney, by order of the court, withdrew from the plaintiff-client's case following a heart attack. The plaintiff retained new counsel and after trying, unsuccessfully, to move the trial date, negotiated a settlement of the lawsuit. The plaintiff then commenced a legal malpractice action alleging attorney negligence/malpractice, breach of fiduciary duty, constructive fraud and punitive damages. Citing Rule 1.16(a) of the North Carolina Rules of Professional Conduct, which states that "an attorney 'shall withdraw from the representation of a client if: . . . (2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client," the Court held that summary judgment was properly granted in favor of the defendant-attorney.

B. Malpractice Claims Arising from Criminal Actions.

Persons convicted of crimes who wish to prosecute professional negligence claims against their lawyer arising out of criminal representation will find the task particularly challenging. In *Belk v. Cheshire*, 159 N.C. App. 325, 583 S.E.2d 700 (2003), the Court of Appeals affirmed summary judgment for plaintiff's criminal defense counsel observing, following review and approval of decisions from across the United States, that courts impose a stricter standard for criminal malpractice actions in recognition of three basic public policy

principles: “(1) [t]he criminal justice system affords individuals charged with crimes a panoply of protections against abuses of the system and wrongful conviction, including safeguards against incompetent and ineffective counsel; (2) a guilty defendant should not be allowed to profit from criminal behavior; and (3) the pool of legal representation available to criminal defendants, especially indigents, needs to be preserved.” The Court of Appeals concluded “that the burden of proof required to show proximate cause in an action for legal malpractice arising in the context of a criminal proceeding is, for public policy reasons, necessarily a high one.” 159 N.C. App. 325, 332, 583 S.E.2d 700, 706. *Accord, Smith v. Harvey*, 2004 N.C. App. LEXIS 1017 *5-6 (June 1, 2004)(a “plaintiff who alleges an attorney-provided negligent representation in a criminal proceeding has an augmented or higher standard allegation and proof.”)

C. Bifurcation.

Superior Courts have statutory and case authority to bifurcate the trial of the issues of legal negligence from the issues in the case-within-a-case. Rule 42(b) of the North Carolina Rules of Civil Procedure provides, in pertinent part: “The court may in furtherance of convenience or to avoid prejudice, . . . order a separate trial of any separate . . . issues.” A separation of issues under Rule 42(b) rests in the sound discretion of the court. *Fulk v. Piedmont Music Ctr.*, 138 N.C. App. 425, 531 S.E.2d 476 (2000); *Aetna Ins. Co. v. Carroll’s Transfer, Inc.*, 14 N.C. App. 481, 484, 188 S.E.2d 612, 614 (1972); and the court’s decision will not be disturbed absent a showing of clear abuse of discretion and injury or prejudice to the opposing party. *In re Moore*, 11 N.C. App. 320, 181 S.E.2d 118 (1971).

Bifurcation has been ordered in legal malpractice actions. In *Kearns v. Horsley*, 144 N.C. App. 200, 552 S.E.2d 1 (2001), the Court of Appeals upheld an order of bifurcation in favor of the defendants in a legal malpractice action. At the trial the defendants moved for a bifurcation

of the issues requiring the plaintiff to prove her case-within-a case, a personal injury claim arising out of a trip-and-fall at a movie theatre, prior to proceeding with a trial of her legal malpractice claim against the defendants. The trial court granted the defendant's motion; on appeal, the plaintiff argued that the trial court erred in granting defendants' motion to bifurcate the trial. The Court of Appeals affirmed the Superior Court's ruling because, under the *Rorrer v. Cooke* case-within-a-case standard, trying both cases at once, which required the application of different state's laws, would have confused the jury and would have prejudiced the defendants. 144 N.C. App. 200, 211-212, 552 S.E.2d 1, 8-9.

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UNDERSTANDING AND AVOIDING APPELLATE TRAPS

SELECTED EXCERPTS FROM:
“UNDERSTANDING AND AVOIDING APPELLATE TRAPS”
LAWYERS MUTUAL CLE SPEAKER SERIES
2014-2015

ANDREW H. ERTESCHIK**

I. DISMISSAL OF APPEALS AND OTHER SANCTIONS

A. STATE APPELLATE COURTS

In North Carolina’s state appellate courts, Rules 25 and 34 of the North Carolina Rules of Appellate Procedure are the enforcement mechanism for rules violations. Rule 25(b) provides that “[a] court of the appellate division may, on its own initiative or motion of a party, impose a sanction against a party or attorney or both when the court determines that such party or attorney or both substantially failed to comply with these appellate rules,” and that “[t]he court may impose

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sanctions of the type and in the manner prescribed by Rule 34 for frivolous appeals.”¹

In turn, Rule 34 of the North Carolina Rules of Appellate Procedure provides:

A court of the appellate division may, on its own initiative or motion of a party, impose a sanction against a party or attorney or both when the court determines that an appeal or any proceeding in an appeal was frivolous because of one or more of the following:

- (1) the appeal was not well grounded in fact and was not warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law;
- (2) the appeal was taken or continued for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
- (3) a petition, motion, brief, record, or other paper filed in the appeal was grossly lacking in the requirements of propriety, grossly violated appellate court rules, or grossly disregarded the requirements of a fair presentation of the issues to the appellate court.²

The Rule provides for the one or more of the following sanctions:

“(1) dismissal of the appeal; (2) monetary damages including, but not limited to single or double costs, damages occasioned by delay, [or] reasonable expenses,

¹ N.C. R. App. P. 25(b).

² N.C. R. App. P. 34(a).

including reasonable attorney fees, incurred because of the frivolous appeal or proceeding; or (3) any other sanction deemed just and proper.”³

In *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*,⁴ the North Carolina Supreme Court explained that “Rules 25 and 34, when viewed together, provide a framework for addressing violations of the nonjurisdictional requirements of the rules,” and that these Rules are intended to “promote compliance with the appellate rules.” The Court further cautioned that “[i]n the event of substantial or gross violations of the nonjurisdictional provisions of the appellate rules . . . the party or lawyer responsible for such representational deficiencies opens the door to the appellate court’s need to consider appropriate remedial measures.”⁵

For appeals to the North Carolina Court of Appeals or the Supreme Court of North Carolina, *Dogwood* remains required reading for determining whether violations of the rules will result in sanctions and, if so, which sanctions. After years of our appellate courts’ internal struggle to strike the proper balance between the need to enforce the appellate rules and the need to resolve appeals on the

³ N.C. R. App. P. 34(b).

⁴ 362 N.C. 191, 199, 657 S.E.2d 361, 366 (2008).

⁵ *Id.*

merits, the Court in *Dogwood* set forth a comprehensive framework to determine when a violation of the appellate rules should result in dismissal.

The essence of *Dogwood* is that the nature of the rules violation governs whether an appellate court should excuse noncompliance. As the Court explained, the occurrence of “default” under the appellate rules generally falls into three categories: (1) violation of appellate rules governing issue preservation; (2) violation of “jurisdictional” appellate rules; and (3) violation of “nonjurisdictional” appellate rules.

With respect to the first category, the Court explained that a party’s failure to properly preserve an issue for appellate review under Rule 10 of the North Carolina Rules of Appellate Procedure will ordinarily justify an appellate court’s refusal to consider the issue on appeal, subject to certain exceptions applicable only in rare instances.

As to the second category of default, the Court reaffirmed its prior cases holding that when a “jurisdictional default” (i.e., the failure to file a notice of appeal) occurs, the appellate court must dismiss the appeal in all but the rarest of exceptions. For such jurisdictional defaults, the Court explained, the appellate court may not invoke Rule 2 to reach the merits of the appeal. (Note: This is

perhaps the number 1 appellate “trap” that currently exists. If you file your notice of appeal one day late, your appeal will be dismissed.)

Finally, the Court explained that violations of “nonjurisdictional” appellate rules normally should not lead to dismissal of the appeal. The Court explained that Rules 25 and 34 govern this type of noncompliance and provide for various sanctions short of dismissing the case or issue. Moreover, the Court made clear that even when substantial or gross violations of nonjurisdictional rules warrant dismissal of the appeal, an appellate court may nevertheless consider invoking Rule 2 to reach the merits under certain extraordinary circumstances.

