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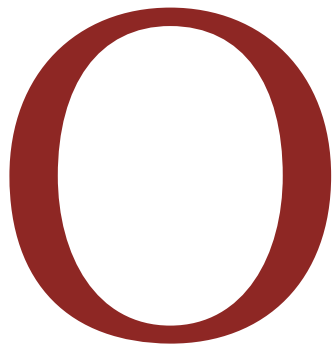
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Access to Justice

BY THOMAS W. LAMBETH AND GENE NICHOL



On October 12, 2007, The Honorable Sarah Parker, Chief Justice of North Carolina, in her capacity as chair of North Carolina's Equal Access to Justice Commission, convened a summit on civil access to justice in

North Carolina. Members of the commission, members of the North Carolina Supreme Court and Court of Appeals, representatives of the superior and district courts, of the North Carolina Legislature, of the Administrative Office of the Courts, and lawyers and laypersons concerned with the provision of civil legal services to indigent persons in our state convened to map the future of civil legal services in North Carolina.



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Gene Nichol, president of the College of William & Mary, and Tom Lambeth, former executive director of the Z. Smith Reynolds Foundation, were keynote speakers. Their remarks, edited slightly for length, follow.

Opening Address by Thomas Lambeth

An early agenda listed my remarks as "The Moral Imperative." That is a pretty heavy load to lift.

It sounds a little like preaching and I am no preacher. I am not even a lawyer.

Yet if I were a preacher and this were my

sermon for the day, I would not turn to my inspiration to the scriptures—although they are an important and inspiring source for a discussion of justice and equity.

Instead I would turn to the words of a North Carolina journalist, an English explorer, and a Pennsylvania founding father. I think

what all of them wrote and how the years have embraced their words speaks to the purpose of your work. My understanding of that work, as a layman, is that you are determining whether we as North Carolinians and we as Americans will live up to our promise and the promises of our past.

My concern about whether we achieve that is driven by my own 300 years of North Carolina roots, by the two public servants whom I spent an important part of my years serving, and by my involvement in a family philanthropy—someone else's money I would note—which committed itself many years ago to helping the people of North Carolina improve the quality of their lives.

In that latter pursuit the Reynolds Foundation learned from its first grant forward that access to the benefits of citizenship was essential to that goal of a better life for Tar Heels and their families. I know that will continue under the leadership of Leslie Winner who has a lifetime of commitment to such values.

Now, to my eloquent trio: the journalist is the late Jonathan Daniels who decades ago wrote of North Carolina the following:

The state, good, beautiful, varied, is a long way from perfection; but more than any other state in the old America, it is as it was in the beginning—with the same high hope in it, the same free people, and the will to possess the same free chance. Other states possess the houses, the capitals, the preserved places, the restored buildings, but the North Carolina continuity is of peoples, not of buildings, of the pioneer possibility of equality and comradeship in equality. That belief in that possibility is more than anything I know the mark of North Carolina.

The English explorer is Ralph Lane who in September some 422 years ago, in the first letter written in the English language from the New World to the old, reported the following:

Since Sir Richard Grenville's departure from us...we have discovered the mainland to be the goodliest land under the cope of heaven.

And finally, the words of Gouverneur Morris of Pennsylvania who was successful in taking the words in the original draft of the preamble to the United States Constitution which were "we the delegates of the sovereign states of Delaware, Georgia, etc."—and substituting for them, the words that are there today:

We the people.

Three sets of words: a belief in the pioneer possibility of equality; the goodliest land under the cope of heaven; we the people.

Now, when Daniels wrote those words all North Carolinians did not share the same pioneer possibility of equality—it was a possibil-

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ity deferred—and when the founders settled upon "we the people" it was clearly we—only some of the people—it was, essentially, we the white males and not all of them; and the goodliest land spoke of a geography, not a people. Yet over the years North Carolina has moved towards the expansion of those pioneer possibilities—the nation and North Carolina have come close to making "we the people" all of the people; and we in North Carolina have done much to create out of that 16th century description of the land and

water and climate a new notion of what we could as a state become for all of our people.

So what of this matter of ideas and equality? Of people and possibilities? We have had cause to look at them again in our greatest modern tragedy as a nation. Soon after the planes crashed into the Twin Towers, the Pentagon, and the Pennsylvania countryside, people began to speculate why the planners of that monstrous crime did not select flight times that would have had the planes hit their targets when they were at their maximum

human capacity.

We have learned through the 9-11 Commission that the reason the planes that day headed for their collisions without regard to what hour would find the maximum number of people in the buildings targeted was that in their evil calculations the terrorists did not care how many people were there. They saw the buildings without regard to the human equation that proved so deadly. They saw them as symbols of our democracy. They saw them as somehow essential to what made us who we are.

They made a mistake. They sought to bring down a nation by bringing down buildings, thinking that such an act would somehow destroy us. Yet, even if their worst designs had prevailed—for example, if they had hit the Capitol—the nation would not have collapsed. It is not the symbols of our nationhood, sacred as they may be to most of us, that make us what we are. It is the idea of freedom that does that. The idea was there before the buildings. It will be there if they are ever gone.

We sometimes forget that the founders of our nation were most often scholars. Jefferson, Adams, Rush, Madison, and Franklin were men for whom liberty emerged as a great idea.

To give credibility to that idea of liberty—to make believable that ideal of "we the people" in the 21st century—that realization of the goodliest land must belong to all of us; it must be liberty for all, it must be a shared destiny in which both the sacrifice and the celebration belong to all of us.

And it must work in the lives of real people with real problems and real opportunities.

There is no more powerful component of that idea of liberty than the idea that, within our free land, justice is there for all and that it is accessible and applicable to all equally and in the same measure of impact and outcome. When we fail to realize that ideal, when we deny justice to any, when we deny the protection of the law because of wealth or power or position or class or religion or race, we diminish it for all. More than that, we rend the fabric of the contract that we have made as citizens of a free land—a contract between all of us for the protection of all of us. Justice becomes less than it should be. In a time when there are many enemies of our democracy, we weaken our resolve in meeting those forces at home and abroad.

The law should be empowering and redeeming in a democracy. If it empowers

only some, if it redeems for only some, it loses its value to all.

Judge Learned Hand once asked of his law clerk, "To whom am I responsible? No one can fire me; no one can dock my pay. Even those nine bozos in Washington, DC, can't make me decide as they wish. Everyone should be responsible to someone. To whom am I responsible?" Then he turned to the law books in his library and said, "To those books on the shelves there above us. That's to whom I am responsible."

It is that idea of the written law and its majesty that lifts up all of us. To deny that empowerment to any is not only a travesty, it is a travesty that is dangerous in times that demand we stand together in a common conviction of the worth of our nation.

It is not an easy thing that is proposed to do through the work of this commission—not an easy thing to stand for justice accessible and equitable. Those of us in the Methodist church sing a hymn that calls us to show "the courage to do justice," that commands us to "not be afraid to defend the weak because of the anger of the strong" nor "be afraid to defend the poor because of the anger of the rich."

My Jewish friends read in the Talmud that "justice, equal justice shalt thou pursue" and in subsequent commandments define equal justice as exactly the same justice for the immigrant as the native born requiring a civil and criminal process that gives not the slightest preference to the rich and powerful over the poor and powerless. Those who are of that ancient faith are ordered to pursue a relentless, never-ending quest for evidence that might tend to exculpate the accused.

Cicero said that the law "is the highest reason. It is implanted in nature, which commands what ought to be done and forbids the opposite." When we have taken from the law by denial of access or equal application, we have violated nature, we have done damage to reason.

In North Carolina in 2008 we worry much about whether we are becoming two North Carolinas; one prospering and expanding, one declining. Today the control of our legislature rests in the hands of the representatives of 15 counties—not because of any conspiracy, just because of dramatically changing demography.

Into this dramatically-changing environment we add a series of gaps: an achievement gap, an income gap, a transportation gap, a

mushrooming infrastructure gap, and a political power gap. Will we compound an already dangerous division with a justice gap?

We need to remember that equity in the access to justice and equity in its enforcement is not only protective of those who seek such access and who are the targets of its enforcement, it is protective of those we have charged with the responsibility of enforcement.

My own experience in law enforcement—in the military police—was brief and largely uneventful, but one only has to walk once with an unholstered .45 into a darkened building with strange noises or patrol a narrow alley behind a commissary to have some sense of the awesome burden of those for whom law enforcement is a career. The law enforcer is strengthened in that role when he or she serves a community that believes the law belongs to all of them and that it is applied in equal measure to all.

Finally, I believe the work of ensuring equal access to civil justice is fundamental to our larger effort to bring the benefits of a global economy to all the people of North Carolina. In that effort, in this century we as North Carolinians and as citizens of the United States confront awesome odds. The numbers against which we compete—when we look at nations such as India and China—are staggering. There are nine cities in the US with a population over one million; more than 60 exist in China. How can we possibly overcome such an advantage? Our best hope is to be very smart, very strategic, and integral to that is making our democracy work so that no part of our state or nation will think that the outcome is less important to them because they are less important to the rest of us. To go into such a competitive world without the support of all is to invite disaster.

The fact is that in North Carolina we are not ready for prime time. Each hour our state adds 21 people to its population. If we are to meet the needs that this tsunami of population increase represents, the public investment will be as little as \$19 billion; perhaps more than \$60 billion. We cannot achieve that kind of public commitment with a population that is divided by inequitable access to the benefits of democracy.

So, if you do not believe in equal access to justice as a matter of common humanity, believe in it as essential to economic development.

The ABA in its mandate to the Task Force

on Access to Civil Justice uses language that captures the challenge best for me. It mentions "problems that can imprison one in poverty or discrimination." That is, of course, the reality with which you—we—must deal. That denial of access to civil justice imprisons those denied in a situation that prevents them from being all that they might be. It prevents them from contributing all that they might contribute to the common good. Yet they are not the only prisoners when such a condition prevails. All of the community in which they live is to some extent imprisoned. We are all denied the benefits that would come from a society in which equality of access and opportunity prevail.

What you are about is important work. It is consistent with the noblest traditions of your profession and with the deepest values of our democracy. In the best Tar Heel spirit, go forth and pursue justice, equal justice; do not fear to defend the weak because of the anger of the strong; do not fear to defend the poor because of the anger of the rich.

I wish you well and I thank you for letting me be a part of this summit. ■

From 1978 until 2001, Tom Lambeth served as executive director of the Z. Smith Reynolds Foundation in Winston-Salem. He currently serves as a senior fellow of the foundation. In 1988 the University of North Carolina presented him with a Distinguished Alumnus Award and in 1990 he was a recipient of the William Richardson Davie Award from UNC. In 1992 the University's Alumni Association presented him with a Distinguished Service Award. In 2000 UNC Greensboro awarded him the McIver Award for Public Service. In the fall of 2001 the UNC System Board of Governors presented him with the University Award.

Keynote Address by Gene Nichol

Thank you Madame Chief Justice. That's a phrase I've always wanted to say, by the way. And never been able to. I'm particularly heartened it's Madame Chief Justice Sarah Parker. Congratulations—and congratulations to the people of North Carolina.

I love my present job—the College of William & Mary was a national treasure even before there was a nation to treasure it. I promised myself three years ago, when I left Chapel Hill, that I was going to get myself out of the newspapers for a change.



Leonard T. Jernigan, Jr., attorney and adjunct professor of law, is pleased to announce that his supplement to *North Carolina Workers' Compensation - Law and Practice* (4th edition) is now available from Thomson West Publishing (1-800-328-4880).

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That hasn't really worked out. I have been honored to win such hearty support from folks like Bill O'Reilly and Newt Gingrich. I've been listening to Bruce Springsteen's new album—and he has a line "you'll take comfort in knowing you've been roundly blessed and cursed." I find some reassurance in that.

I'm happy, as well, to have the assignment I've drawn—exploring the call to equal justice. Our greatest challenge as a profession. Perhaps our greatest challenge as a nation. But I will say, thankfully, to sketch out these concerns before this legal community—here in Carolina—that in my experience believes more fully, more potently, in the challenges of equal justice than others, in what is now a long career, than others I have known. I'm not surprised, though I am heartened, that Janet Ward Black has pushed access to justice so hard in her presidency. It is, for this bar, in the blood, the sacrifices, the demands, the struggles of justice. You have seen, firsthand, the darkness and the light. And you have taught much in what Dr. (Frank Porter) Graham called the charge to build "a nobler and fresher civilization in this ancient com-

monwealth." I'll try not to preach—especially from a distant academic perch. I am reminded of Mark Twain's claim that "to do right is noble. To advise others to do right is also noble, and much less trouble to yourself."

So let me start with the obvious. We carve "equal justice under law" on our courthouse walls. It is the literal cornerstone of our system of adjudication. We swear fealty to it every day. For decades, we've announced as a fundamental principal of our constitutional law "there can be no equal justice when the kind of trial a person gets depends on the amount of money he has." But the framework in which we operate has little in common with what we say.

Think about a set of facts that we all know to be true. Lawyers cost money. Some have it. Lots don't. Yet unlike some industrial nations, we recognize no general right to representation in civil cases. We spend far less than other western democracies on subsidized legal representation. Less than one percent of our total expenditure for lawyers goes toward services for the poor. Legal aid budgets are capped at levels making effective

representation of the poor a statistical impossibility. Even at that, they've been cut by about a third over the last dozen years.

We have one lawyer for every 400 people generally, and one legal services lawyer for every 7,000 persons living in poverty; in North Carolina reportedly one legal services lawyer for every 18,000 eligible citizens. Our legal services lawyers turn away eight out of ten clients with actionable claims. We fence folks out even further by creating categories of unworthy poor; and placing restrictions on the most efficient avenues for representation. Study after study shows about 80% of the legal need of the poor is unmet—in North Carolina, in Virginia, in the country. The circumstance is almost as bleak for middle income Americans.