Prior to *Dogwood*, lawyers appearing before our appellate courts nervously submitted appeals, fearful that they could be dismissed for a technical violation of the rules. The vast majority of this guesswork has been eliminated by the framework set forth in *Dogwood*, which had the practical effect of reducing the likelihood that an appeal would be dismissed for violations of the appellate rules that did not implicate jurisdictional concerns. Indeed, some members of the appellate bar believed that after *Dogwood*, non-jurisdictional appellate rules violations might never again result in dismissal of an appeal.

In its recent decision in *Trevarthen v. Treadwell*⁶, however, the Court of Appeals made clear that even in the wake of *Dogwood*, non-jurisdictional appellate rules violations – i.e., failing to contract for the transcript when it should have been included in the record, improper formatting, numerous misspellings, failing to include a standard of review, grossly improper Bluebooking, etc. – may still warrant in dismissal of an appeal. Though an unpublished decision, *Trevarthen* should be viewed as a word of caution to appellate practitioners not to push the limits of *Dogwood* (or the appellate court’s patience).

B. FEDERAL APPELLATE COURTS

The enforcement mechanism for rules violations in the Fourth Circuit may be found in Local Rule 46(g), entitled “Rules of Disciplinary Enforcement.” Local Rule 46(g) provides that the Fourth Circuit may discipline any member of its bar for certain conduct, including “[c]onduct with respect to this Court which violates the rules of professional conduct or responsibility in effect in the state or other jurisdiction in which the attorney maintains his or her principal office, the Federal Rules of Appellate Procedure, the local rules of this Court, or orders or other instructions of this Court.”⁷ The discipline meted out by the Court “may consist of disbarment, suspension from practice before this Court, monetary sanction,

⁶ *Trevarthen v. Treadwell*, 727 S.E.2d 406 (Ct. App. July 3, 2012).

⁷ Loc. R. 46(g)(1)(c).

removal from the roster of attorneys eligible for appointment as Court-appointed counsel, reprimand, or any other sanction that the Court may deem appropriate.”⁸

In the Fourth Circuit, “[a]ll matters pertaining to discipline of attorneys are submitted to the Court's Standing Panel on Attorney Discipline, which consists of three active circuit judges, each of whom is appointed by the Chief Judge to serve on the Panel for a three-year term.” Local Rule 46(g)(8).

As for violations of the Federal Rules of Appellate Procedure, the Fourth Circuit has explained that “[t]he determination whether or not to dismiss an appeal for failure to comply with the rules of appellate procedure lies within the sound discretion of the court of appeals,” and that motions to dismiss may be properly denied “notwithstanding clear failure of the appellant to comply with the rules.”⁹ More recently, the Fourth Circuit has explained that while violations of the Federal Rules of Appellate Procedure “may result in dismissal of the appeal, this Court has a measure of discretion . . . whereunder it may consider an appellant’s claim of error, even despite its inadequate assertion, especially when the pertinent record appears fully to be before the court, and the controverted questions have actually

⁸ Loc. R. 46(g)(2).

⁹ *Branch v. Reynolds Metals Co.*, 502 F.2d 1163 (4th Cir. 1974).

been argued.”¹⁰ Ultimately, in the Fourth Circuit, the issue may turn on whether there is a “good faith justification” for the failure to comply with the rules.¹¹

II. APPEALS FROM INTERLOCUTORY ORDERS

A. GENERALLY

If the order does not dispose of all claims and defendants, it is known as an “interlocutory order.”¹² “Generally, there is no right of immediate appeal from interlocutory orders.”¹³ Rather, the party wishing to appeal the interlocutory order must wait until there has been a final judgment in the case before the interlocutory order may be appealed.¹⁴

The reason for this rule was articulated by the Supreme Court of North Carolina in its 1950 decision in *Veazey v. Durham*:

¹⁰ *United States v. Sharp*, 400 Fed. Appx. 741, 743 n.1 (4th Cir. 2010) (internal citations and quotations omitted).

¹¹ *See Branch v. Reynolds Metals Co.*, 502 F.2d 1163 (4th Cir. 1974) (“We conclude that [the appellant] has failed to offer a good faith justification for his failure to comply with the rules, and, accordingly, we grant [the appellee’s] motion to dismiss the appeal.”).

¹² N.C. Gen. Stat. § 1A-1, Rule 54(b) (2013) (“A judgment is either interlocutory or the final determination of the rights of the parties.”); *Pratt v. Staton*, 147 N.C. App. 771, 773, 556 S.E.2d 621, 623 (2001) (“An order . . . granting a motion to dismiss certain claims in an action, while leaving other claims in the action to go forward, is plainly an interlocutory order.”)

¹³ *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990).

¹⁴ *Veazey v. Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950).

There is no more effective way to procrastinate the administration of justice than that of bringing cases to an appellate court piecemeal through the medium of successive appeals from intermediate orders. The rules regulating appeals from the Superior Court to the Supreme Court are designed to forestall the useless delay inseparable from unlimited fragmentary appeals, and to enable courts to perform their real function, i.e., to administer “right and justice . . . without sale, denial, or delay.”¹⁵

Premature appeals from interlocutory orders delay the final resolution of litigation and impose a substantial financial burden upon all the litigants involved.¹⁶ Accordingly, the courts have long guarded against such burdens unnecessarily.¹⁷

There are, however, a number of exceptions to this general rule. For an illustration of many practical examples of immediately appealable interlocutory orders, practitioners should consult the NCBA Appellate Rules Committee’s recently published *Guide to Appealability of Interlocutory Orders*, available at: www.ncbar.org/about/committees/appellate-rules-committee.

B. IMPROPER APPEALS

The filing of frivolous immediate appeals from interlocutory orders as a delay tactic is a problem in North Carolina. This may be fueled in part by the doctrine of *functus officio*, which dictates that the trial court generally loses

¹⁵ *Id.* at 363-64, 57 S.E.2d at 382 (quoting N.C. Const. art. I, § 35).

¹⁶ *Id.*

¹⁷ *See, e.g., Royster v. Wright*, 118 N.C. 152, 154, 24 S.E.2d 746, 747 (1896).

jurisdiction once a notice of appeal is filed.¹⁸ Thus, an immediate appeal from an interlocutory order has the practical effect of “stopping the clock.” Some litigants see this as an advantage in and of itself.

Practitioners should take note that Rule 34(a)(2) of the North Carolina Rules of Appellate Procedure provides for sanctions when “the appeal was taken or continued for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.”¹⁹ In addition, Rule 3.1 of the North Carolina Rules of Professional Conduct provides: “A lawyer shall not bring . . . a proceeding, or assert . . . an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.”²⁰

Lawyers who appear before North Carolina’s appellate courts should be mindful of these ethical parameters when pursuing immediate appeals from interlocutory orders.

III. DEADLINES

The following chart tracks the deadlines for a typical appeal from a North Carolina state trial court to the North Carolina Court of Appeals:

¹⁸ See generally Thomas L. Fowler, *Functus Officio: Authority of The Trial Court After Notice of Appeal*, 81 N.C. L. Rev. 2331 (2003).

¹⁹ N.C. R. App. P. 34(a)(2).

²⁰ N.C. R. Prof’l Conduct 3.1.

Action	Time	Rule Reference
Appellant files Notice of Appeal with Superior Court	30 days from entry of judgment	Rule 3(c)
Appellant prepares and serves Proposed Record on Appeal on Appellee	35 days from Notice of Appeal or, if transcript is ordered, from receipt of transcript	Rule 11(b)
Appellee serves Appellant with Objections or Proposed Alternative Record on Appeal	33 days (30 days plus 3 for service) from service of Proposed Record	Rule 11(c)
Record on Appeal is “deemed settled” by Rule	10 days after service of objections to Proposed Record on Appeal, provided no party seeks judicial settlement of the record	Rule 11(c)
Appellant files Record on Appeal	15 days from date Record on Appeal is “deemed settled”	Rule 12(a)
Appellant files Brief	30 days from date Clerk of Court of Appeals mails the printed Record on Appeal to the parties	Rule 13(a)
Appellee files Brief	33 days (30 days plus 3 for service) from date of filing of Appellant’s Brief	Rule 13(a)
Appellant files Reply Brief ²¹	17 days (14 days plus 3 for service) from date of filing of Appellee’s Brief	Rule 28(h)
Clerk of Court of Appeals mails Calendars for Oral Argument indicating whether case will be argued	Highly variable, but often approximately 1 month prior to date on which case is calendared	No specific rule; internal Court policy/practice
Court issues decision	Highly variable, but often approximately 90 days after the date on which case is calendared	No specific rule; internal Court policy/practice

²¹ As amended by a 28 February 2013 Order of the North Carolina Supreme Court, Rule 28(h) now permits an appellant to file a reply brief as a matter of right.

SELECTED EXAMPLES OF ENGAGEMENT LETTERS

INDIVIDUAL REPRESENTATION

August 27, 2014

RE:

Dear _____:

We are pleased that you have asked the firm to serve as your counsel. At the outset of any engagement, we believe it is appropriate to confirm in writing the nature of the engagement and the terms of our representation, and that is the purpose of this letter. If you have any questions about this letter or any of its provisions, do not hesitate to call. Otherwise, this letter will constitute the terms of our engagement. Again, we are pleased to have the opportunity to serve you.

Client(s). _____ will be our only client(s) in this matter.

Scope of Engagement. Our representation will be limited to the specific matters described in this paragraph. You are engaging us to represent [you, or the name of the client(s)], and we agree to represent [you, or the name of the client(s)], for the purpose of

_____ (hereinafter referred to as the "matter" or "engagement").

Nature of Relationship. Our objective is to provide high quality legal services to our clients at a fair and reasonable cost. The attorney-client relationship is one of mutual trust and confidence. If you have any questions at all concerning the terms of this engagement, our ongoing handling of this legal matter, or about any issue relating to a monthly statement that is unclear or appears to be unsatisfactory, we invite your inquiries.

Fees and Expenses. Our fees will be based primarily on the hourly rate for each attorney and paralegal devoting time to this matter. Our standard hourly rates for attorneys likely to be involved currently range from \$_____ per hour to \$_____ per hour. Time devoted by paralegals is charged at hourly rates ranging from \$_____ to \$_____ per hour. My current hourly rate is \$_____ per hour. (Add others per hour as needed).

General Waiver of Conflicts. As we have discussed, you are aware that the firm represents many other companies and individuals. This confirms your [or client's name, as appropriate] continued agreement that we may continue to represent or may undertake in the future to represent existing or new clients in any matter that is not substantially related to our work for you [or client's name, if appropriate] in this matter or any other matter for which you may subsequently engage our firm, even if the interests of such clients in those other matters may be directly or indirectly adverse to you [or client's name]. We agree, however, that your prospective consent to conflicting representation contained in the preceding sentence shall not apply in any instance where, as a result of our representation of you, we have obtained proprietary or other confidential information of a non-public nature, that, if known to such other client, could be used in any such other matter by such client to your material disadvantage. You should know that, in similar engagement letters with many of our other clients, we have asked for similar agreements to preserve our ability to represent you.

Conclusion of Matter. The matter will conclude when all work has been completed. Following the conclusion of the matter, you may request your files be returned to you, otherwise they will be retained by the firm and disposed of in accordance with our retention policy.

If the foregoing accurately states the terms of our engagement, then this is the confirmation of our agreement with you regarding this matter. If the foregoing does not accurately state the terms of our engagement, please let us know immediately, and do not proceed to use our firm on this particular matter until we have agreed upon the terms of engagement and another letter is delivered to you confirming those terms. Once again, we are pleased to have this opportunity to work with you. Please call me if you have any questions or comments during the course of our representation.

Very truly yours,

LAW FIRM

By:

Enclosure

STANDARD TERMS OF REPRESENTATION

This document sets forth the standard terms of our engagement as your lawyers. Unless modified in writing by mutual agreement, these terms will be an integral part of our agreement with you. Therefore, we ask that you review this document carefully and contact us promptly if you have any questions. You should retain this document in your file.

The Scope of Our Work

The legal services that we will provide to you are described in our engagement letter. Our representation is limited to performance of the services described in that letter and does not include representation of you or your interests in any other matter.

Any expressions on our part concerning the outcome of your legal matters are expressions of our best professional judgment, but are not guarantees. Such opinions are necessarily limited by our knowledge of the facts and are based on the state of the law at the time they are expressed.

It is our policy that the person or entity that we represent is the person or entity that is identified in our engagement letter and does not include any affiliates of such person or entity (*i.e.*, if you are a corporation or partnership, any parents, subsidiaries, employees, officers, directors, shareholders or partners of the corporation or partnership, or commonly owned corporations or partnerships; or, if you are a trade association, any members of the trade association). Accordingly, for conflict of interest purposes, we may represent another client with interests adverse to any such affiliate without obtaining your consent.

Who Will Provide the Legal Services

Customarily, each client of the firm is served by a principal lawyer contact. You are free to request a change of principal lawyer at any time. Subject to the supervisory role of the principal lawyer, your work or parts of it may be performed by other lawyers and legal assistants in the firm. Such delegation may be for the purpose of involving lawyers or legal assistants with special expertise in a given area or for the purpose of providing services on the most efficient and timely basis.

Communications

If at any time, you have any question about our services, staffing, billing or other aspects of our representation, please do not hesitate to let us know. It is important to us that you are satisfied with our services and responsiveness at all times. The Firm has assumed in accepting this engagement that we are permitted to communicate with you and/or your personnel in person or by telephone, first-class mail, fax, express delivery services and/or e-mail. The firm will employ encryption when required to protect personally identifiable information and/or private health information or as requested by the client. If you require special exceptions to our general communications policy, now or in the future, please notify us promptly.

How Fees Will Be Set

(This section does not apply if you and your principal lawyer have agreed in writing to a different fee arrangement such as a flat fee or contingent fee.)

To help determine the value of our services, each of our lawyers and legal assistants maintain time records for each client and matter. We record our time in units of tenths of an hour. The time records are reviewed monthly by the billing attorney assigned to you before a statement is rendered. All attorneys and legal assistants of the Firm are assigned hourly rates based primarily on experience and expertise. Our hourly rates are adjusted from time to time (generally once a year) and may change during the course of our engagement. We view such rates as only a benchmark, and not as the sole determinant, of the value of our services for billing purposes. Instead, the amount of our billing statement

will be the fair value of the services as determined by the billing attorney taking into account the time records for the matter, the types of services we have been asked to perform, any special level of expertise required, the novelty and complexity of the issues presented, the time constraints imposed on us, the extent to which our investment in office systems have efficiently produced a high-quality product, the size and scope of the matter, results obtained, and other relevant circumstances.

Client Responsibilities

You agree to pay our statements for services and expenses as provided below. In addition, you agree to be candid and cooperative with us and will keep us informed with complete and accurate factual information, documents and other communications relevant to the subject matter of our representation or otherwise reasonably requested by us. Because it is important that we be able to contact you at all times to consult with you regarding your representation, you will inform us, in writing, of any changes in the name, address, telephone number, contact person, e-mail address, state of incorporation or other relevant changes regarding you or your business. Whenever we need your instructions or authorization in order to proceed with legal work on your behalf, or to transfer custodial responsibility of records, we will contact you at the latest business address we have received from you. You agree to notify the Firm of changes of status such as name, address and other contact information.

Responses to Audit Letters

From time to time, you may ask us to issue to your accountants a legal opinion in connection with an audit of your financial statements. In most cases, we charge a flat fee for issuing these opinions. We also charge a flat fee for issuing updates to our opinion letters. Please note that we reserve the right to increase the fee if, in preparing an opinion letter, it is necessary to analyze multiple, complex loss contingencies.