As every person in this room knows, neither the billable hour nor the possibility of a significant contingent fee cover the waterfront of American legal disputes. New York's State Bar study a couple of years ago found that we leave the poor unrepresented on most crushing problems of life—divorce, child custody, domestic violence, housing, benefits. We think it natural that a commercial dispute between battling corporations takes six months to try, while the fate of a battered child is determined in only a few minutes. What passes for civil justice among the have-nots is breathtaking.

On the criminal side, we trivialize the right to counsel we have declared. Across the country, public defenders can have crushing caseloads. Rates of compensation for appointed lawyers are often absurd. Competitive bid schemes can make them worse—leading to what has been described as "meet 'em, greet 'em, and plead 'em" defense regimes.¹ We've developed laughable rules of constitutional effectiveness—what Deborah Rhode calls a "jurisprudence of dozing"—ruling not only inexperienced lawyers, but drunk lawyers, drugged lawyers, mentally ill lawyers, and sleeping lawyers can pass muster. One court explained that "the constitution does not say a lawyer has to be awake;" another ruled that sleeping "might have been a strategic ploy to gain sympathy from the jury." This must have provided only modest consolation to the convicted client.

We enthuse about access and equality rhetorically. But we don't make serious efforts to give them practical content. Average citizens are effectively priced out of

the justice system. They're also typically barred from participating in the closed regulatory scheme that excludes them. The system we have is powerfully, dramatically, and fundamentally at odds with who we say we are.

In studying the literature—as best a university president can do—I learned that "the best available research indicates that the American legal profession averages less than half an hour of work per week on pro bono services."² Most lawyers do no pro bono work at all. Recent affluence has eroded rather than expanded support for pro bono programs. Over the past 15 years, the average revenue of the country's most successful firms increased by over 60%. Pro bono hours dropped by one-third.

In law schools, issues of access to justice are either missing or marginalized in our curricula. Relatively little of our research focuses on what passes for justice among the poor. Our curriculum takes the present deployment of legal resources as a given. Who uses the system is unexplored. Law firms are not topics of study or critique. Despite the marvelous clinical programs expanding across the country, unequal access to justice has not made it to the core of legal education. Only ten percent of schools have pro bono requirements—and fewer than that apply them to faculty. The greatest shortcoming of American law schools may be the failure to explore and articulate a theory of the just deployment of legal resources.

And, without intending to, we've added to the problems of access by our own patterns of decision-making. Tuition has risen, particularly in public law schools, many multiples of inflation. Private school tuition dramatically exceeds that of the public. Costs per student have soared in the past two decades with institutions competing feverishly for star faculty and deans, supremacy in facilities, in technology, in expensive brochures sent across the land to convince unwilling recipients how terrific the schools are and thus, against all odds, improve their rankings in *US News*. None of which add much, or perhaps anything, to the quality of educational experience.

Then young lawyers graduate owing \$100,000 or more while public sector jobs around the country average starting salaries of about \$40,000, further taxing a legal system that already excludes the poor and the

near-poor from voluntary access to civil justice. Law schools, of course, didn't cause all this. But I'm loathe to think that, completely without justification, we're guilty of piling on.

When we survey this landscape, I think we're compelled to say that we would have hoped for more from our nation's justice system—more from our country. And I think we'd say as well that these are but components of a set of much larger problems—larger betrayals of the command of equal justice. Denials that we've gotten used to—that have become commonplace—betrayals from which we have chosen to simply turn our gaze. We've gotten used to things we should never have gotten used to. And we've apparently been satisfied.

1. But how can we be satisfied when the richest nation on earth, the richest nation in human history, allows almost 37 million of its citizens to live in stark, unrelenting poverty? A quarter of black Americans. A fifth of Latinos. Almost one in five of our children—13 million—even higher percentages in North Carolina—one in four—as if any theory of justice or virtue could explain the exclusion of innocent children from the American dream.

2. And how can we be satisfied when 47 million Americans have no health care coverage of any kind? Sixteen percent of North Carolinians. Leaving us alone among the industrial nations in failing to provide some form of universal coverage. When, as Dr. King proclaimed, inequality in access to health is the most pernicious discrimination of all?

3. How can we be satisfied when over 40,000 North Carolinians every year fall prey to domestic violence—most of them with no access to lawyers—though the legal system may be the only effective avenue to save their lives? As if the most endangered of us somehow don't count. And so sometimes don't survive.

4. And how can we be satisfied when, 50 years after the majestic phrases of *Brown v. Board of Education*, all over the country schools are rapidly re-segregating, removing meaningful racial integration from our national agenda. Ignoring Thurgood Marshall's claim before the Supreme Court that "these plaintiffs seek the most vital right that can be claimed by children—the right to be treated as entire citizens of the nation into which they have been born."

5. And how can we be satisfied when in Virginia and North Carolina and across much of the country we allow rich and poor public schools—not just private schools mind you, but rich and poor public schools. As if it were thought acceptable to treat some of our children as second and third class citizens. Our religions teach that all children are equal in the eyes of God. We operate our schools as if we didn't believe it.

6. And how can we be satisfied when a new study concludes higher education is more economically polarized today than at any time in the last three decades? So that if you come from a family making over \$90,000 a year, your chances of getting a college degree by age 24 are better than one in two. If your family makes \$35,000 or less, the odds are one in 17. One in 17. As if intellect and character and commitment, and worth, were hereditary.

7. And how can we be satisfied when my own institution, and other distinguished universities across the nation, still have so much to do to demonstrate, in our Chancellor, Justice O'Connor's words, that these distinctive paths to leadership are "visibly open" to all segments of society.

The frank truth is that if the exclusions and indignities of American race and poverty are right, then the Constitution is wrong.

If the debilitations of those locked at the bottom are acceptable, then our scriptures are wrong.

If these denials of equal citizenship and equal dignity are permissible, then we pledge allegiance to a cynical illusion, not to a foundational creed.

So that's why your work triggered here—to make the promises of justice real—in the bar, in the courts, at legal services, in the law schools, in the state house, is so crucial, so defining. I hope that, together, we'll begin to insist upon a higher calling of public obligation—a more demanding and optimistic vision of professionalism, of citizenship. One born in, dependent on, and dedicated to the foundational American aspiration of equal justice. I hope that we will declare our commitment to it. We'll enroll our hearts. We'll enlist our spirits. We'll mark our lives. We'll enlist because ...

1. Somewhere we read, "we hold these truths to be self-evident that all are created equal."

2. And somewhere we read, the "central purpose of America is that the weak would

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gradually be made stronger and ultimately all would have an equal chance."

3. And somewhere we read, that "injustice anywhere is a threat to justice everywhere."

4. And somewhere we read, "history will judge us on the extent to which we use our gifts to lighten and enrich the lives of our fellows."

5. And somewhere we read, "the arc of the moral universe is long, but it bends toward justice."

6. And somewhere we read, we have "to believe the things we teach our children." Believe them and make them real.

7. And somewhere we read that "when ever you did these things to the least of these, you did them to me."

8. And somewhere we read "you reap what you sow."

9. And somewhere we read that "the pursuit of justice and the pursuit of happiness march not in opposite directions but hand in hand."

10. And somewhere we read, "no, we are not satisfied and we shall not be satisfied 'til

justice rolls down like waters and righteousness like a mighty stream."

Thank you. ■

Gene R. Nichol is the president of the College of William and Mary. He previously served as Burton Craige Professor and dean of the University of North Carolina School of Law. He served as law dean at the University of Colorado from 1988 to 1995, and as James Gould Cutler Professor and director of the Institute of Bill of Rights Law at William & Mary from 1985 to 1988. Nichol was also a faculty member at the University of Florida and West Virginia University. He founded the Byron R. White Center for the Study of American Constitutional Law at the University of Colorado (1990) and the Center for Civil Rights at the University of North Carolina (2001).

Endnotes

1. Deborah Rhode, *Access to Justice*, 69 Fordham Law Review 1785 (2001).
2. Deborah Rhode, *Access to Justice*, 69 Fordham Law Review 1785, 1810 (2001).

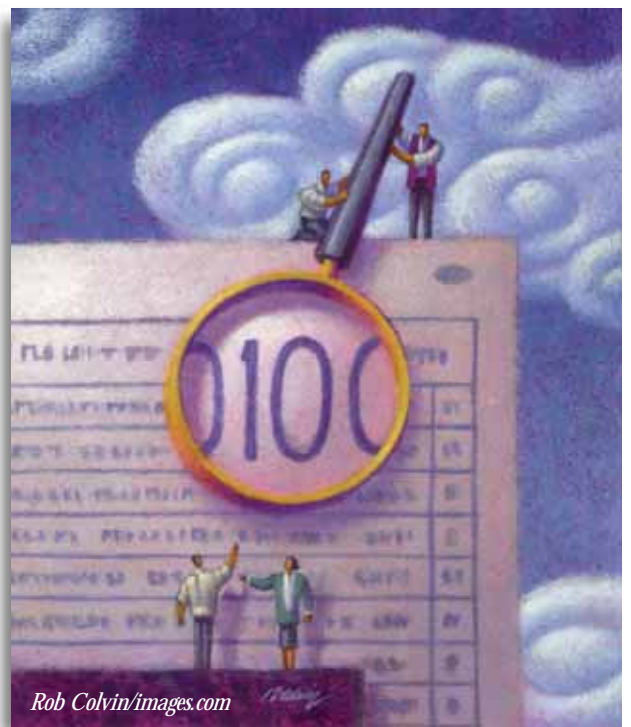
Examining North Carolina's New Tax Assessment, Refund, and Appeal Procedures

BY CHARLES B. NEELY JR. AND NANCY S. RENDLEMAN

The following is part two of a two-part article. The first installment appeared in the Winter 2007 Journal.

The Office of Administrative Hearings ("OAH"), established in 1985, has ten administrative law judges (ALJ) who conduct hearings on appeals from administrative agencies, including, among many others, environmental, health and human services, personnel, health care certificate of need, and licensing disputes. Most administrative appeals fall under the aegis of OAH. The disputes are often complex and frequently involve the use of expert witnesses. The Office of Administrative Hearings is an independent, quasi-judicial agency created by

G.S. 7A-750, under authority of Article III, Section 11 of the NC Constitution. The chief administrative law judge, who serves as director of the OAH, is appointed by the chief justice. The chief administrative law judge appoints additional administrative law judges as authorized by the General Assembly. He may designate certain ALJs as having the experience and expertise to preside at specific types of contested cases.¹



One of the goals of advocates for reform of the tax appeal system was to attain both independence and expertise in the hearing officers assigned to tax appeals. The Office of Administrative Hearings was designed to provide both independence² and expertise in contested administrative matters and has developed a reputation for both.³ It is the intention of the chief administrative law judge to see that members of the central panel of administrative law judges receive tax training. At the current time, he does not intend to assign cases to a single ALJ, but rather intends to develop expertise in at least several ALJs.⁴

SL 2007-491 provides that taxpayers who disagree with a notice of final determination issued by the department⁵ may contest the determination by filing a petition for a contested case hearing at the OAH pursuant to Article 3 of Chapter 150B, but only after exhausting the prehearing remedy provided by the new legislation. The prehearing remedy is exhausted upon issuance by the department of the final determination after conducting a review and a conference.⁶ The petition to the OAH must be filed within 60 days of service, by personal delivery or mailing, of the final determination.⁷

The requirements for the petition are set forth in G.S. 150B-23(a). The taxpayer must allege facts tending to establish that the department has deprived the taxpayer of property, ordered the taxpayer to pay a penalty, or otherwise substantially prejudiced the taxpayer's rights *and* that the department exceeded its authority or jurisdiction, acted erroneously, failed to use proper procedure, acted arbitrarily or capriciously, or failed to act as required by law or rule.⁸

Although G.S. 150B-23(e) provides that all OAH hearings are open to the public, new G.S. 150B-31.1 sets forth special provisions applicable to contested tax cases. G.S. 150B-31.1(e) provides that "the record, proceedings, and decision in a contested tax case [in the OAH] are confidential until the final decision is issued in the case," overriding the general provisions of G.S. 150B-23(e). As is discussed below, the final decision in the case is issued by the secretary, so the proceedings will retain taxpayer confidentiality until that point. In recent years, pleadings filed in superior court by the attorney general's staff representing the department occasionally contained taxpayer information. Motion practice and trials of tax cases also resulted in

taxpayer records being available in court files. The new procedures should alleviate taxpayers' confidentiality concerns because they can litigate their disputes with the department, at least through the process before the OAH and before the secretary through the final decision, without the concern of having their documents spread upon the public record.

Another goal of reform advocates was to develop a body of published precedent readily available to taxpayers. Although efforts have been made recently to increase publication of decisions of the secretary, heretofore, decisions of the secretary were published selectively. In the past several years, these decisions were sometimes published on the department's website, but practitioners could never be certain that they had access to all of the secretary's decisions relevant to a particular issue. G.S. 105-256(a) now provides that the secretary shall publish *all* final decisions of the secretary in contested tax cases, but that identifying taxpayer information must be redacted prior to publication.

Hearings on all contested tax cases must now be conducted in Wake County, unless the parties agree to hear the case in another county.⁹ This new provision overrides the more general provisions of G.S. 150B-24 as to venue.