Estimates

We are often requested to estimate the amount of fees and costs likely to be incurred in connection with a particular matter. Whenever possible, we will furnish such an estimate based upon our professional judgment, but always with a clear understanding that it is not a maximum or fixed-fee quotation unless specifically stated as such. The ultimate cost frequently is more or less than the amount estimated because of conditions over which we have little or no control. Our actual fees will be determined in accordance with the policies described herein.

Administrative Expenses and Other Disbursements

We currently have a flat rate administrative expense charge of \$10.25 per billed hour which is calculated in lieu of telephone charges, photocopying, postage, facsimile, and other typical administrative expenses. We reserve the right to prospectively make minor adjustments in this amount or change to an equivalent percentage charge. Additionally, you will be charged separately for extraordinary disbursements made by us on your behalf, such as special postage, third-party delivery charges, travel, bulk photocopying, secretarial overtime, if necessary, and use of other service providers such as investigators, printers or experts. In litigated matters, we include payments made by us for process servers, court reporters, deposition transcript expenses, witness fees and the like. We also make separate charges for the use of "Lexis" and other computerized legal research systems that often significantly reduce lawyer research time. Invoices from third party providers of ancillary services with significant costs may be sent directly to you for payment.

Billing Arrangements and Terms of Payment

We will bill you on a regular basis, normally each month, for fees, administrative expenses and disbursements. We make every effort to include disbursements in the statement for the period in which the disbursements are incurred. However, some disbursements are not available to us until following

months, in which case a supplemental statement will be rendered to you for these additional charges or an estimated amount will be included in the initial billing and an adjustment made when the actual disbursement information is available. You agree to make payments within 30 days of receiving our statement. Unpaid fees, expenses and disbursements accrue interest at the maximum rate permitted by state law, but not exceeding 1½% per month (18% per annum) from the beginning of the month in which they became overdue.

We will give you prompt notice if your account becomes delinquent, and you agree to bring the account or the deposit current. If the delinquency continues and you do not arrange satisfactory payment terms, we will withdraw from the representation and pursue collection of your account. You agree to pay the costs of collecting the debt, including court costs, filing fees and a reasonable lawyer's fee.

Retainer and Trust Deposits

New clients of the Firm, and existing clients under certain circumstances, are commonly asked to make a deposit with the Firm. If you make a deposit with us, or provide a retainer, you grant us a security interest in those funds. Typically, the deposit is equal to the fees and costs likely to be incurred during a two-month period. Unless otherwise agreed, the deposit will be credited toward your unpaid invoices, if any, at the conclusion of services. At the conclusion of our legal representation or at such time as the deposit is unnecessary or is appropriately reduced, the remaining balance or an appropriate part of it will be returned to you. If the deposit is insufficient to cover current expenses and fees on at least a two-month basis, it may have to be increased.

All trust deposits we receive from you will be placed in a trust account for your benefit. As approved by the North Carolina Supreme Court, your deposit will be placed in a pooled account if it is not expected to earn a net return, taking into consideration the size and anticipated duration of the deposit and the transaction costs. Other trust deposits will also be placed in the pooled account unless you request a segregated account. Interest earned on the pooled account is payable to the North Carolina State Bar to fund programs for the public's benefit. Interest earned on the segregated trust account will be added to the deposit for your benefit and will be includable in your taxable income.

Termination of Engagement

You may at any time terminate our services and representation upon written notice to us. Such termination shall not, however, relieve you of the obligation to pay for all services already rendered, including work in progress and remaining incomplete at the time of termination, and to pay for all expenses incurred on your behalf through the date of termination.

We reserve the right to withdraw from our representation as required or permitted by the applicable rules of professional conduct. We will try to identify in advance and discuss with you any situation that may lead to our withdrawal and if withdrawal ever becomes necessary we will give you written notice of our withdrawal. In the event that we terminate the engagement, we will take such steps as are reasonably practicable to protect your interests in the specified matter, and you agree to take all steps necessary to free us of any obligation to perform further, including the execution of any documents necessary to perfect our withdrawal. We will be entitled to be paid for all services rendered and costs or expenses incurred on your behalf through the date of withdrawal. If permission for withdrawal is required by a court or arbitration panel, we will promptly request such permission, and you agree not to oppose our request.

Conclusion of Representation; Retention and Disposition of Documents

Unless previously terminated, our representation of you in any matter will terminate on the date that we provide our last legal service to you in connection with that matter. At the conclusion of the matter, if you would like for us to return any of your records or property, please contact us promptly. Should you request return of any of your records or property, we reserve the right to assess reasonable fees and costs associated with any time spent or expenses incurred in fulfilling your requests. Our own records pertaining to the matter, and any records or property that you do not request be returned to you,

will be retained by the firm for a reasonable time after termination of our engagement on the matter, consistent with our records retention program. At the conclusion of the relevant retention period, we will securely dispose of the applicable records and property in our possession pertaining to the closed matter.

Post-Engagement Matters

You are engaging the firm to provide legal services in connection with a specific matter. After completion of the engagement, there may be changes in applicable laws or regulations, or new legislation or court decision that could have an impact upon you, your future rights and liabilities, or the matter for which we are engaged hereunder. You understand and agree that you are not engaging us to monitor new legislation or court decision, or changes in laws and regulations that occur after we have completed the engagement described above, and you agree that we are not responsible for advising you of any such new legislation or court decisions, or changes in laws or regulations.

Your Right to Arbitrate

If you disagree with the amount of our fee, please take up the question with your principal lawyer contact or with the Firm's managing partner. Typically, such disagreements are resolved to the satisfaction of both sides with little inconvenience or formality. In the event of a fee dispute which is not readily resolved, you have the right to request mediation and arbitration under supervision of the District Bars for the jurisdictions in which we practice or the State Bar, and we agree to participate fully in that process.

Questions

If you have questions about any aspect of our arrangements or our statements please feel free to raise those questions. It is very important that we proceed on a clear and satisfactory basis in our work for you. We are open to the discussion of all of these matters and we encourage you to be comfortable in letting us know if you have any questions or concerns regarding these arrangements.

Thank you.

COMPANY REPRESENTATIONS

August 27, 2014
[Client name and address]

RE: [Engagement for Legal Services]

Dear _____:

We are pleased that you have asked the firm to serve as counsel to [name of company] (the "Company"). At the outset of any engagement, we believe it is appropriate to confirm in writing the nature of the engagement and the terms of our representation, and that is the purpose of this letter. If you have any questions about this letter or any of its provisions, do not hesitate to call. Otherwise, this letter will constitute the terms of our engagement. Again, we are pleased to have the opportunity to serve you.

Client. The Company will be our only client in this matter.

Scope of Engagement. Our representation will be limited to the specific matters described in this paragraph. The Company is engaging us to represent it, and we agree to represent it, for the purpose of

_____ (hereinafter referred to as the
"matter" or "engagement").

Nature of Relationship. Our objective is to provide high quality legal services to our clients at a fair and reasonable cost. The attorney-client relationship is one of mutual trust and confidence. If you have any questions at all concerning the terms of this engagement, our ongoing handling of this legal matter, or about any issue relating to a monthly statement that is unclear or appears to be unsatisfactory, we invite your inquiries.

Fees and Expenses. Our fees will be based primarily on the hourly rate for each attorney and paralegal devoting time to this matter. Our standard hourly rates for attorneys likely to be involved currently range from \$_____ per hour to \$_____ per hour. Time devoted by paralegals is charged at hourly rates ranging from \$_____ to \$_____ per hour. My current hourly rate is \$_____ per hour. [Add other per hour rates as needed].

General Waiver of Conflicts. As we have discussed, you are aware that the firm represents many other companies and individuals. This confirms the Company's continued agreement that we may continue to represent or may undertake in the future to represent existing or new clients in any matter that is not substantially related to our work for the Company in this matter or any other matter for which the Company may subsequently engage our firm, even if the interests of such clients in those other matters may be directly or indirectly adverse to the Company. We agree, however, that the Company's prospective consent to conflicting representation contained in the preceding sentence shall not apply in any instance where, as a result of our representation of the Company, we have obtained proprietary or other confidential information of a non-public nature, that, if known to such other client, could be used in any such other matter by such client to the Company's material disadvantage. You should know that, in similar engagement letters with many of our other clients, we have asked for similar agreements to preserve our ability to represent the Company.