Although new G.S. 150B-31.1(b) provides for simplified procedures in contested tax cases involving taxpayers not represented by an attorney—thereby addressing a principal concern of the department during the legislative proceedings—taxpayers other than individual taxpayers¹⁰ will require representation by attorneys.¹¹ Given the increased formality of the quasi-judicial proceedings before the OAH when contrasted with the relative informality of proceedings before the secretary, including the use of the Rules of Evidence¹² and the use of discovery pursuant to the Rules of Civil Procedure,¹³ and the fact that the record established before the ALJ will be the record for purposes of judicial review, taxpayers are better protected by the involvement of competent counsel.¹⁴

G.S. 150B-28(b), which protected agencies from having to produce "records related solely to the internal procedures of the agency," was repealed by S.L. 2007-491. Taxpayers seeking discovery from the department will be bound solely by the provisions of Rule 26(b) of the Rules of Civil

Procedure, which broadly allows discovery "regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action... ." The information sought in discovery need not itself be admissible "if the information sought appears reasonably calculated to lead to the discovery of admissible information."¹⁵

Several procedural points are worth mentioning. Taxpayers, who will have the burden of proof in contested cases, must establish the facts required by G.S. 150B-23(a) by a preponderance of the evidence.¹⁶ Objections to evidence need not be raised at the hearing for a party to object to consideration of the evidence by the ALJ, the secretary, or by the superior court on judicial review.¹⁷ ALJs may take official notice of all facts of which judicial notice may be taken, including "facts within the specialized knowledge of the agency."¹⁸

Motion practice before the OAH is governed by Rule 6 of the General Rules of Practice for the superior and district courts.¹⁹ The ALJ may dispose of cases on motions to dismiss under Rule 12(b) and on motions for summary judgment under Rule 56 of the Rules of Civil Procedure.²⁰

In tax cases brought under old G.S. 105-267, it was possible for several superior court judges to be involved with a tax case through its life unless the case was designated as "exceptional" or "complex business."²¹ A tax case assigned to the OAH will have one ALJ who will handle all proceedings involving the case, which should promote judicial economy.

In issuing his decision, the ALJ must include findings of fact and conclusions of law.²² The ALJ may receive proposed findings of fact and conclusions of law and written arguments after the contested hearing.²³ Good practice would indicate that practitioners prepare to tender proposed findings of fact reflecting the evidence admitted. Counsel in proceedings before the OAH frequently submit orders reflecting the relief which they seek for consideration by the ALJ.

In making his decision, the ALJ shall give "due regard to the demonstrated knowledge and expertise of the agency with respect to the facts and inferences within the specialized knowledge of the agency."²⁴

Final Agency Decision by Secretary

Upon rendering his decision, the ALJ

must serve a copy of the decision on the taxpayer and the department, and must promptly serve a copy of the official record on the department²⁵ so that the secretary may make the final decision contemplated by G.S. 150B-36. The taxpayer will have the right to make exceptions to the decision of the ALJ and present written arguments to the secretary, and may well want to do so to protect its interests.²⁶ The secretary must adopt each finding of fact contained in the ALJ's decision "unless the finding is clearly contrary to the preponderance of the admissible evidence, giving due regard to the opportunity of the administrative law judge to evaluate the credibility of witnesses."²⁷ The secretary may not hear new evidence. If the secretary does not adopt the findings of fact, he must set forth in detail his reasons for not adopting the findings and the evidence he has relied upon in not adopting the findings. If the secretary makes findings not contained in the ALJ's decision, he must similarly set out the basis in the evidence for his findings. Any finding the secretary makes must be supported by the preponderance of the evidence in the record established before the ALJ. *Id.* The secretary must adopt the decision of the ALJ unless the secretary demonstrates that the decision is "clearly contrary to the preponderance of the evidence," and must set forth his reasoning. *Id.*

Judicial Review

A taxpayer aggrieved by a final decision in a contested tax case may seek judicial review of the decision under the provisions of Article 4 of Chapter 150B of the General Statutes, G.S. 150B-43 *et seq.*, by filing a petition in superior court within 30 days after it has been served with the final decision.²⁸ Notwithstanding G.S. 150B-45, which provides that petitions seeking judicial review shall be filed in Wake County or in the superior court of the county where the person resides, under S.L. 2007-491 the petition in a tax case must be filed in the Wake County Superior Court, in accordance with the provisions for mandatory business cases set forth in G.S. 7A-45.4(b) through (f).²⁹ Prior to filing the petition, the taxpayer must pay the amount of tax, penalties, and interest the final decision states is due.³⁰

The Tax Review Board has been abolished by S.L. 2007-491, as its review functions have been eliminated with direct judicial review of final secretary decisions.³¹

Advocates for reform of the tax appeal system sought expertise, not only in the hearing of tax appeals, where the record is set, but in the judicial review of final decisions of the secretary in the courts. Tax cases are often complex and technical. The business court has developed a reputation for its highly competent judges, assisted by judicial clerks, accustomed to dealing with complex business cases. A recent study recognized that, in the future, it might be appropriate to refer tax cases to the business court.³²

Assignment of complex tax cases to the business court should ultimately result in a greater degree of tax expertise in the judges handling these cases. As was contemplated when the business court was established, a body of reported case law is being developed by the business court upon which practitioners are relying. It seems probable that a body of tax law precedent will be developed by the business court which will provide guidance to taxpayers and practitioners.

One problem encountered by the drafters of S.L. 2007-491 was that, while it was thought desirable that many tax cases be reviewed in the business court, not all tax cases may be suitable for assignment to the business court. The Administrative Office of the Courts was particularly concerned that the resources of the business court not be unduly burdened by the assignment of tax cases which the chief justice or chief business court judge might not think appropriate for review by that court. The issue was resolved by the legislative decision to designate tax appeals as mandatory business cases upon filing,³³ but to allow the chief justice and the chief business court judge to retain discretion as to which cases should be rejected by the business court and referred instead to the Wake County Superior Court.³⁴

Once the petition and the notice of designation of a case as a mandatory complex business case have been filed, if the chief justice approves the assignment of the case to the business court, the chief judge of the business court then assigns the case to one of the three business court judges. An objection to designation of the tax appeal as a mandatory business case may be filed by the department within 30 days after service of the notice of designation. In such event, the chief judge of the business court may determine that the case should not be designated as a mandatory complex business case and the case returned to the Wake County

Superior Court. The court may also make such a decision on its own motion. If either the department or the taxpayer disagrees with the decision, the party may appeal to the chief justice. *Id.*

Although an adverse party has the right to object to the designation of a case as a mandatory complex business case, given that the objection must be made in good faith and that new G.S. 7A-45.4(a)(7) clearly provides that a tax appeal which has gone through the OAH process may be designated as a mandatory complex business case, such an objection by the department would seem questionable.

As is discussed above, new G.S. 150B-31.1(e) provides that "the record, proceeding, and decision in a contested tax case [in the OAH] are confidential until the final decision is issued in the case." New G.S. 105-256(a)(9) provides that the secretary shall publish final decisions of the secretary in all contested tax cases, with identifying taxpayer information redacted prior to publication. *Query* whether reading the two statutes together indicates legislative intent that the record and proceedings before the OAH should be held in confidence even after the final decision is entered, since their publication would render meaningless the protection of taxpayer confidentiality intended by G.S. 105-256(a)(9). The department, which takes seriously its confidentiality obligations, should preserve the confidentiality of the record and proceedings transmitted to it by the OAH.

Once a petition seeking judicial review is filed, it is clearly available for public inspection. However, business court Rule 10.1 allows for the entry of protective orders for confidential or proprietary information.³⁵ Rule 26(c) of the Rules of Civil Procedure allows for the entry of protective orders during discovery.³⁶ It seems reasonable that good cause could be shown for maintaining the confidentiality of the record established before the OAH during the judicial review process. As a possible analogy, the NC Supreme Court has held that the records of medical peer review committees, protected by statute, can be protected from public view at trial under both state and federal constitutional open courts guarantees.³⁷

Although the business court plans to use electronic filing for tax cases,³⁸ the rules of the business court allow parties to move to prevent electronic filing to protect confiden-

tial or proprietary information.³⁹

Scope and Standard of Review

The final decisions of the secretary are subject to very different standards of judicial review, depending upon whether the secretary adopts the decision of the ALJ or not. Under G.S. 150B-51(b), if the secretary adopts the decision of the ALJ, the court may reverse or modify the secretary's decision if the substantial rights of the taxpayer may have been prejudiced because the secretary's findings, inferences, conclusions, or decisions are (1) in violation of constitutional provisions, (2) in excess of the statutory authority or jurisdiction of the agency, (3) made upon unlawful procedure, (4) affected by other errors of law, (5) unsupported by substantial evidence admissible in view of the entire record as submitted, or (6) arbitrary, capricious, or an abuse of discretion.⁴⁰

On judicial review of an administrative agency's final decision, the substantive nature of each assignment of error dictates the standard of review. [citation omitted] Questions of law receive *de novo* review, whereas fact-intensive issues such as sufficiency of the evidence to support an agency's decision are reviewed under the whole-record test. [citation omitted] Under the *de novo* standard of review, the trial court consider(s) the matter anew and freely substitutes its own judgment for the agency's judgment. [citation omitted]⁴¹

Appellate courts reviewing the decision of the superior court proceeding under G.S. 150B-51(b) will apply the same standard of review.

However, under G.S. 150B-51(c), if the agency substitutes its judgment for that of the ALJ, "the court shall review the official record, *de novo*, ... shall make findings of fact and conclusions of law[.]... shall not give deference to any prior decision in the case, and shall not be bound by the findings of fact or the conclusions of law contained in the agency's final decision."⁴² It is clear that the General Assembly, in rewriting the Administrative Procedures Act in 2000, intended to discourage agencies from overruling decisions of administrative law judges.

Appellate courts reviewing the decision of a superior court proceeding under G.S. 150B-51(c) will uphold the superior court's findings of fact "if supported by substantial evidence."⁴³ Questions of law receive *de novo*

review.⁴⁴

Direct Appeals to Superior Court Without Hearing in the OAH

In certain instances set forth in G.S. 150B-36(c), the decision of the ALJ, prior to a full evidentiary hearing, is a final decision appealable directly to superior court in accordance with the mandatory business case provisions. Those of principal interest to taxpayers include a decision by the ALJ that the OAH lacks jurisdiction and an order entered dismissing the contested case under Rule 12(b) in which all issues are disposed of. In addition, under G.S. 150B-36(d), if the ALJ grants summary judgment for the taxpayer or grants judgment on the pleadings under Rule 12(c), and the secretary does not adopt the ALJ's decision, the taxpayer will be entitled to immediate judicial review in superior court.

If the taxpayer's petition to the OAH involves, as the sole issue, the *unconstitutionality* of a statute and not the *application* of the statute, then the OAH must dismiss the petition for lack of jurisdiction. Under North Carolina law, quasi-judicial bodies like the OAH do not have the authority to resolve claims of facial unconstitutionality, these claims being reserved for the judiciary.⁴⁵ Following such dismissal, the taxpayer may bring an action in Wake County Superior Court to challenge the statute following the procedures for a mandatory business case. However, the taxpayer must first pay the tax, penalties, and interest the final determination states is due, and the action must be filed within two years of the dismissal.⁴⁶

If, however, the taxpayer's petition to the OAH raises statutory claims or alleges that a statute is unconstitutional as applied by the department (that the application of a statute to a taxpayer's particular facts and circumstances is unconstitutional) in addition to a claim of facial unconstitutionality, the taxpayer must continue through the contested case process. The claim of facial unconstitutionality will then be reviewed with the taxpayer's other claims during the judicial review process in superior court.⁴⁷

Conclusion

SL 2007-491, many of the provisions of which have been long sought by tax practitioners, enhances the due process rights of taxpayers by providing a meaningful prepayment hearing on disputed assessments and a clear procedure for seeking refunds. As such,

it should enhance the regard of citizens for the fairness of North Carolina's tax procedures. ■

Charles Neely and Nancy Rendleman engage in the practice of state and local tax litigation with the law firm of Williams Mullen Maupin Taylor in its Raleigh, North Carolina, office. The authors represented the Council on State Taxation in advocating for the adoption of S.B. 242, which contained the legislative reforms set forth in S.L. 2007-491 discussed in this article.

Endnotes

1. G.S. 7A-753.
2. As one example, *ex parte* communications with the ALJ, a concern of practitioners in appeals to the secretary under the former procedure, are prohibited. G.S. 150B-35.
3. For an insightful discussion of proceedings before the OAH, see Chief Administrative Law Judge Julian Mann III, *Administrative Justice: No Longer Just A Recommendation*, 79 N.C. L. REV. 1639 (2001). See also, *Practice Before the Office of Administrative Hearings: An Overview*, www.oah.state.nc.us.
4. Conference with Chief Administrative Law Judge Julian Mann, September 5, 2007.
5. The Department of Revenue provided to the Revenue Law Study Committee the following statistics on 2006 appeals under the former system, which may provide some indication of appeal volume to the OAH under the new system: corporate, excise, and franchise - 7; motor fuels - 4; personal tax - 10; sales & use - 5; and unauthorized substance - 131.
6. G.S. 105-241.15.
7. G.S. 150B-23(f).
8. G.S. 150B-23(a).
9. G.S. 150B-31.1(c).
10. According to the OAH, in approximately 65% of its cases, individuals appear *pro se*; it is apparent that ALJs are accustomed to having unrepresented individuals appear before them.
11. G.S. 84-1 *et seq.*; see also *Lexis-Nexis v. TraviSHan Corp.*, 155 N.C. App. 205, 573 S.E.2d 547 (2002) (corporations cannot engage in litigation *pro se*).
12. G.S. 150B-29. The standards for admissibility are liberalized in G.S. 150B-29(a).
13. G.S. 150B-28; G.S. 150B-33(b)(3) & (3a).
14. See also 26 N.C.A.C. § 03.0112 for administrative procedures relating to discovery and 26 N.C.A.C. 03.0122 for administrative procedures relating to evidence.
15. G.S. 1A-1, Rule 26(b).
16. G.S. 150B-29(a); G.S. 150B-34(a).
17. G.S. 150B-29(a).
18. G.S. 150B-30.
19. 26 N.C.A.C. § 03.0115.
20. G.S. 150B-33(b); G.S. 150B-36.
21. Rule 2.1 of the General Rules of Practice for the Superior and District Courts.

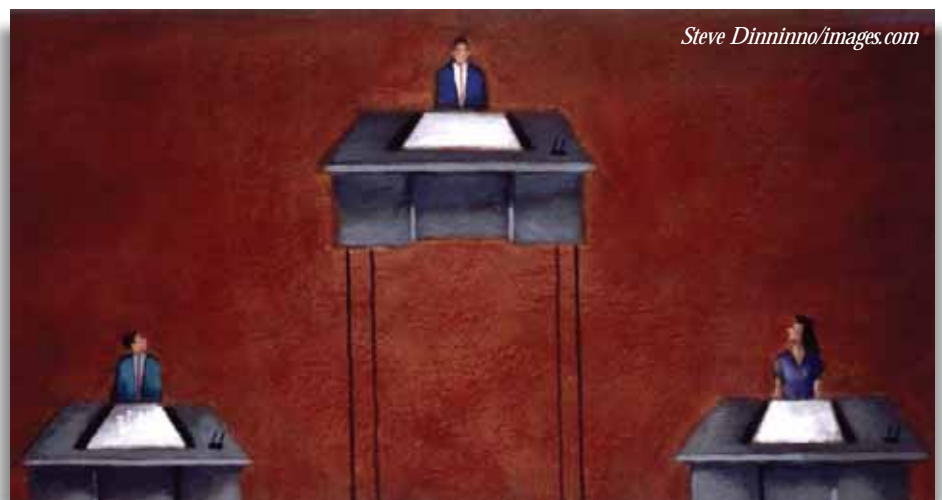
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The Attorney's Ethical Duties to Supervise Law Office Staff

BY JUDGE JOHN M. TYSON

North Carolina law firms are consolidating and growing larger.¹ As law firms grow, support staff and professional paralegals are delegated greater responsibilities with decreasing direct supervision. The traditional image of an attorney having daily, direct, or visible contact with support staff and paralegals, who are all located in a single office, is disappearing as rapidly as typewriters and floppy disks. Rapid advances in office and wireless technologies, digital communication, and document preparation and transmission allow the rendition of legal services across state, national, and international boundaries. These technical advances raise many new issues of both the unauthorized practice of law and maintaining client confidentiality.

In this emerging era, attorneys and their support staff are challenged on how to both survive and thrive while: (1) protecting the client's confidences; (2) not violating the law; (3) not risking an attorney's law license; and (4) not subjecting the attorney and support staff to civil or criminal liability. Attorneys and law office staff are encouraged to have available a current edition of *The Lawyer's Handbook*, published by the North Carolina State Bar ("State Bar"). Let us examine the statutes, rules, and the State Bar's guidance on these issues.



What is the "Practice of Law"

The State Bar often addresses which tasks a lawyer must personally perform and which tasks may be performed by nonlawyers and thus delegated to the firm's office staff. North Carolina limits the practice of law to active licensed members of the State Bar and to stakeholders of professional corporations, partnerships, and limited liability companies,

properly registered and qualified as professional law firms.²

N.C. Gen. Stat. § 84-2.1 (2005) is broadly worded and defines the "practice of law" as: performing any legal service for any other person, firm, or corporation, with or without compensation, specifically including the preparation or aiding in the preparation of deeds, mortgages, wills, trust instru-

ments, inventories, accounts, or reports of guardians, trustees, administrators, or executors, or preparing or aiding in the preparation of any petitions or orders in any probate or court proceeding; abstracting or passing upon titles, the preparation and filing of petitions for use in any court, including administrative tribunals and other judicial or quasi-judicial bodies, or assisting by advice, counsel, or otherwise in any legal work; and to advise or give opinion upon the legal rights of any person, firm, or corporation: Provided, that the above reference to particular acts which are specifically included within the definition of the phrase "practice law" shall not be construed to limit the foregoing general definition of the term, but shall be construed to include the foregoing particular acts, as well as all other acts within the general definition.

The last sentence of this statute makes it clear that the statute's "laundry list" of specific activities is not exclusive and are only examples of other activities that constitute the practice of law.

N.C. Gen. Stat. § 84-4 (2005) defines the exclusivity of the practice of law to licensed attorneys and the legal boundaries all non-lawyers must observe. N.C. Gen. Stat. § 84-4 states:

Except as otherwise permitted by law, it shall be unlawful for any person or association of persons, except active members of the Bar of the state of North Carolina admitted and licensed to practice as attorneys at law, to appear as attorney or counselor at law in any action or proceeding before any judicial body, including the North Carolina Industrial Commission, or the Utilities Commission; to maintain, conduct, or defend the same, except in his own behalf as a party thereto; or, by word, sign, letter, or advertisement, to hold out himself, or themselves, as competent or qualified to give legal advice or counsel, or to prepare legal documents, or as being engaged in advising or counseling in law or acting as attorney or counselor at law, or in furnishing the services of a lawyer or lawyers; and it shall be unlawful for any person or association of persons except active members of the Bar, for or without a fee or consideration, to give legal advice or counsel, perform for or furnish to another legal services, or to prepare directly or through another for another person,

firm, or corporation, any will or testamentary disposition, or instrument of trust, or to organize corporations or prepare for another person, firm, or corporation, any other legal document.

N.C. Gen. Stat. § 84-8 (2005) states that "any individual, corporation, or association, who or which violates the statute prohibiting the unauthorized practice of law is guilty of a Class 1 misdemeanor." The rules and regulations of the State Bar interpreting this statute are published officially in the *North Carolina Reports*, the official reporter of the opinions and rulings of the North Carolina Supreme Court, and in the North Carolina Administrative Code - Title 27.

Due to the expansion of nonlawyer staff in law firms, the State Bar issued Rule 5.3, entitled, "Responsibilities Regarding Nonlawyer Assistants." Rule 5.3 states:

With respect to a nonlawyer employed or retained by or associated with a lawyer:

- (a) a partner, and a lawyer who . . . possesses comparable managerial authority . . . shall make reasonable efforts to ensure that the firm or organization has in effect measures giving reasonable assurance that the nonlawyer's conduct is compatible with the professional obligations of the lawyer;
- (b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the nonlawyer's conduct is compatible with the professional obligations of the lawyer; and
- (c) a lawyer shall be responsible for conduct of such a nonlawyer that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

- (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or
- (2) the lawyer is a partner or has comparable managerial authority in the law firm or organization in which the person is employed, or has direct supervisory authority over the nonlawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action to avoid the consequences.³

Actions and conduct of staff can place an attorney's license in jeopardy and subject the attorney to civil or criminal liability for actively requiring, acquiescing in, or acknowledging

unlawful acts by a nonlawyer. The State Bar holds a licensed attorney responsible for the acts of a nonlawyer employee working under his or her supervision, if the lawyer "orders," knows of, or "ratifies" the actions of the nonlawyer.⁴

Seeking Guidance

Any person may request an opinion from the State Bar on whether a certain course of conduct may violate the Rules. The State Bar has addressed a number of specific situations.

A. Delegation of Duties

A nonlawyer may deliver a message to a court holding calendar call, stating the lawyer is unable to attend due to a legitimate reason.⁵ A scheduling conflict in another court is an example of a legitimate reason.⁶ "This should only be done when necessary and the lawyer must make reasonable efforts to ensure that the nonlawyer's conduct is compatible with the professional obligations of the lawyer."⁷

Under certain circumstances, a lawyer may delegate to a nonlawyer the signing of court documents and pleadings.⁸ A supervising attorney must make reasonable efforts to ensure that the nonlawyer's conduct is "compatible with the professional obligations of a lawyer."⁹ This signing should only be done if the lawyer is unavailable and no other lawyer in the firm is available to do so.¹⁰ First, the signing must not violate any law, court order, local rule, or rule of civil procedure.¹¹ Second, the nonlawyer must be properly supervised under the circumstances.¹² Third, "the signature clearly discloses that another has signed on the lawyer's behalf."¹³

B. Out-of-State Attorneys

Many North Carolina law firms operate multiple offices in several states. Special rules have been adopted regarding out-of-state lawyers, firms with multiple offices, and former lawyers who continue to work at their previous firms. Rule 5.5 of the North Carolina State Bar Rules of Professional Conduct entitled "Unauthorized Practice of Law" states:

- (a) A lawyer shall not practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction.
- (b) A lawyer who is not admitted to practice in this jurisdiction shall not:
 - (1) . . . establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or
 - (2) hold out to the public or otherwise represent that the lawyer is admitted to

practice law in this jurisdiction.

....

(d) A lawyer shall not assist another person in the unauthorized practice of law.

(e) A lawyer or law firm shall not employ a disbarred or suspended lawyer as a law clerk or legal assistant if that individual was associated with such lawyer or law firm at any time on or after the date of the acts which resulted in disbarment or suspension through and including the effective date of disbarment or suspension.

(f) A lawyer or law firm employing a disbarred or suspended lawyer as a law clerk or legal assistant shall not represent any client represented by the disbarred or suspended lawyer or by any lawyer with whom the disbarred or suspended lawyer practiced during the period on or after the date of the acts which resulted in disbarment or suspension through and including the effective date of disbarment or suspension.¹⁴

These rules are designed to limit the *de facto* practice in North Carolina by an attorney licensed in another state and prevents a disbarred lawyer from returning to his or her prior firm and resuming practice without being licensed.

C. Residential Real Estate Closings

Recent changes have occurred in the closing and financing of residential real estate transactions due to pressure from the Federal Trade Commission. On December 14, 2001, the Federal Trade Commission wrote the North Carolina State Bar Ethics Committee urging the State Bar to reconsider two of its ethics opinions requiring attorneys to be physically present at residential real estate closings.¹⁵ In response, the State Bar issued an advisory opinion defining the role of a nonlawyer during a real estate closing.¹⁶ The advisory opinion states:

Residential real estate transactions typically involve several phases, including the following: abstraction of titles; application for title insurance policies, including title insurance policies that may incorporate tailored coverage; preparation of legal documents, such as deeds (in the case of a purchase transaction) and deeds of trust; explanation of documents implicating parties' legal rights, obligations, and options; resolution of possible clouds on title and issues concerning the legal rights of parties to the transaction; execution and acknowledgment of documents in compliance

with legal mandates; recordation and cancellation of documents in accordance with North Carolina law; and disbursement of proceeds after legally recognized funds are available. These and other functions are sometimes called, collectively, the "closing" of the residential real estate transaction. The North Carolina General Assembly has determined specifically that only persons who are licensed to practice law in the state may handle many of these functions.¹⁷

The advisory opinion outlines the following conduct and actions that would constitute the unauthorized practice of law, if performed by a nonlawyer: (1) providing a legal opinion on title to real property; (2) explaining the legal status of title to real estate or the legal effect of anything found in the chain of title; (3) explaining or giving advice concerning matters disclosed by a land survey about the rights or responsibilities of the parties; (4) providing a legal opinion in response to questions by any party regarding any legal rights; (5) advising a party how to take title in alternative ways or the legal consequences of taking title in those ways; (6) drafting a legal document or assisting a party to select a document among different forms having varying legal implications; (7) explaining or recommending to a party a course of action, if this advice requires a legal judgment; and (8) attempting to resolve a legal dispute between the parties.¹⁸

D. Nonlawyer's Roles at Residential Real Estate Closings

The State Bar does not consider overseeing the execution of residential real estate closing documents and receiving and disbursing closing proceeds as acts constituting the practice of law, requiring an attorney to be physically present.¹⁹ A supervised nonlawyer assistant may identify to a client, who is a party to a residential real estate transaction, the documents to be executed, direct the client as to the correct place on each document to sign, and disburse proceeds, even though the lawyer is not physically present.²⁰ If any party asks any question regarding the legal rights or obligations of the parties or the legal effect of the documents, a nonlawyer may not answer.²¹

The State Bar has been aggressive in pursuing individuals, corporations, and other entities who are engaged in activities the State Bar asserts would constitute the unauthorized practice of law.²² Attorneys who conduct residential real estate closings should carefully review their closing procedures and delegation

of tasks to nonlawyer staff, if an attorney is not physically present or immediately available to address these issues.

Upholding Client Confidentiality

One of the highest duties of an attorney is to preserve the confidences and secrets of clients from disclosure. Courts and the State Bar hold lawyers to a very high duty to uphold their clients' confidentiality.²³ This duty includes establishing procedures to ensure that law office staff protect clients' confidential information.

Rule 1.6, entitled "Confidentiality of Information," states:

(a) A lawyer shall not reveal information acquired during the professional relationship with a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information protected from disclosure by paragraph (a) to the extent the lawyer reasonably believes necessary:

(1) to comply with the Rules of Professional Conduct, the law, or court order;

(2) to prevent the commission of a crime by the client;

(3) to prevent reasonably certain death or bodily harm;

(4) to prevent, mitigate, or rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services were used;

(5) to secure legal advice about the lawyer's compliance with these Rules;

(6) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client; to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved; or to respond to allegations in any proceeding concerning the lawyer's representation of the client . . .²⁴

"[A] lawyer may disclose information to the IRS concerning a real estate transaction which would otherwise be protected if required to do so by law, and further, that notice of such required disclosure, should be given to the client and other affected parties."²⁵

A. Client Files

Law office staff should be aware of specific



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Bar requirements when maintaining, closing, and disposing of client files. A closed file may be destroyed at any time with the client's consent; otherwise, the client's file must be retained for a minimum of six years after conclusion of the representation.²⁶ The firm should establish a policy on whether original documents are delivered to the client during or at the completion of representation. In order to destroy the file prior to the passage of six years, the client must be contacted and told his file will be destroyed.²⁷ The client can retrieve the file or, within a reasonable period of time, direct it to be transferred to another lawyer.²⁸ The file may be destroyed if the client indicates they do not desire to retrieve it.²⁹ If the client fails to retrieve the file within a reasonable period of time, the file may be destroyed.³⁰ Real property, wills, and estate files with original documents require detailed policies on retention and destruction.