Conclusion of Matter. The matter will conclude when all work has been completed. Following the conclusion of the matter, you may request that the Company's files be returned to you, otherwise they will be retained by the firm and disposed of in accordance with our retention policy as noted in the "Conclusion of Representation; Retention and Disposition of Documents" section of the attached Standard Terms of Representation.

If the foregoing and the enclosed Standard Terms of Representation accurately state the terms of our engagement, then this is the confirmation of our agreement with the Company regarding this matter. If the foregoing and the enclosed Standard Terms of Representation do not accurately state the terms of our engagement, please let us know immediately, and do not proceed to use our firm on this particular matter until we have agreed upon the terms of engagement and another letter is delivered to you confirming those terms. Once again, we are pleased to have this opportunity to work with the Company. Please call me if you have any questions or comments during the course of our representation.

Very truly yours,

LAW FIRM

By:

Enclosure

STANDARD TERMS OF REPRESENTATION

This document sets forth the standard terms of our engagement as your lawyers. Unless modified in writing by mutual agreement, these terms will be an integral part of our agreement with you. Therefore, we ask that you review this document carefully and contact us promptly if you have any questions. You should retain this document in your file.

The Scope of Our Work

The legal services that we will provide to you are described in our engagement letter. Our representation is limited to performance of the services described in that letter and does not include representation of you or your interests in any other matter.

Any expressions on our part concerning the outcome of your legal matters are expressions of our best professional judgment, but are not guarantees. Such opinions are necessarily limited by our knowledge of the facts and are based on the state of the law at the time they are expressed.

It is our policy that the person or entity that we represent is the person or entity that is identified in our engagement letter and does not include any affiliates of such person or entity (*i.e.*, if you are a corporation or partnership, any parents, subsidiaries, employees, officers, directors, shareholders or partners of the corporation or partnership, or commonly owned corporations or partnerships; or, if you are a trade association, any members of the trade association). Accordingly, for conflict of interest purposes, we may represent another client with interests adverse to any such affiliate without obtaining your consent.

Who Will Provide the Legal Services

Customarily, each client of the firm is served by a principal lawyer contact. You are free to request a change of principal lawyer at any time. Subject to the supervisory role of the principal lawyer, your work or parts of it may be performed by other lawyers and legal assistants in the firm. Such delegation may be for the purpose of involving lawyers or legal assistants with special expertise in a given area or for the purpose of providing services on the most efficient and timely basis.

Communications

If at any time, you have any question about our services, staffing, billing or other aspects of our representation, please do not hesitate to let us know. It is important to us that you are satisfied with our services and responsiveness at all times. The Firm has assumed in accepting this engagement that we are permitted to communicate with you and or your personnel in person or by telephone, first-class mail, fax, express delivery services and/or e-mail. The firm will employ encryption when required to protect personally identifiable information and/or private health information or as requested by the client. If you require special exceptions to our general communications policy, now or in the future, please notify us promptly.

How Fees Will Be Set

(This section does not apply if you and your principal lawyer have agreed in writing to a different fee arrangement such as a flat fee or contingent fee.)

To help determine the value of our services, each of our lawyers and legal assistants maintain time records for each client and matter. We record our time in units of tenths of an hour. The time records are reviewed monthly by the billing attorney assigned to you before a statement is rendered. All attorneys and legal assistants of the Firm are assigned hourly rates based primarily on experience and expertise. Our hourly rates are adjusted from time to time (generally once a year) and may change during the course of our engagement. We view such rates as only a benchmark, and not as the sole determinant, of the value of our services for billing purposes. Instead, the amount of our billing statement

will be the fair value of the services as determined by the billing attorney taking into account the time records for the matter, the types of services we have been asked to perform, any special level of expertise required, the novelty and complexity of the issues presented, the time constraints imposed on us, the extent to which our investment in office systems have efficiently produced a high-quality product, the size and scope of the matter, results obtained, and other relevant circumstances.

Client Responsibilities

You agree to pay our statements for services and expenses as provided below. In addition, you agree to be candid and cooperative with us and will keep us informed with complete and accurate factual information, documents and other communications relevant to the subject matter of our representation or otherwise reasonably requested by us. Because it is important that we be able to contact you at all times to consult with you regarding your representation, you will inform us, in writing, of any changes in the name, address, telephone number, contact person, e-mail address, state of incorporation or other relevant changes regarding you or your business. Whenever we need your instructions or authorization in order to proceed with legal work on your behalf, or to transfer custodial responsibility of records, we will contact you at the latest business address we have received from you. You agree to notify the Firm of changes of status such as name, address and other contact information.

Responses to Audit Letters

From time to time, you may ask us to issue to your accountants a legal opinion in connection with an audit of your financial statements. In most cases, we charge a flat fee for issuing these opinions. We also charge a flat fee for issuing updates to our opinion letters. Please note that we reserve the right to increase the fee if, in preparing an opinion letter, it is necessary to analyze multiple, complex loss contingencies.

Estimates

We are often requested to estimate the amount of fees and costs likely to be incurred in connection with a particular matter. Whenever possible, we will furnish such an estimate based upon our professional judgment, but always with a clear understanding that it is not a maximum or fixed-fee quotation unless specifically stated as such. The ultimate cost frequently is more or less than the amount estimated because of conditions over which we have little or no control. Our actual fees will be determined in accordance with the policies described herein.

Administrative Expenses and Other Disbursements

We currently have a flat rate administrative expense charge of \$10.25 per billed hour which is calculated in lieu of telephone charges, photocopying, postage, facsimile, and other typical administrative expenses. We reserve the right to prospectively make minor adjustments in this amount or change to an equivalent percentage charge. Additionally, you will be charged separately for extraordinary disbursements made by us on your behalf, such as special postage, third-party delivery charges, travel, bulk photocopying, secretarial overtime, if necessary, and use of other service providers such as investigators, printers or experts. In litigated matters, we include payments made by us for process servers, court reporters, deposition transcript expenses, witness fees and the like. We also make separate charges for the use of "Lexis" and other computerized legal research systems that often significantly reduce lawyer research time. Invoices from third party providers of ancillary services with significant costs may be sent directly to you for payment.

Billing Arrangements and Terms of Payment

We will bill you on a regular basis, normally each month, for fees, administrative expenses and disbursements. We make every effort to include disbursements in the statement for the period in which the disbursements are incurred. However, some disbursements are not available to us until following

months, in which case a supplemental statement will be rendered to you for these additional charges or an estimated amount will be included in the initial billing and an adjustment made when the actual disbursement information is available. You agree to make payments within 30 days of receiving our statement. Unpaid fees, expenses and disbursements accrue interest at the maximum rate permitted by state law, but not exceeding 1½% per month (18% per annum) from the beginning of the month in which they became overdue.

We will give you prompt notice if your account becomes delinquent, and you agree to bring the account or the deposit current. If the delinquency continues and you do not arrange satisfactory payment terms, we will withdraw from the representation and pursue collection of your account. You agree to pay the costs of collecting the debt, including court costs, filing fees and a reasonable lawyer's fee.

Retainer and Trust Deposits

New clients of the Firm, and existing clients under certain circumstances, are commonly asked to make a deposit with the Firm. If you make a deposit with us, or provide a retainer, you grant us a security interest in those funds. Typically, the deposit is equal to the fees and costs likely to be incurred during a two-month period. Unless otherwise agreed, the deposit will be credited toward your unpaid invoices, if any, at the conclusion of services. At the conclusion of our legal representation or at such time as the deposit is unnecessary or is appropriately reduced, the remaining balance or an appropriate part of it will be returned to you. If the deposit is insufficient to cover current expenses and fees on at least a two-month basis, it may have to be increased.