After notice to the client and before a file is destroyed, the lawyer should review the file and retain any items which belong to the client or other useful information derived from representation for which the statute of limitations has not expired.³¹ An inventory of all

destroyed files should be kept. The method chosen to destroy the files must preserve the client's confidentiality.³²

B. Protecting Privileged Communications

Cellular telephone and "walkie-talkie" communications are essentially radio transmissions and are easily intercepted and recorded. Emails stored on a server owned by an internet service provider may not be secure. When attorneys or law office staff are using unsecured or wireless methods of communication, such as cellular phones and emails, "a lawyer must take steps to minimize the risk that confidential information may be disclosed."³³

If materials are mistakenly received "that appear on their face to be subject to the attorney client privilege or otherwise confidential, which were inadvertently sent to the lawyer by the opposing party or opposing counsel [the lawyer receiving these materials], should refrain from examining the materials and return them to the sender."³⁴ The firm should establish a policy and prominently post a legend on emailed, faxed, and even traditionally mailed communications to preserve the privilege, warn unintended recipients, and provide instructions to return or destroy the confiden-

tial materials.³⁵

Conclusion

Avoiding the unauthorized practice of law by nonlawyers and preserving clients' confidences are paramount obligations of an attorney and their importance must be communicated to all law firm employees. Rapid advances in technology and communication, together with multiple offices, enlarging case loads, and client expectations for the "need for speed," at the lowest cost, add immense pressure to attorneys, and law firm support staff to "get it done ASAP." As firms grow larger, further consolidate, and establish multiple offices both within and outside of North Carolina, issues of the unauthorized practice of law, multi-state practice, and protecting client's confidentiality will further challenge law firms in the future.

A nonlawyer must not misrepresent their position or provide legal advice. Privileged communications of the client must be protected from disclosure, even after the representation is completed and the file is closed. With proper supervision and training, law office staff can perform a wide range of tasks to assist and

help the law firm operate both ethically and efficiently to serve the client's needs and not violate the statutes and rules of the State Bar. ■

Judge John M. Tyson was elected statewide in 2000 and currently serves as a judge of the North Carolina Court of Appeals and also serves as an adjunct professor of law at the Norman Adrian Wiggins School of Law, Campbell University, teaching Real Property Planning since 1987. Judge Tyson earned a Master of Laws in the Judicial Process (LL.M.) from the University of Virginia School of Law (2004); a Master of Business Administration (MBA) from Duke University (1988); and a Juris Doctor (JD) with honors from Campbell University School of Law (1979 Member of the Charter Class). Judge Tyson earned the designation of board certified specialist in real property law business, commercial, and industrial transactions by the North Carolina State Bar in 2001, was recertified in 2007, and is the only North Carolina judge so certified.

Appreciation is expressed to Mr. Kevin Hall, a third year law student at the Norman Adrian Wiggins School of Law at Campbell University for his research assistance, and to Mrs. Deana Walker, NCCP, for her assistance in processing the manuscript.

Endnotes

1. The *Triangle Business Journal* recently reported that two larger Raleigh law firms each employ more than 140 lawyers and over 100 paralegals and support staff. Cameron Snipes, Triangle Law Firms, *Triangle Business Journal*, May 4, 2007 at 25A.
 2. N.C. Gen. Stat. § 84-4 (2005); N.C. Gen. Stat. § 84-5 (2005).
 3. Rule 5.3, North Carolina Revised Rules of Professional Conduct (2007).
 4. *Id.*
 5. 2000 FEO 10.
 6. *Id.*
 7. *Id.*
 8. 2006 FEO 13.
 9. *Id.*
 10. *Id.*
 11. *Id.*
 12. *Id.*
 13. *Id.*
 14. Rule 5.5, North Carolina Revised Rules of Professional Conduct (2007).
 15. www.ftc.gov/opa/2001/12/ncstatebar.shtm
 16. North Carolina State Bar, Authorized Practice Advisory Opinion 2002-1 (January 24, 2003).
 17. *Id.*
 18. *Id.*
 19. *Id.*
 20. 2002 FEO 9.
 21. *Id.*
 22. In a 2006 case, a company was holding themselves out to the public and accepting attorney's fees for preparing legal documents, title abstracts, and opinions, and performing real estate closings. See *North Carolina State Bar v. Closing Place, Inc.* (*Lawyers Weekly* (October 20, 2006) (No. 06 13 1161, 18 pp.) (Donald W. Stephens, J.)) The State Bar brought an action against the company in superior court and, through a consent order, enjoined the unlicensed individuals and the company from engaging in the practice of law and performing residential real estate closings and any services associated with a closing. *Id.* The company did not admit any wrongdoing or violations of the law in the consent judgment. *Id.*
 23. See *In re Miller*, 358 N.C. 364, 595 S.E.2d 120 (2004).
 24. Rule 1.6 of the North Carolina State Bar Rules of Professional Conduct (2007).
 25. RPC 23.
 26. RPC 209.
 27. *Id.*
 28. *Id.*
 29. *Id.*
 30. *Id.*
 31. *Id.*
 32. *Id.*
 33. RPC 215.
 34. RPC 252.
 35. Two examples of legends used by prominent North Carolina law firms are:
- PRIVILEGE AND CONFIDENTIALITY NOTICE:
This communication (including any attachment) is being sent by or on behalf of a lawyer or law firm and may contain confidential or legally privileged information. The sender does not intend to waive any privilege, including the attorney/client privilege, that may attach to this communication. If you are not the intended recipient, you are not authorized to intercept, read, print, retain, copy, forward, or disseminate this communication. If you have received this communication in error, please notify the sender immediately by email and delete this communication and all copies.
- or
- CONFIDENTIALITY NOTICE: This electronic mail transmission may have been sent on behalf of a lawyer. It may contain information that is confidential, privileged, proprietary, or otherwise legally exempt from disclosure. If you are not the intended recipient, you are hereby notified that you are not authorized to read, print, retain, copy or disseminate this message, any part of it, or any attachments. If you have received this message in error, please delete this message and any attachments from your system without reading the content and notify the sender immediately of the inadvertent transmission. There is no intent on the part of the sender to waive any privilege, including the attorney client privilege, that may attach to this communication. The sender of this electronic mail transmission is not authorized to practice law and all information and materials included herewith are under the supervision of and subject to the review of counsel and should not be relied upon until such review has occurred. Thank you for your cooperation.

Tax Procedures (cont.)

22. G.S. 150B-34(a); 26 N.C.A.C. § 03.0127(c).
23. 26 N.C.A.C. § 03.0127(a).
24. G.S. 150B-34(a).
25. 26 N.C.A.C. § 03.0127.
26. G.S. 150B-36(a).
27. G.S. 150B-36(b).
28. G.S. 105-241.16; G.S. 150B-45.
29. G.S. 105-241.16.
30. *Id.* The option of posting a bond, previously provided by G.S. 105-241.3 in connection with judicial review of appeals of assessments, is no longer available to taxpayers under the new law.
31. In addition to reviewing decisions of the secretary, the Tax Review Board, augmented by the addition of the secretary, was also responsible for hearing taxpayer requests for changes in the apportionment formula for corporate income and franchise tax purposes. Under the new law, decisions concerning alternate apportionment methods will be made by the secretary. G.S. 105-122(c1); G.S. 105-130.4(t1). These decisions, as were those of the ATRB, are not appealable.
32. Chief Justice's Commission on the Future of the North Carolina Business Court, *Final Report and Recommendation* (Oct. 28, 2004).
33. G.S. 7A-45.4(7).
34. G.S. 7A-45.4.
35. Rule 10.1 of the General Rules of Practice and Procedure for the North Carolina Business Court.
36. G.S. 1A-1, Rule 26(c).
37. *Virmani v. Presbyterian Health Servs. Corp.*, 350 N.C. 449, 515 S.E.2d 675 (1999).
38. Email from Chief Business Court Judge Ben Tennille of September 10, 2007.
39. Rule 10.1 of the General Rules of Practice and Procedure of the North Carolina Business Court.
40. G.S. 150B-51(b).
41. *Luna v. N.C. Dep't of Environment and Natural Resources*, ___N.C. App. ___, 648 S.E.2d 280, 282 (Aug. 7, 2007).
42. G.S. 150B-51(c).
43. G.S. 150B-52; *Donoghue v. NC Dep't of Correction*, 166 N.C. App. 612, 603 S.E.2d 360 (2004).
44. G.S. 150B-52 ("The scope of review to be applied by the appellate court under this section is the same as it is for other civil cases"); *Medina v. Div. of Soc. Servs.*, 165 N.C. App. 502, 598 S.E.2d 707 (2004) (the appellate standard for all questions of law is *de novo* review).
45. *State ex rel. Utilities Com'n v. Carolina Utility Customers Ass'n, Inc.*, 336 N.C. 657, 673-74, 446 S.E.2d 332, 342 (1994) (citing *Great American Insurance Company v. Gold*, 254 N.C. 168, 118 S.E.2d 792 (1961)).
46. G.S. 105-241.17.
47. G.S. 105-241.16.

10 Tips for the North Carolina Appellate Advocate

BY ADAM H. CHARNES

Practicing before an appellate court is fundamentally different from trial litigation. Too often, however, trial lawyers who do not specialize in appellate practice fail to appreciate those differences and thereby

disserve their clients when handling appeals. This article is intended to demystify appellate litigation and provide some basic suggestions that will assist the nonspecialist when he or she litigates before an appellate court.

1 **Preserve your issues for appeal in the trial court**—The first task for the appellate advocate occurs before the notice of appeal has been filed—namely, preserving issues for appeal. This essential step is sometimes overlooked in the heat of battle in the trial court. The trial lawyer often is focused on the task at hand—i.e., defeating his opponent's motion, winning at trial, etc.—and may lose sight of the need to ensure that the court's errors are preserved for later appellate review. Such a short-term focus can result in critical mistakes that cause an appellate court subsequently to decline to review errors briefed and argued on appeal. What precisely needs to be done to preserve an error for appellate review varies somewhat by issue and between federal and state court and

is beyond the scope of this article. But two things are clear: (1) trial lawyers must understand completely what steps to take to ensure that appellate arguments are not waived and (2) they should quickly identify those errors made by the trial court that may constitute reversible error on appeal and ensure that they are preserved.

2 **Know and follow the rules of appellate procedure**—The importance of following the applicable procedural rules cannot be understated. As appellate court dockets become increasingly busy, courts are getting noticeably less tolerant of rule violations. This phenomenon is evident in the decisions of the North Carolina appellate courts. Following the

decision in *Viar v. NC Dept. of Transp.*, 359 N.C. 400 (2005), the state appellate courts have routinely dismissed appeals, or declined to hear arguments, on the basis of rule violations—some of which would appear to be relatively minor—without any showing of prejudice to the opposing party or the court. The assignment of error provisions of the state appellate rules (N.C.R. App. P. 10(c)) are the primary culprit and they trip up even the best of lawyers.

Such strict application of procedural rules, however, also occurs in federal court. In *Smoot v. Mazda Motors of Am., Inc.*, 469 F.3d 675 (7th Cir. 2006), Judge Richard Posner, writing for the court, criticized at length and in detail both parties' briefs for incompletely and incorrectly describing the presence of diversity jurisdiction in the federal district court. He required the parties to show cause why they should not be sanctioned—even though the opinion conceded that any rule violations were harmless because diversity jurisdiction clearly was present. Judge Posner denied that the judges were being "fusspots and nitpickers" and instead noted that the court had been "plagued by the carelessness" of many lawyers in drafting the jurisdictional sections of their briefs. *Id.* at 677.

In short, practitioners should take the time required to know and comply with the rules. Don't assume that seemingly harmless rule violations will be overlooked. Even if your appeal is not rejected or your arguments deemed waived, sloppiness in following the rules and other procedural requirements suggests to the court a carelessness in lawyering that judges may well assume carries over to your substantive arguments. And if in doubt about the meaning or require-

ments of a rule, call the clerk's office for guidance or consult with an experienced appellate practitioner.

3 Don't write too much—Lawyers often blunder by trying to do too much in their appellate briefs. State and federal appellate dockets—like the dockets of most other courts—have increased substantially over the past few decades. Appellate judges are therefore required to read hundreds of merits briefs per year. Judges who have limited time may not fully digest long, complicated, and heavily footnoted briefs. Your appellate brief, therefore, should be as concise as possible. If you can say it in fewer pages, you are almost always better advised to do so.

Another, and more fundamental, aspect of "writing too much" is the sin of arguing too many issues in your brief. You should pick your best issues and include them—and only them—in the brief. While there are exceptions, the appellate lawyer usually should present no more than three or four issues for appeal. Arguing too many issues has several deleterious effects. First, including weaker issues reduces your credibility before the court. The judges may well wonder whether they should credit your description of the facts, or your reading of a case, if your abilities or candor are called into question by the bad judgment of arguing a weak issue with equal fervor as a strong one. Just as significantly, arguing too many points may cause you to waste precious, limited space in your brief. The page limits for briefs in the North Carolina Court of Appeals are quite low; the Fourth Circuit, for example, allows a maximum of 14,000 words for opening briefs, while in the state court of appeals such briefs are limited to only 8,750 words. In complicated appeals involving difficult or unresolved legal issues, lawyers often use and need every one of those 8,750 words. Lawyers fundamentally err by briefing weaker issues in a shortened form, both because their arguments are often so short and cryptic that they stand no chance of being adopted by the court and because they rob the stronger primary issues of precious space and credibility.

In short, resist the temptation to include too much in your brief; use your legal judg-

ment and skills to make the tough decision to abandon weaker or less important appellate issues; avoid over-footnoting and the use of unnecessary string cites.

4 Don't write too little—The appellate judges know nothing about your case. They may also know little about the legal issues involved in your appeal. In your brief you need to provide them with the evidentiary and legal tools to rule in your favor.

On the law, do not fear "talking down" to the judges. They might already know the basic legal principles underlying, say, the ERISA or tax law issue in the case, but they will not be offended if your brief reminds them. At the least, you will provide a discussion that could prove useful when a judge or his law clerk begins drafting the opinion. And your discussion of basic legal principles could provide critical background that places your argument in context or that educates a judge or law clerk unfamiliar with that area of law.

With respect to the facts, you should not force the court to dig through the record to find the facts needed to resolve the case. While a brief can include unnecessary factual discussion that mires the judges in confusing and irrelevant details, you should ensure that the brief presents the appropriate factual material along with correct and full record citations for each fact necessary for your arguments.

5 Write clearly and persuasively—Counsel of course should strive to make all of their pleadings clear, concise, and persuasive. But quality, effective writing is especially important in an appellate brief. Oral persuasion is the coin of the realm before the jury, but in most appellate cases the briefs make or break the appeal. Virtually all appellate judges have already reached at least a tentative decision when they take the bench for oral argument. Moreover, appellate judges typically spend considerably more time studying the briefs than do trial court judges. Thus, a poorly written brief, or one that does not explain the client's position in an intelligible way, can readily doom even a winning argument. One easy way of ensuring that your brief is comprehensible and persuasive

is to ask a lawyer not involved in the case to read it and provide feedback on both substance and the quality of the writing.

6 Don't overargue—It is standard advice that good legal writing avoids use of such adverbs as "clearly," "obviously," "plainly," and the like. The substance of your argument should convince the court that your legal position is correct; the court will not be persuaded simply by how emphatically you make a point. But the same error can be made even without use of those adverbs. When addressing a difficult legal argument, particularly one where the headwinds are against you, it is perfectly fine, indeed preferable, to acknowledge that the legal question is a close one. If you make every legal argument with equal insistence that you are correct, you will lose credibility when the court finds an issue that is close. By contrast, when you acknowledge that some issues in the case present close questions, the court is more likely to reward your candor by crediting your argument that others are easy winners for you. Put another way, your credibility is your most important asset; do not squander it by failing to acknowledge the difficult parts of the argument.

7 Know and embrace the applicable standard of review—In reviewing your appellate argument, the first thing that every appellate judge will determine is the standard of review. The outcome of an appeal may well turn on whether the appellate court is reviewing the issue *de novo* or under the more deferential standards of abuse of discretion or clear error. And appellate counsel could well lose an appeal by not identifying the proper standard and tailoring the arguments in his brief to that standard. Take advantage of a favorable standard of review, and recognize your burden in overcoming a difficult one.

Two critically important errors frequently occur in appellate briefs. First, counsel sometimes assumes a burden that is higher than that applicable in the case. For example, suppose the trial court dismissed your client's claims at summary judgment. On appeal, you do not need to demonstrate

that your client's evidence was stronger than its opponent's; rather, you need only prove that there was a genuine dispute of material fact. Your appellate brief, therefore, should argue that your summary judgment evidence created a factual dispute and thus you "presented sufficient facts to create a triable issue"—rather than that your client would have prevailed at trial.

Second, and conversely, attorneys often err by ignoring a stringent standard of review. If the trial court's adverse ruling can be overturned only for abuse of discretion, it does you little good to argue only that the ruling was erroneous. Ignoring a tough standard of review will not make it go away—or cause the judges to forget about it.

8 Prepare effectively for oral argument—Oral argument presents the appellate advocate with a critical opportunity to change the minds of unconvinced or wavering judges or to solidify the votes of friendly judges. Unfortunately for their clients, many litigators see oral argument as an experience to be endured, rather than as an opportunity to be exploited, and they prepare both insufficiently and improperly.

Preparation for an oral argument before an appellate court is straightforward, but time consuming. Of course, the oral advocate must do the obvious things—such as re-familiarize himself with the arguments in the briefs (often forgotten after the sometimes lengthy delay between briefing and argument) and update all research—both his and his opponents'. But the truly effective appellate advocate will do more. He will seek new and better ways of presenting the arguments set forth in his brief(s). After all, the judges and their clerks will be very familiar with the brief; simply re-hashing the briefs at argument adds little value. The oral advocate will also critically examine the weaknesses of his client's legal arguments from a new perspective. When drafting a brief, advocates typically respond to and rebut the arguments advanced by opposing counsel; when preparing for argument, the lawyer must anticipate the different—and sometimes stronger—arguments that could be advanced against his position.

It is also critical for the appellate lawyer to master the record on appeal. Judges often

ask counsel where certain evidence is located in the record. It is essential that arguing counsel not only be able to answer questions accurately regarding the content of the record, but also be able to direct the court to the correct place in the record. Lawyers lacking a photographic memory should take to argument a "cheat sheet" of citations to the record for key facts, evidence, and events. Mastering the record is just as important when the lawyer who tried the case is handling the appeal. This lawyer must not rely on his or her memory, often faulty, of events sometimes long in the past; rather, when preparing for the appeal the trial lawyer should refresh his recollection about the content of the record.

Finally, most appellate advocates find moot courts invaluable in preparing for the argument. You and your co-counsel are so familiar with the case that it is sometimes difficult to achieve sufficient detachment to identify the most troublesome legal issues or to recognize the issues that may confuse someone new to the case. Conducting a moot court before lawyers playing the part of the judges can provide critical insights on a whole host of issues related to the oral argument—how to order the issues, what phrases to use, what issues to focus on, and so forth. Many experienced appellate lawyers hold two or more moot courts in difficult cases—one a couple of weeks before the argument, just as the lawyer begins the final stage of preparation, and one just a few days before the argument to refine the presentation.

9 When presenting oral argument, follow a few simple rules—Advocates should approach the oral argument as a *conversation*, not a *lecture*.

As an advocate you should hope for a "hot bench" that asks lots of question, for the questions tell you the issues that most concern or confuse the judges. Thus, you should freely depart from your prepared outline to address the issues raised by the court. Make sure that you identify in advance and then weave in the critical points that you think you *must* discuss at argument, but otherwise address the topics that interest the judges. And in no circumstances should you commit one of the two most common mistakes of novice appellate

advocates—reading a prepared speech and failing to answer a question asked by a judge.

10 Understand and argue the criteria for discretionary review and certiorari—If you are faced with an unfortunate loss in an appellate court, in your path to further appellate review may be a daunting hurdle—the Supreme Court's discretion to deny review of your case. The United States Supreme Court has, in almost all circumstances, a wholly discretionary docket, and the North Carolina Supreme Court's docket is significantly discretionary. If you ask one of those courts to hear your case on a discretionary basis, it is not enough to show in your petition for review that the court of appeals erred. Neither the federal nor state supreme court views itself as a court of error-correction. Both courts' exercise of their discretion to decide which cases to hear is guided by specific criteria set forth in rule or statute. *See* S. Ct. R. 10; GS § 7A-31. The primary task in the petition for certiorari or discretionary review is not demonstrating the error of the decision below, therefore, but rather establishing that your case satisfies those criteria. For example, in litigation not involving a governmental entity, the primary criterion on which the US Supreme Court bases its certiorari decision is the existence or absence of a conflict among the federal circuits. That question, therefore, should be the primary focus of any cert. petition. Both Supreme Courts are asked to hear many more cases than there is room on the docket, so your petition should convincingly explain why the issues presented are both unresolved and merit the Court's time and attention. ■

Adam H. Charnes, a partner in the Winston-Salem office of Kilpatrick Stockton LLP, practices appellate, constitutional, and complex business litigation. A 1991 magna cum laude graduate of the Harvard Law School, he served as a law clerk to Justice Anthony M. Kennedy of the Supreme Court of the United States and Judge J. Harvie Wilkinson III of the United States Court of Appeals for the Fourth Circuit. Mr. Charnes is a member of the Appellate Rules Committee of the North Carolina Bar Association.

The New North Carolina Business Court

BY JUDGE ALBERT DIAZ AND A. JORDAN SYKES

Since 1996, some of the most complex and significant business disputes in North Carolina have been

heard in the North Carolina Business Court.¹ With recently expanded jurisdiction and new offices in Charlotte and Raleigh, the business court's complex commercial litigation docket will continue to grow in the future. As more and more attorneys find their cases assigned to the business court, an understanding of the court's jurisdiction and rules will become an important tool

for North Carolina's trial bar.

A Brief History of the North Carolina Business Court

In 1994, Governor Jim Hunt established the North Carolina commission on Business Laws and the Economy.² Governor Hunt tasked the commission with recommending statutes, rules, and regulations that would encourage the growth of local businesses

and entice other businesses to locate and incorporate in the state.³

In January 1995, the commission, noting the high esteem in which the Delaware Court of Chancery was held by the business community, recommended that North Carolina establish a business court.⁴ The creation of a business court, the commission

noted, would solve two problems related to the litigation of complex business disputes in North Carolina.⁵ First, it would ensure that complex cases were heard by a single judge who could manage the cases from beginning to end, thereby solving the problems associated with litigating complex business disputes under North Carolina's



judicial rotation system.⁶ Second, a business court in North Carolina, much like the court of chancery in Delaware, could develop a body of case law to serve as guidance to North Carolina's business community.⁷

The commission recommended that the North Carolina Supreme Court amend Rule 2.1 of the General Rules of Practice for the Superior and District Courts to allow the chief justice of the North Carolina Supreme Court to designate certain cases as complex business cases.⁸ The commission also recommended that the Supreme Court add Rule 2.2 to the General Rules of Practice to allow the chief justice to designate one or more special superior court judges to hear those cases.⁹

In the fall of 1995, the Supreme Court implemented the commission's recommendations, and the General Assembly appropriated funds for an additional special superior court judge.¹⁰ In January 1996, Governor Hunt appointed Ben F. Tennille as a special superior court judge, and the chief justice designated him as North Carolina's first special superior court judge for complex business cases.¹¹ Although Judge Tennille worked out of a home office for the first few years of the business court's existence, by 1999, the General Assembly had provided the court with funding for an office in Greensboro.¹²

In 2001, the business court earned its complex business litigation "sea legs" during the SunTrust challenge to the proposed merger between Wachovia and First Union.¹³ The parties to the dispute agreed to bring both their state and federal claims before the business court in June 2001, and, by August 2001, Judge Tennille rendered the key decision in the case.¹⁴ As reported in the *Business Lawyer*, "the litigation's magnitude, the parties' recognition that the business court embodied a trustworthy and capable forum to resolve all of their disputes, and the speed and thoroughness with which the legal issues were addressed established a national identity for [the court]."¹⁵

Four years later, the commission on the Future of the North Carolina Business Court (created by Chief Justice I. Beverly Lake Jr. and chaired by Associate Justice Mark Martin) recommended several changes to the court's operations.¹⁶ In August of 2005, the General Assembly adopted most of these recommendations, passing a bill expanding the business court's

jurisdiction by designating certain types of cases as "mandatory complex business cases" and allocating funds to expand the court into Charlotte and Raleigh.¹⁷

The North Carolina Business Court Today

Today, the business court hears three types of cases: mandatory complex business cases, discretionary complex business cases, and exceptional cases.

Under section 7A-45.4 of the North Carolina General Statutes, any case that involves a material issue related to the law governing corporations, partnerships, limited liability companies, or limited liability partnerships is a mandatory complex business case.¹⁸ Likewise, any case that involves a material issue related to (1) securities law, (2) antitrust law, (3) state trademark and unfair competition law,¹⁹ (4) intellectual property law, or (5) the internet, electronic commerce, or biotechnology is considered a mandatory complex business case.²⁰

Additionally, following legislation enacted earlier this year, the commission's mandatory complex business case jurisdiction has been expanded to include appeals in contested tax cases brought under the provisions of Article 4 of Chapter 150B of the General Statutes, G.S. 150B-43 *et seq.*²¹

The parties to a mandatory complex business case may designate it as such by filing a notice of designation with the superior court in which the case is pending and serving the notice on each opposing party, the chief special superior court judge for complex business cases, and the chief justice.²² Once the chief justice approves a designation, the chief special superior court judge for complex business cases assigns the case to a commission judge.

Cases that are not assigned to the business court as mandatory complex business cases may nevertheless be assigned to the court as either discretionary complex business or exceptional cases. Both types of cases are designated pursuant to the General Rules of Practice. While an exceptional case may be assigned to any special superior court judge, only a business court judge may hear a discretionary complex business case.²³

In contrast to mandatory complex business cases, the chief justice designates a case as either an exceptional or discretionary complex business case based upon the rec-

ommendation of a senior resident superior court judge, a chief district court judge, or a presiding superior court judge, all of whom may make their recommendation *ex mero motu* or on the motion of a party.²⁴ In further contrast to mandatory complex business cases, no set of issues necessarily qualifies a case as either a discretionary complex business or exceptional case; rather, the chief justice, when deciding how to designate a case, considers a variety of factors, including (1) the interests of the parties, (2) the amount and nature of pre-trial discovery and motions, (3) whether the parties voluntarily agree to waive venue for hearing pre-trial motions, (4) the complexity of the evidentiary matters and legal issues involved in the case, and (5) whether designation as a discretionary complex business case or an exceptional case will promote the efficient administration of justice.²⁵

Although the designation "mandatory complex business case" has only existed since January 2006, mandatory complex business cases have quickly come to dominate the business court's docket. Of the 155 active cases before the business court as of November 2007, 93 of them are mandatory complex business cases.²⁶ Furthermore, of the 451 cases assigned to the business court since its inception, 197 have been assigned since January 2006.²⁷

Practice Before the Court

The General Rules of Practice and Procedure for the North Carolina Business Court (the "Business Court Rules")²⁸ apply to every case assigned to the court, regardless of the case's designation as mandatory complex business, discretionary complex business, or exceptional, and "are intended to take advantage of computer-assisted methods of information processing and the transmission of such information by advanced communications equipment"²⁹ The Business Court Rules

and the equipment and methods they enable are intended to provide better access to court information for litigants, counsel, and the public; increase the efficiency and understanding of court personnel, counsel, and witnesses; decrease costs for litigants and others involved in the court system; and facilitate the efficient and effective presentation of evidence in the courtroom.³⁰

While an attorney practicing before the

court should read and understand all of the Business Court Rules, this article will highlight those rules most often overlooked.