All trust deposits we receive from you will be placed in a trust account for your benefit. As approved by the North Carolina Supreme Court, your deposit will be placed in a pooled account if it is not expected to earn a net return, taking into consideration the size and anticipated duration of the deposit and the transaction costs. Other trust deposits will also be placed in the pooled account unless you request a segregated account. Interest earned on the pooled account is payable to the North Carolina State Bar to fund programs for the public's benefit. Interest earned on the segregated trust account will be added to the deposit for your benefit and will be includable in your taxable income.

Termination of Engagement

You may at any time terminate our services and representation upon written notice to us. Such termination shall not, however, relieve you of the obligation to pay for all services already rendered, including work in progress and remaining incomplete at the time of termination, and to pay for all expenses incurred on your behalf through the date of termination.

We reserve the right to withdraw from our representation as required or permitted by the applicable rules of professional conduct. We will try to identify in advance and discuss with you any situation that may lead to our withdrawal and if withdrawal ever becomes necessary we will give you written notice of our withdrawal. In the event that we terminate the engagement, we will take such steps as are reasonably practicable to protect your interests in the specified matter, and you agree to take all steps necessary to free us of any obligation to perform further, including the execution of any documents necessary to perfect our withdrawal. We will be entitled to be paid for all services rendered and costs or expenses incurred on your behalf through the date of withdrawal. If permission for withdrawal is required by a court or arbitration panel, we will promptly request such permission, and you agree not to oppose our request.

Conclusion of Representation; Retention and Disposition of Documents

Unless previously terminated, our representation of you in any matter will terminate on the date that we provide our last legal service to you in connection with that matter. At the conclusion of the matter, if you would like for us to return any of your records or property, please contact us promptly. Should you request return of any of your records or property, we reserve the right to assess reasonable fees and costs associated with any time spent or expenses incurred in fulfilling your requests. Our own records pertaining to the matter, and any records or property that you do not request be returned to you,

will be retained by the firm for a reasonable time after termination of our engagement on the matter, consistent with our records retention program. At the conclusion of the relevant retention period, we will securely dispose of the applicable records and property in our possession pertaining to the closed matter.

Post-Engagement Matters

You are engaging the firm to provide legal services in connection with a specific matter. After completion of the engagement, there may be changes in applicable laws or regulations, or new legislation or court decision that could have an impact upon you, your future rights and liabilities, or the matter for which we are engaged hereunder. You understand and agree that you are not engaging us to monitor new legislation or court decision, or changes in laws and regulations that occur after we have completed the engagement described above, and you agree that we are not responsible for advising you of any such new legislation or court decisions, or changes in laws or regulations.

Your Right to Arbitrate

If you disagree with the amount of our fee, please take up the question with your principal lawyer contact or with the Firm's managing partner. Typically, such disagreements are resolved to the satisfaction of both sides with little inconvenience or formality. In the event of a fee dispute which is not readily resolved, you have the right to request mediation and arbitration under supervision of the District Bars for the jurisdictions in which we practice or the State Bar, and we agree to participate fully in that process.

Questions

If you have questions about any aspect of our arrangements or our statements please feel free to raise those questions. It is very important that we proceed on a clear and satisfactory basis in our work for you. We are open to the discussion of all of these matters and we encourage you to be comfortable in letting us know if you have any questions or concerns regarding these arrangements.

Thank you.

Engagement Paragraph – Contingency Fee

Contingency Fee Agreement. You have agreed with us that the firm will undertake this engagement on a contingency fee basis. Our fee will be based upon all amounts recovered on your behalf, including actual damages, punitive or exemplary damages, treble damages, interest, and attorneys fees, but excluding any recovery of costs awarded to reimburse out-of-pocket expenses incurred in bringing your claims. Our fee will be _____ percent (%) of all amounts recovered on your behalf by any settlement(s) made prior to filing legal action, and our fee will be _____ percent (%) of all amounts recovered on your behalf after legal action is filed, whether by settlement, jury verdict, or otherwise, unless there is an appeal of an award in your favor. If any award by a trial court in your favor is appealed, our fee will be _____ percent (%) of all amounts ultimately recovered if there is a single appeal, and our fee will be _____ percent (%) of all amounts ultimately recovered on your behalf if there is more than one appeal. Unless the Termination of Services provisions apply as stated in the enclosed Standard Terms of Representation, the contingency fee would only be due and paid in the event you recover damages by judgment, settlement, or otherwise.

In addition to any contingency fee we earn in the event of a recovery, you are responsible for out of pocket expenses, including deposition charges, medical records charges, Federal Express and similar charges, large copying projects and messenger services. We would bill these charges separately, generally during the month following the month in which out-of-pocket expenses are incurred. We may advance out-of-pocket expenses and defer billing for them until the conclusion of this matter, in which event you agree that we may deduct and retain those amounts from any recovery, or you will pay them at the time of any recovery, in addition to the contingency fee described above.

We have enclosed our Standard Terms of Representation which apply to this engagement, except to the extent that this letter provides differently. In that regard, the administrative expense charge described therein for which we ordinarily charge a fixed amount per hour of services rendered, will not be charged.

Termination of Legal Services; Fees and Expenses Due. We are confident that we can work together in a manner satisfactory to you, but you are free to terminate our services at any time. However, if you terminate this engagement before a final settlement or conclusion of this matter, you agree that our fee has been earned, and you agree to pay LAW FIRM, at our option, an amount equal to (a) the hourly rate for the services of the attorneys and paralegals who work on this matter, based upon their standard hourly rates as determined by the firm during the duration of this engagement, plus all out-of-pocket expenses and all of the administrative expense charges as described in the Standard Terms of Representation, or (b) that percentage of any settlement or other recovery for your claims that would have applied had the recovery been made at the time we last represented you (for example, if you terminate our firm before legal action is filed, and you ultimately make a recovery, we would be entitled to ____%; if you terminate our firm after legal action is filed but before a settlement or trial verdict, and you ultimately make a recovery, we would be entitled to ____%), plus all out-of-pocket expenses we incurred.

In the event of Termination as stated in the enclosed Standard Terms of Representation, our fee would be deemed earned if our withdrawal was caused by your refusal to cooperate or communicate with us in pursuit of your claims. Otherwise you would only be responsible for paying or reimbursing us for any unpaid out of pocket expenses we incurred on your behalf.

We cannot begin to represent you until we have received the signed confirmation of our engagement. Consequently, please sign in the appropriate places below and return the original signed copy to me at your earliest convenience. Once again, we are pleased to have this opportunity to represent you and look forward to working with and for you.

Very truly yours,

LAW FIRM

By:

[Attorney]

Enclosure

The foregoing letter accurately states the terms of the engagement of LAW FIRM to represent the undersigned in connection with the matter described above.

Accepted by:

CLIENT NAME(s)

Engagement Paragraph - Corporate

(1) Multiple Participants in Business Transactions — Single Representation

As we discussed on _____, this firm will be counsel only for [insert name of client]. We will not be counsel for [insert names of other participants]. They are encouraged to retain other counsel. As this matter proceeds, we will be seeking to protect [name of client] 's interests as best we can, which may mean taking action that might eventually disadvantage [names of other participants]. If a dispute arises among [name of client] and [name of other participants], we will have the right to represent [name of client] in that dispute, if [name of client] so chooses.

(2) Multiple Representation in Business Transactions-Represent Entity Only

It is understood that our client for purposes of this representation is [name of trade association or other group-type client], and not any of its individual members or any other entities whose interests in this matter are being represented by those individual members.

Until the [corporation] [partnership] is functioning, we will send our statements to _____, who will be responsible for their payment.

When the [corporation] [partnership] begins functioning, we will send our statements to the [corporation] [partnership]. From that point forward our only client will be the [corporation] [partnership], and we will not be counsel for any of you individually. Absent a specific future understanding, we will not be representing any of you individually or jointly.