Business Court Rule 15

Business Court Rule 15 addresses motion practice before the court. Among other things, the rule sets word limits on the length of briefs and requires that certain motions be accompanied by a brief.

Under Rule 15, all motions must state "with particularity the grounds [for the motion], . . . cite any statute or rule of procedure relied upon and . . . [state] the relief or order sought."³¹ Further, nearly every motion filed in the business court must be accompanied by a *separate* brief;³² the business court will not normally accept a motion that purports to include a brief in its body. Failure to accompany a motion with a separate brief is grounds for the court to summarily deny it.³³

Once a motion and supporting brief have been filed in the business court, the respondent has 20 days after service of the brief supporting the motion (or 30 days if the motion is for summary judgment) to file a response.³⁴ If a respondent does not file a response within the time allotted by the rules, such failure "constitute[s] a waiver of the right thereafter to file such brief or response . . . [and] the motion will be considered and decided as an uncontested motion, and ordinarily will be granted without further notice."³⁵ A reply brief may be filed ten days after service of a response,³⁶ and an addendum to a brief or a suggestion of subsequently decided controlling authority may be filed any time prior to the court's ruling on the motion.³⁷

Business Court Rule 15.8 sets limitations on the length of briefs. Under the rule, "briefs in support of motions and responsive briefs shall be double-spaced and limited in length to a maximum of 7,500 words. Reply briefs shall also be double spaced and may not exceed 3,750 words."³⁸ The word limits contained in Rule 15.8 cannot be enlarged by informal agreement; if the parties need to enlarge those limits, they must file a motion with the court.³⁹ Additionally, any motion to expand the limits contained in Rule 15.8 must be made at least five days before the filing of the brief for which the expansion of word limitations is sought; the Court will deny any requests to expand the limitations contained in Business Court Rule 15.8 that are filed simultaneously with the brief.⁴⁰

One requirement of Business Court Rule 15.8 often overlooked by attorneys is the requirement that every brief filed be accompanied by a certification that it complies with the length limitation of the Rule 15.8.⁴¹ Where the court has entered an order expanding the word limits on a brief, the attorney filing the brief should file a certificate indicating that the brief complies with the word limits set out in the order. While failure to include this certificate will usually only result in a directive from the court that the attorney comply with the rule, the court will strike any brief where the attorney filing it does not, or cannot, make the required certification.

Business Court Rule 17

Business Court Rule 17 sets forth the case management protocols for the court's docket. Under this rule, the parties to a business court case must meet within 30 days of the assignment or designation of a case to the court to discuss the case management issues set out in the Rule.⁴² Within 15 days of the case management meeting, the parties must submit a joint case management report that indicates their positions regarding the case management issues.⁴³ After the parties file the joint case management report, the court will hold a case management conference.⁴⁴ Following the conference, the court will issue a case management order governing all case management issues.⁴⁵

The deadlines under Rule 17 are calculated from the filing date of either the order designating the case a discretionary complex business or exceptional case or the order assigning a mandatory complex business case to a particular business court judge. The three-day period for service under Rule 6 of the North Carolina Rules of Civil Procedure does not apply to the deadlines under Rule 17 of the Business Court Rules; however, if the deadline for filing a joint case management report falls on a weekend or holiday, then the joint case management report is due the following business day.

Unless the parties agree otherwise, counsel for the first plaintiff listed in the complaint is responsible for initiating and scheduling the case management meeting, and preparing and circulating a first draft of the joint case management report.⁴⁶ Moreover, "[i]f the parties disagree on any issues in the Case Management Report, they shall nonetheless file a single Case Management

Report that, in any areas of disagreement, states the views of each party."⁴⁷ Thus, the parties do not have to come to an agreement on all issues in the case management report before filing it with the Court. The parties must, however, submit a *joint* case management report; the court will likely strike any case management report that is submitted unilaterally.

Following submission of the case management report, the court will set a date for the case management conference. Under Rule 17.3, "the Court will convene a Case Management Conference with attendance by counsel for all parties and their clients . . . unless the court shall, in its discretion, excuse the attendance of clients."⁴⁸ Accordingly, an attorney whose case is assigned to the business court should contact the office of the business court judge to whom his case is assigned and determine whether that judge will excuse client attendance at the case management conference.

Business Court Rule 18.6(a)

Business Court Rule 18.6(a) addresses discovery motions. Under that Rule, the court "will not consider motions and objections relating to discovery unless moving counsel files a certificate that, after personal consultation and diligent attempts to resolve differences, the parties are unable to reach an accord."⁴⁹ This certificate must contain "the date of the conference, the names of the participating attorneys, and the specific results achieved."⁵⁰ Simply attaching a string of correspondence to a discovery motion does not satisfy the certification requirement of Rule 18.6(a). Rather, the certificate should be set out on a separate page from the motion and contain a concise, yet detailed, description of the discovery conference. The court will strike any discovery motion that does not include the certificate required by Rule 18.6(a).

Misconceptions Regarding the Court

Although the business court has been in operation for over a decade, there are still some misconceptions regarding its operation.

For example, there is no requirement that parties waive both their right to trial by jury and any objection to venue in Charlotte, Greensboro, or Raleigh as a precondition to transfer of the case to the business court. Nor is there any minimum

amount in controversy requirement for assignment of cases to the court.

Finally, the court does not exist to decide cases in a manner that benefits business. As the Court emphatically noted in *Digital Recorders, Inc. v. McFarland*:

[T]he North Carolina Business Court was created to provide judicial specialization in complex business litigation. Th[e] court's judges do not, however, decide cases based on the prevailing economic winds, nor do [they] consider how best to promote a litigant's business interests. [Their] oath is the same as that of any judge in this state—to apply the law and decide cases without regard to the parties who are before [the court].⁵¹

Conclusion

The business court's website, www.ncbusinesscourt.net, contains a wealth of information about the North Carolina Business Court, including the court's rules, instructions on electronic filing, and an index of business court opinions. The website also contains contact information for each of the court's offices, and the staff at each office is willing and able to answer any question regarding the court. ■

Judge Diaz has served as a special superior court judge for complex business cases since August 2005. Before taking the bench in November 2001, Judge Diaz practiced law with Hunton & Williams and served on active duty as a Marine Corps judge advocate, handling criminal cases at trial and all levels of appeal, including the US Supreme Court, and serving as a military trial and appellate judge. Judge Diaz received his JD from the New York University School of Law, his MSBA from Boston University, and his BS in Economics from the University of Pennsylvania. Judge Diaz's chambers are in Charlotte.

Jordan Sykes served as Judge Diaz's law clerk from August 2006-August 2007. He received his JD from Wake Forest University School of Law and his BA in Economics from Princeton University. Jordan is a litigation associate with Helms Mullis & Wicker, PLLC.

Endnotes

1. Paul C. Ridgeway, *Practice Before the North Carolina Business Court*, Trial Briefs, Oct. 2005, at 5.
2. North Carolina Business Court, History of the Court, www.ncbusinesscourt.net/history.htm (last visited Nov. 2, 2007).
3. *Id.*

4. *Id.*
5. Carrie A. O'Brien, Note, *The North Carolina Business Court: North Carolina's Special Superior Court for Complex Business Cases*, 6 N.C. Banking Inst. 367, 375 (2002).
6. *Id.* at 375-76.
7. *Id.* at 376.
8. North Carolina Business Court, *supra* note 2.
9. *Id.*
10. *Id.*
11. *Id.*
12. O'Brien, *supra* note 5, at 377.
13. Ridgeway, *supra* note 1.
14. *Id.*
15. *Id.* (quoting Mitchell L. Bach & Lee Applebaum, *A History and Creation of Business Courts in the Last Decade*, 60 Bus. Law. 147 (2004)).
16. North Carolina Bar Association, *NC Business Court Announces Expansion*, Nov. 21, 2005, www.ncbar.org/news/1/1107/index.aspx.
17. *Id.* Judge John Jolly serves as the Raleigh Business Court Judge; Judge Tennille now serves as the chief special superior court judge for complex business cases, with chambers in the Elon University School of Law.
18. N.C. Gen. Stat. § 7A-45.4(a)(1) (LEXIS through 2007 legislation).
19. Cases that contain only claims based on unfair competition under section 75-1.1 of the North Carolina General Statutes, however, are not considered mandatory complex business cases. N.C. Gen. Stat. § 7A-45.4(a)(4).
20. N.C. Gen. Stat. § 7A-45.4(a)(2)-(6).
21. For a detailed explanation of this new legislation see Charles B. Neely Jr. & Nancy S. Rendleman, *North Carolina's New Tax Assessment, Refund, and Appeal Procedures*, North Carolina State Bar Journal (December 2007).
22. N.C. Gen. Stat. § 7A-45.4(b). A plaintiff seeking to designate an action as a mandatory complex business case must file the notice contemporaneously with the filing of the complaint. N.C. Gen. Stat. § 7A-45.4(d)(1). A defendant must move to designate within 30 days of receipt of service of the pleading seeking relief from the defendant. N.C. Gen. Stat. § 7A-45.4(d)(3). Any objection to the notice of designation must be filed within 30 days after service of the notice. N.C. Gen. Stat. § 7A-45.4(e).
23. Gen. R. Prac. 2.1(b).
24. Gen. R. Prac. 2.1(a).
25. Gen. R. Prac. 2.1(d).
26. Thirty-six of the active cases are discretionary complex business cases, and 26 are exceptional cases.
27. Although the business court has been assigned at least one case from 52 different counties in North Carolina, the majority of the business court's cases have come from Mecklenburg County (95 cases), Wake County (88 cases), and Guilford County (65 cases).
28. The Business Court Rules were adopted on March 9, 2000, and significantly revised on July 31, 2006. The latest version of the rules is available on the business court's website, www.ncbusinesscourt.net.
29. BCR 1.2 (2006).
30. BCR 1.4. The key to the facilitation of access to case information is the court's electronic filing and

service system.

31. BCR 15.3.
32. BCR 15.2. Motions made orally during a hearing or a trial need not be accompanied by a brief, BCR 15.2, and written motions that do not require a brief are listed in Business Court Rule 15.10. These motions include: (1) discovery motions in which the parties have agreed to the expedited procedures described in Business Court Rule 15.12; (2) motions for an extension of time; (3) motions to continue a pre-trial conference, hearing, or trial; (4) motions to add parties; (5) motions to amend the pleadings; (6) motions to file supplemental pleadings; (7) motions to appoint a next friend or a guardian ad litem; (8) motions for substitution of parties; (9) motions to stay proceedings or enforce judgments; and (10) motions for pro hac vice admission. BCR 15.10. Additionally, some business court judges may not require a separate brief for certain ministerial motions not listed in Business Court Rule 15.10, such as a motion to appoint a commissioner, a motion to expand the word limits under Business Court Rule 15.8, or a consent motion for a protective order.
33. BCR 15.11. When filing a motion, however, attorneys should remember that, under Rule 5(f)(7) of the North Carolina Rules of Civil Procedure, the clerk of court will not accept briefs without an order from the court directing it to do so. Thus, briefs in support of or in opposition to a motion should only be filed on the commission's electronic filing system.
34. BCR 15.6.
35. BCR 15.11.
36. BCR 15.7. The reply brief should be limited to a discussion of matters newly raised in the response, and should not merely restate arguments addressed in the first brief. *Id.*
37. BCR 15.9. A suggestion of subsequently decided controlling authority should contain only the citation to the case relied upon, if published, or a copy of the opinion if the case is unpublished. *Id.*
38. BCR 15.8. Headings, footnotes, quotations, and citations count toward these word limits; the case caption, any tables of contents or authorities, and any required certificates do not. *Id.*
39. *Id.* The court, however, favors concise briefs. *Id.*
40. *Id.*
41. *Id.* The certificate of compliance need not appear in any particular location. It may be placed within a brief, or it may be attached to the brief on a separate page. The certificate may state the exact number of words in the brief, or it may simply state, "I certify that this brief complies with Business Court Rule 15.8."
42. BCR 17.1.
43. BCR 17.2.
44. BCR 17.3.
45. BCR 17.4.
46. BCR 17.1-17.2.
47. BCR 17.2.
48. BCR 17.3.
49. BCR 18.6(a).
50. *Id.*
51. *Digital Recorders, Inc. v. McFarland*, 2007 NCBC 23 74 (NC Super. Ct. June 29, 2007), www.ncbusinesscourt.net/opinions/2007%NCBC%2023.pdf.

Voices of American Law. US Supreme Court Cases Meet the 21st Century

BY LAUREN COLLINS

Christopher Columbus Langdell, former dean of Harvard Law School, is credited with popularizing the case method of teaching law at the end of the 19th century. One hundred years from now, *Voices of American Law* will be named among the initiatives that brought the case method into the 21st century and extended the relevance of this learning tool beyond legal education into legal practice.

At various times in history, teaching the law through the analysis of legal opinions has been given boundless praise and equal criticism. Once again, the arguments regarding the credibility of the case method have picked up recently as the literature regarding human learning styles increasingly shows that people, especially those brought up in the eras of television, personal computers, and the Internet, learn better when multiple senses are stimulated. Rather than argue about its strengths or weaknesses, a project undertaken at the Duke University School of Law expands upon the case method to bring cases alive in a way that would likely soothe objectors at the same time as it supports the belief that a legal opinion can provide a thorough understanding of the law behind the decision. It's all in the presentation.