Engagement Paragraph – Joint Representation – Litigation

Joint Representation. Ethical rules require that when a law firm represents multiple clients in a single matter it must discuss the risks and benefits of the joint representation. The benefits to the Joint Plaintiffs here include some economies of scale and reduced cost to each plaintiff as well as the ability to present a unified position pursuant to a unified case strategy. The disadvantages of joint representation vary depending on whether there is any risk that a conflict could arise between joint clients. In this matter, we believe that the interests of the Joint Plaintiffs coincide – and each Joint Plaintiff has so indicated – and that it is therefore unlikely that a conflict may occur. Nevertheless, it is not possible for us to state with certainty that the existing unity of interest will remain throughout the course of the litigation. It is possible that defendants' case strategy, or facts developed through discovery, could create a conflict of interest in the positions of the Joint Plaintiffs which does not currently exist.

In the event that a conflict arises, we will attempt to resolve any such conflict through the informed consent of the Joint Plaintiffs. If an irresolvable conflict arises, however, we would no longer be able to represent each of the Joint Plaintiffs. Rather, at that time, we would be required to seek withdrawal from the representation of the interests of at least one – and perhaps both – of the Joint Plaintiffs. By accepting our representation, you acknowledge that you have retained the firm to represent both of the Joint Plaintiffs simultaneously, aware of the risk that at some point in the future it could become necessary for the firm to seek withdrawal from representing one – and perhaps both – of the Joint Plaintiffs.

Joint representation also affects lawyer-client confidentiality and the attorney-client privilege. As between jointly represented clients, the attorney-client privilege does not attach. Hence, it must be assumed that if future litigation occurs between the jointly represented clients, the attorney-client privilege will not protect any communications which occurred during the joint representation. Furthermore, within the scope of the joint representation, it is not permissible for an attorney to withhold information relevant to the joint representation shared by one joint client with another joint client. This is so because the attorney has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect that client's interests and the right to expect that the attorney will use that information to that client's benefit. Thus, any information each of you shares with the firm relevant to the joint representation may, and likely will, be shared with the other Joint Plaintiff. Should the representation proceed and one of the Joint Plaintiffs insist that information it provided relevant to the joint representation be kept confidential from the other Joint Plaintiff, it is likely that the firm will be required to seek withdrawal from its representation of one – and perhaps both – of the Joint Plaintiffs.

Engagement Paragraph – Litigation

To enable us to represent you effectively, you agree to cooperate fully with us in all matters relating to your case, and to fully and accurately disclose to us all facts and documents that may be relevant to the matter or that we may otherwise request. You also will make yourself reasonably available to attend meetings, discovery proceedings and conferences, hearings and other proceedings. You also agree to pay our statements for services and other charges as stated below.

1. Either at the commencement or during the course of our representation, we may express opinions or beliefs concerning the litigation or various courses of action and the results that might be anticipated. Any such statement made by any partner or employee of our firm is intended to be an expression of opinion only, based on information available to us at the time, and should not be construed by you as a promise or guarantee.

2. You authorize us to retain any investigators, consultants or experts necessary in our judgment to represent your interests in the litigation. At our option, we may forward third-party charges in excess of \$ _____ directly to you for payment.

3. Once a trial or hearing date is set, we will require you to pay all amounts then owing to us and to deposit with us the fees we estimate will be incurred in preparing for and completing the trial or arbitration, as well as jury fees and arbitration fees likely to be assessed. If you fail to timely pay any additional deposit requested, we will have the right to cease performing further work and to withdraw from the representation.

4. As we have discussed, the fees and costs relating to this matter are not predictable. Accordingly, we have made no commitment to you concerning the maximum fees and costs that will be necessary to resolve or complete this matter. Any estimate of fees and costs that we may have discussed represents only an estimate of such fees and costs. It is also expressly understood that payment of the firm's fees and costs is in no way contingent on the ultimate outcome of the matter.

5. Local Counsel - We understand that our firm's role in this representation will be as local counsel to you for the client in the above-described matter, and that you are and will remain primarily responsible for the representation of [client's name] in this matter. As local counsel, we are obligated to make reasonable inquiry and determine that any pleading or brief to be signed by us is well-grounded in fact and warranted by existing law or a good faith argument for its change. The law in this jurisdiction does not permit us to simply delegate or forward to co-counsel our duty of reasonable inquiry. In addition, each attorney in your firm who will participate in the matter will need to apply and be admitted for the limited purposes of this action. See North Carolina General Statute §84-4.1, Local rule 83.1 for the Eastern, Middle and Western Districts of North Carolina.

Engagement Paragraph – Joint Representation

Joint Representation Agreement and Waiver. As we discussed, each of you could choose to be represented by separate counsel in this matter. You have advised us that there are considerations of cost as well as strategic advantages for each of you in joint representation. You have also advised us that you have agreed on all material issues concerning this matter.

You acknowledge and agree that, despite your current consensus on all material issues, it is possible that disagreements and other differences may arise between and among your group in the future. In that event, we will request that you resolve any such differences between or among yourselves without our involvement or assistance. If you cannot resolve your differences and those differences result in a conflict of interest that would materially limit our ability to provide competent and diligent representation to each of you with respect to this matter, then we may withdraw from the representation of one or more of you as necessary to resolve the conflict of interest. In such event, you agree that we may continue to represent the other, even if, as a result of such withdrawal, we may take positions adverse to your interests in any subsequent negotiations or proceeding relating to this matter. [It is further agreed that we may continue to represent _____ in those unrelated matters in which the firm has previously represented and currently represents _____.]

Shared Information. As we discussed, one of the necessary consequences of joint representation of multiple clients by a single lawyer or law firm is the sharing of confidential information concerning the subject matter of the joint representation. You acknowledge and agree that communication between the firm and any or all of you relating to this matter will be treated as confidential and will not be disclosed outside your group without your informed consent or as otherwise permitted by the applicable rules of professional conduct or other law. You also acknowledge and agree that whatever relevant or material communications or information that we receive from any one or more of you concerning this matter will be shared with each of you as we consider appropriate. You further acknowledge and agree that in this event of a dispute between or among one or more of you, and you are no longer represented by us in this matter, as the result of a conflict of interest or other cause, we may nevertheless use any confidential information we have concerning this matter adversely to you or to the advantage of those we continue to represent in any subsequent negotiation or proceeding relating to this matter.

Our bills will be sent to _____, but all of you will be jointly and severally responsible for their payment. If you disagree on any issue, we will ask you to resolve your differences among yourselves, without our assistance. If you cannot resolve your differences, we will not be able to represent any one of you as to that issue. If the differences are serious enough, we may be required by applicable ethics rules to withdraw from the matter completely.

Withdrawal by Client. Any of you may withdraw from the joint representation at any time for any reason, upon written notice to the firm [and the others in the group]. You acknowledge and agree, however, that: (1) you will remain responsible for your share of the firm's fees and expenses incurred to and including the date on which notice is received by the

firm; (2) you will be responsible to retain and pay for separate legal representation; and (3) we may continue to represent the others in the group consistent with the other provisions of this letter, even if we may take positions adverse to your interests in and subsequent negotiation or proceeding relating to this matter.

Engagement Paragraph - Retainer

As Security

Retainer. Our representation will not commence until we receive from you a [certified] [cashier's] check in the amount of \$ _____. These funds will remain in our client trust account for the duration of our representation, and any remaining balance will be returned to you immediately upon termination of our representation. If additional sums are due, you agree to pay the outstanding balance. We reserve the right to use any part of said funds to satisfy a delinquent payment, and to discontinue our representation until you forward funds to restore the full retainer. We reserve the right to request an additional retainer.

Draw Down

Retainer. Our representation will not commence until we receive from you a [certified] [cashier's] check in the amount of \$ _____. Those funds will be deposited in our client trust account, and we will draw against those funds to satisfy our monthly statements, copies of which will be sent to you for your information. Upon depletion of the retainer, we will so advise you, and you agree to pay all further statements upon receipt. We reserve the right to request an additional retainer.



Speaker Biographies

THE BROCKER LAW FIRM PA

STACEY A. PHIPPS, ATTORNEY AT LAW, PC

POYNER SPRUILL LLP

LAWYERS MUTUAL



**LAWYERS
MUTUAL**

LIABILITY INSURANCE
COMPANY OF
NORTH CAROLINA

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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.

STACEY A. PHIPPS, ATTORNEY AT LAW, PC

Prior to entering private practice, **Stacey Phipps** spent 17 years as a public servant in North Carolina state government, including serving in the Department of Public Safety and working with the State Highway Patrol. Stacey also served as an Assistant Attorney General where she litigated personal injury, medical malpractice, and workers compensation claims. She currently practices primarily in the area of plaintiff's civil litigation, including auto accident and other negligence cases. Her government career also included serving as chief of staff and general counsel for State Treasurer Richard Moore, and as a staff attorney for the State Ethics Commission.

Stacey has been a Lawyer Assistance Program volunteer for 13 years and serves on numerous local and state Bar committees.



Drew Erteschik is a partner with Poyner Spruill. Drew focuses his practice on complex civil litigation and appeals. His litigation experience covers a wide array of substantive areas including complex business litigation, government-related disputes, and federal and state constitutional litigation. He has tried cases to verdict in state court, federal court, and the North Carolina Business Court, and has been named by Super Lawyers magazine as a "Rising Star."

Rick Kane practices environmental law and lawyers' professional responsibility law at Poyner Spruill LLP in Charlotte and Raleigh. He served as an advisory member of the State Bar Ethics Committee 2002-2009 and as a member of the Disciplinary Hearing Commission 2003-2009. He has been recognized in Chambers USA's *Leading Lawyers for Business*, The Best Lawyers in America®, and Business North Carolina magazine's "Legal Elite." Prior to joining Poyner Spruill he served in the Marines as an artillery and infantry officer and judge advocate. He holds degrees from Duke University, Boston University, and Vanderbilt University.

Jerry Parnell is a partner in the Charlotte office of Poyner & Spruill. Jerry is a Past President of the North Carolina State Bar, a Recipient of the Chief Justice's Professionalism Award, a Fellow of the American Bar Foundation, and concentrates his practice in professional malpractice defense, white collar crime, government investigations, and municipal representation. In more than forty years of practice he has been involved in a wide array of civil and criminal cases throughout the western half of North Carolina, in the Fourth Circuit Court of Appeals and in the appellate courts of North Carolina.

Lisa Sumner is a partner with Poyner Spruill. She practices in the areas of Bankruptcy and Commercial Litigation, and she the Assistant Leader of Poyner's Financial Services Section. She is licensed and has practiced in the federal and state courts in North Carolina, South Carolina, and Virginia.

Cindy Van Horne is a partner with Poyner Spruill. She represents clients before state and federal courts and arbitration panels, with an emphasis in legal and accounting malpractice defense, and contract litigation in the corporate, banking and motorsports industries. She also has extensive experience representing municipalities in contract, zoning and employment issues. She is AV® rated by Martindale Hubbell Law Directory, which is the highest quality and ethics rating possible for attorneys. She is listed in the Best Lawyers in America® for Legal Malpractice Law.



Troy Crawford joined Lawyers Mutual in 2010 as claims counsel. His primary area of work with Lawyers Mutual is real estate claims. Prior to joining Lawyers Mutual, he worked as subrogation counsel for Investors Title Insurance Company. Troy also co-founded the law firm of Crawford, Christopher & Parker, PA where he practiced civil litigation, estate planning, and real estate matters. He graduated cum laude from both North Carolina State University and Campbell University School of Law.

Will Graebe joined Lawyers Mutual in 1998 as claims counsel before being promoted to Vice President of Claims in 2009. He focuses his efforts at Lawyers Mutual on transactional matters and real estate. Prior to joining Lawyers Mutual, he worked at the law firm of Pinna, Johnston & Burwell. Will graduated from Stetson University and Wake Forest University School of Law. He is an avid swimmer, kayaker, fisherman and yogi.

Laura Loyek came to Lawyers Mutual as claims counsel in 2009. Her focus areas include real estate, litigation, appellate law, and bankruptcy. Prior to joining Lawyers Mutual, she practiced with the law firms of Smith Moore and K&L Gates. Laura received her J.D. from Harvard Law School and her undergraduate degree from Wake Forest University. Laura serves on the Board of Directors of Wake Women Attorneys. She is also an active member of the Real Property Section of the North Carolina Bar Association and the North Carolina Association of Women Attorneys.

Warren Savage joined Lawyers Mutual as claims counsel in 2005. He focuses on litigation, insurance law, 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. Warren currently serves as an advisory member of the State Bar Ethics Committee and speaks frequently at CLEs around the state about professional responsibility and malpractice claims avoidance.

Mark Scruggs joined Lawyers Mutual in March 2001 as claims counsel. Formerly a partner with Spear, Barnes, Baker, Wainio & Scruggs, LLP in Durham, Mark has over 14 years' experience as a trial attorney concentrating in insurance defense litigation. Mark works with Lawyers Mutual primarily in the area of litigation-related claims, as well as workers' compensation and family law matters. He is a 1986 cum laude graduate of Campbell University School of Law. Mark is a past chair of the Law Practice Management section of the North Carolina Bar Association and served as an Advisory Member of the State Bar Ethics Committee. He also serves on the North Carolina Bar Association's "Transitioning Lawyers Commission" working to address issues facing aging lawyers. Mark is active in his community, serving as president of the Kiwanis Club of Durham 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 before being promoted to Vice President of Client Services in 2013. 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*.

Please describe yourself:

- ☐ Lawyer/Attorney ☐ Paralegal
☐ Legal Assistant ☐ Office Administrator/Manager
☐ Other (please specify): _____

Please describe the size of your firm:

- ☐ Solo ☐ 2-5 lawyers
☐ 6-10 lawyers ☐ 11-20 lawyers
☐ 21-30 lawyers ☐ 31-40 lawyers
☐ 41-50 lawyers ☐ More than 50 lawyers
☐ Government ☐ In-house Counsel
☐ Other (please specify): _____

Please identify your area of practice:

- ☐ Real Property ☐ Estates/Trust/Probate
☐ Criminal ☐ Litigation-Plaintiff
☐ Litigation-Defendant ☐ Domestic Relations
☐ Labor ☐ Corporation Law
☐ Intellectual Property ☐ Municipal Law
☐ Securities ☐ Bankruptcy
☐ Commercial ☐ International
☐ Tax ☐ Admiralty
☐ Environmental ☐ Arbitration/Mediation
☐ General Practice ☐ Banking & Financial Institutions
☐ Other (please specify): _____

Please rate the following general factors concerning the seminar:

	Excellent	Good	Fair	Poor
Program format	_____	_____	_____	_____
Seminar manuscript (available online)	_____	_____	_____	_____
Location (hotel)	_____	_____	_____	_____
Registration process	_____	_____	_____	_____

Suggestions: _____

What was the deciding factor in your attending our seminar? Rate 1-8 (1-most important, 8-least)

- _____ LM Brand _____ Ethics credit
 _____ Content _____ Mental health credit
 _____ Education in area of practice _____ CLE credit
 _____ Risk management advice _____ Free/low cost

Other: _____

- Are you insured with Lawyers Mutual?** ☐ Yes ☐ No
Are you insured with Lawyers Insurance? ☐ Yes ☐ No
Can we contact you for Lawyers Insurance? ☐ Yes ☐ No

Name: _____

Phone: _____

Email: _____

Of the sessions you attended, please provide an overall rating for each session, and rate the presentation of each:

	Excellent	Good	Fair	Poor
Due Diligence (overall)	_____	_____	_____	_____

Usefulness of information _____

Quality of presentation _____

Knowledge of speaker(s) _____

Comments: _____

	Excellent	Good	Fair	Poor
Planning Ahead (overall)	_____	_____	_____	_____

Usefulness of information _____

Quality of presentation _____

Knowledge of speaker(s) _____

Comments: _____

	Excellent	Good	Fair	Poor
Landmines (overall)	_____	_____	_____	_____

Usefulness of information _____

Quality of presentation _____

Knowledge of speaker(s) _____

Comments: _____

What topics or issues would you like to see addressed in future seminars?

Location attended: _____