Voices of American Law provides innovative educational materials to assist those who study the law in their understanding of the Supreme Court and its role in American society. The project was originally conceived as a way to make the case method easier for international students to grasp, introducing American Constitutional Law in a way that was more accessible to those who were newly exposed to the American legal system. Led by Professor Thomas Metzloff and producer Sarah Wood, the series is made up of 12 20-

minute documentary depictions of critical cases, with five more to be completed in the coming year. Each documentary includes interviews with the parties and lawyers who shaped the case. They tell the stories of the real people behind the Court's opinions, making the cases feel more authentic to students learning the law from their analysis of the cases. They can do the same for practitioners using the precedential value of the cases to shape local law and policy.

Gaining a better understanding of the significance of the Court's decisions.

The *Voices* documentaries, which serve as

an extension of the case method, are meant to "get students ready to understand the significance of court decisions," Metzloff says. Several of the cases that have been examined for the *Voices* project are those that Professor Metzloff has taught for years as a Civil Procedure professor, but the documentaries provide something additional. By learning more about the background of a case, Metzloff says, "I came to understand the legal arguments and how they fit together, and what was actually at stake in the case. I figured that if I'm learning something having taught the case 20 times, there's something to it."

Every day, Thomas Van Orden passed a granite monument carved with the Ten Commandments on the grounds of the Texas State Capitol in Austin. Believing that a religious text on government property violated the First Amendment, he sued the state of Texas to have it removed. Through interviews with the people involved, the documentary explores the history and context of the monument, and the story of Van Orden's journey to the US Supreme Court.



Through the project, students have reported gaining a better understanding of the reasons a lawyer takes a case and the commitment a party makes when she decides to fight for a cause. For example, Casey Dwyer, a recent Duke Law grad, was struck by her interaction with David Baugh, an African-American attorney who defended the right of Barry Black, a Virginia Klansman, to burn crosses in *Virginia v. Black*, 538 U.S. 343 (2003).

"My experience on the project has taught me to keep in mind that every case has at least two, and often times many more, sides," says Dwyer. She has carried this realization into her work with a major law firm. "The video's focus on the human elements of the cases has helped remind me that my work as a lawyer has real consequences on real people's lives." Her work on *Voices* has influenced her decision to make pro bono cases a significant part of her work as an attorney.

Marla Zimmerman, also a recent Duke grad, learned first hand about the level of commitment clients challenging what they deem to be personal rights violations have through her interaction with a teen who challenged school drug testing in *Board of Education v. Earls*, 536 U.S. 822 (2002). The encounter has had an impact on her work. "My experience with the *Voices of American Law* project continues to influence my legal career. As a practicing lawyer, I make it a practice to analyze and discover the story behind a legal dispute. I believe that understanding the personal backgrounds and motivations of those involved in a case is just as important as understanding the legal arguments."

Shortly after work on the series began, Professor Metzloff integrated the documentary about *BMW v. Gore*, 517 U.S. 559 (1996) into his Civil Procedure course. As a test of the impact of the project, half of the class viewed the video while the other half did not and the entire class was quizzed. The results were that those who had viewed the video showed a significantly better understanding of the facts of the case and were less swayed by the persuasive stance that the author of the opinion had taken. This indicates *Voices* enhances students' learning of the practical skill of assessing factual situations and applying the law to them. This is an intended goal of Professor Metzloff who believes that "law school is about lawyering." To this end, *Voices* "[gives students an] inde-



Pharmaceutical company, Pfizer, was at the center of the planned redevelopment in Kelo v. New London, which sparked the city of New London's actions to exercise its power of eminent domain. Above are the modern offices of Pfizer's headquarters. Kelo's home is on the back side.

pendent basis to assess the Court's logic and rationale." What attorney preparing to attack unfavorable law could not benefit from that?

Voices of American Law benefits those in practice, too.

But *Voices* does not only benefit law professors and the students they teach. Practicing attorneys with limited time and large case loads can take advantage of the level of analysis given to key Supreme Court cases through the documentary series. Rather than researching news articles and broadcasts from scratch, in addition to reading briefs and pleadings, attorneys can get a better feel for a case and its players through *Voices*. The documentaries reveal the interaction between the lawyers and clients in the cases, says Metzloff. This is most certainly instructive to members of the practicing bar dealing with similar issues and clients.

Having collected additional, candid information about the case, the documentarians present it in a form that is engaging, both in its content and format. *Voices* responds to the current research that overwhelmingly finds people learn better when multiple senses are stimulated. "Most people learn better when they have multiple sources of information," says Wood. "You read the case and you get something out of that. You see the case, and you get something out of that. Because of the way that people learn, you get something visually that you don't get from reading."

Each *Voices of American Law* documen-

tary includes the litigation and a journey through the events leading up to it as well as personal interviews with many of the people involved. As an added bonus, the *Voices* website, www.voicesofamericanlaw.org, includes various documents from each case including pleadings, transcripts, amicus briefs, news articles, and evidence raised in the cases being explored. Thus, the series presents the case in many dimensions.

Examined cases can be important to state litigation or extend beyond daily practice to the creation of policy change.

Though each clip is about a Supreme Court case examining constitutional and federal law issues, the documentaries are often directly relevant to issues likely to arise even in a practice limited to state law. One such example is the issue of takings and eminent domain, examined through a greater look at the decision in *Kelo v. New London*, 545 U.S. 469 (2005). The decision in *Kelo*, in which the Supreme Court upheld economic development takings of unblighted, residential property as an extension of the idea of "public use," caused immediate reactions in states across the country, including North Carolina. A review of the opinion might make it easy for the practitioner to intuit the logic and legal position of a homeowner afraid of losing her land or a government official wishing to sustain a small municipality, but falls short of helping one fully understand the extent of the emotions



Susette Kelo's home.



involved on either side of the controversy.

Beginning shortly after the Court's ruling, and as recently as August 2007, editorials and news stories expressing concern in North Carolina demonstrate that the issues raised in *Kelo* have consistently remained on the agenda of the citizenry and state and local governments beyond the boundaries of New London. A call for legislation protecting North Carolina citizens from eminent domain abuse was made after *Kelo* was decided and news accounts that the General Assembly planned to consider the issue were reported in September of 2005, just months after the Supreme Court released its opinion. Thus, litigation on this issue may be ahead of some North Carolina practitioners, giving rise to a need for better understanding of the Court's decision.

Though the reader knows from the opinion that the city had been declared a "distressed municipality" under state guidelines, mightn't it mean more to a practitioner representing a similar client to know that the city of New London is only one mile by six and was fully developed before the economic development plan considered by the Supreme Court was presented? The opinion clearly points out that increased tax revenue was a goal of the plan but fails to include the fact that property tax was the prime method of raising funds for municipality functions and, before the plan, 56% of the land base in the city was non-taxable.

For one representing a property owner, an attorney may wish to understand the life factors that make one staunchly stand up for her

right to retain her property. Perhaps it makes a difference in asking yourself whether you would have taken Susette

Kelo's case to know that she was recently divorced, returning to the town where she grew up, and that the house she fought so fervently to save was one that she watched sit empty for more than two years before she was able to purchase it and fix it up as her own. One might care to know that Kelo's other neighbors who decided to fight for their homes were older, in their 70s and 80s, and depended on Kelo, as the younger and stronger resident, to help them wage their fight. It might also matter that Kelo was present when one of her neighbors was physically removed from his home, which had been condemned and was subsequently torn down. From her account, one might imagine the responsibility she felt and recall it when a client facing a similar challenge walks through the door.

For those who became lawyers to change the world, consider documentaries about one of the many cases that, according to Wood, were specifically selected to provide insight into the use of litigation to affect policy. These have been cases that involved prominent institutions like the University of Michigan in *Grutter v. Bollinger*, 539 U.S. 982 (2003), and significant legal interest groups like the ACLU in *Earls*. The documentaries study the means by which these institutions position themselves to challenge and change law. No matter

the incentive for sustaining a legal career, *Voices* has a case that will be relevant to one's goals and practice.

The reason that students have as much to gain from the *Voices of American Law* series is clear for Metzloff:

Even the most ardent supporters of the case method recognize that after many months (or years) of the same type of analysis, students can easily become bored or angry with the case method. If the power of the case method can be extended so that the richness of actual disputes can be explored more fully, certainly that is a worthy goal. Documentaries on the "master cases" offer that possibility.

This idea is easily extended to the practicing attorney. It is not a stretch to imagine that practitioners, having studied cases over many years, can become frustrated with the traditional review of case law and are able to benefit from more information and detail to help them understand, embrace, and use legal opinions as precedent in their arguments. That frustration is no longer an obstacle, at least with regard to the 17 pivotal US Supreme Court cases that can now be studied in vivid detail through the *Voices of American Law* series. ■

CONTINUED ON PAGE 38

Book Review—*The Best 90 Years of My Life*

BY ROBERT DICK DOUGLAS JR., REVIEWED BY DAVID BENBOW

As a result of repeated and persistent requests by his friends and family to write his autobiography, Greensboro attorney Dick Douglas has done just that. He recently published *The Best 90 Years of My Life*. It is a fascinating account of a good man who has been blessed and continues to be blessed with love, humor, good health, and a sharp mind.

Douglas' description of his boyhood, growing up in Fisher Park in Greensboro, North Carolina, tells of a time when our parents or grandparents were children. By telling about his life, Dick Douglas gives the reader a glimpse of life growing up in Greensboro in the 1900's and tells something of Greensboro's history and its people. Douglas is adamant that he did not set out to write a history of Greensboro. However, these first chapters alone are reason enough to read this wonderful book.

Life was different when Douglas was a boy. The days were slower. Those were barefoot days, which for Douglas continued on into his high school years. Douglas writes of being barefooted in downtown Greensboro on a cold day and having a stranger buy a pair of shoes for him. When he arrived home, his father saw his new shoes and asked the seven year old Douglas about it. His father, who was a prominent attorney, was mortified. Douglas' father returned the shoes to the shoe store telling the owner to donate the shoes to a charitable organization.

Douglas' Boy Scout adventures include being selected with two other scouts to go on an African safari with world renowned photographers Martin and Osa Johnson. Douglas was only 15. When I was a boy, my father told me stories about his boyhood friend, Dick Douglas, and a night in Africa when Douglas was in the back of pick-up truck with a wire cage around the truck bed. During the night, lions chewed the tires of the truck while

Douglas and the two other scouts listened. I thought this was one my father's tall tales. However, when I later became a Boy Scout, I saw a cartoon depiction of Douglas' adventure in my *Boys' Life* magazine. The cartoon showed the lions and the pick-up truck and Dick Douglas in the back of the truck. I then realized that Douglas was a real life explorer whom my father had known.

In his autobiography, Douglas also writes about being required to keep a journal during his African safari. The scouts' trip was sponsored by Putnam Publishing House. Part of the reason that these three scouts were selected to go to Africa was for their writing ability. The three journals were combined into a best selling book entitled, *Three Boy Scouts in Africa*.

Several years later, Douglas had a similar adventure in Alaska and authored *A Boy Scout in the Grizzly Country*. This Alaskan adventure included exploring volcanoes and hunting whales. Both of these books were authored by Douglas before he had completed his first year of college.

Putnam Publishing House had sponsored Douglas' trips to Africa and Alaska. After Putnam published Douglas' two adventure books, Douglas went on speaking tours to promote the books. It was during this time Douglas met George Putnam, the owner of the publishing company and Putman's wife, who just happened to be Amelia Earhart. Douglas was a guest in their home when he was a college student at Georgetown College. During one of these visits, Earhart took Douglas for a ride aboard her auto gyro. Can you imagine riding with Amelia Earhart in her auto gyro?

Douglas' accounts of his college years and his law school years at Georgetown College in Washington, DC, are also interesting, especially to attorneys. After he graduated from

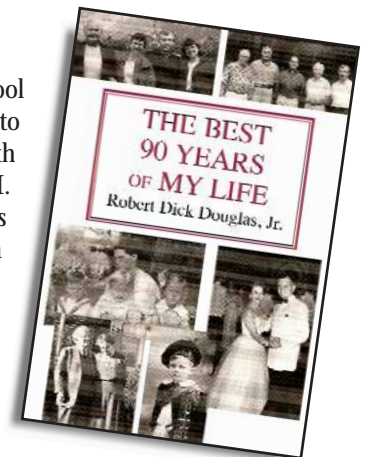
law school he went to work with the FBI. Douglas tells a humorous story about giving J. Edgar Hoover

a cigar as an announcement of the birth of Douglas' first child. Previously, Douglas had secretly followed Hoover to find out where he purchased his cigars. After Hoover left the cigar store Douglas went into the store and asked the salesman for Hoover's favorite cigar. Later, when Douglas handed Hoover the cigar in a glass tube, Hoover asked, "How did you know this is my favorite cigar?" Douglas replied, "Mr. Hoover, I am an FBI agent, and I can find out anything."

After World War II, Douglas began the practice of law in Greensboro in the fall of 1945. He has been practicing law in North Carolina for over 60 years. In his book he tells many stories about interesting cases and characters.

One of the good things about reading this book is that you can call the author at his office in Greensboro five days a week to discuss what it was like to sail off the coast of Alaska hunting whales in 1929, or you can get him to tell you about the time when he shot a lion with a homemade bow and arrow when he was 15 years old.

If you want to read an interesting book about a good man who is living a wonderful life, I highly recommend *The Best 90 Years of My Life*, by Greensboro attorney, Dick Douglas. ■



A Guilford County Legal Dynasty

BY G. STEVENSON CRIHFIELD

It is not unusual for there to be several generations of lawyers in one family in North Carolina. However, in Guilford County there is a remarkable situation regarding the evolution from generation to generation of lawyers and judges.

The Dick-Douglas family stretches back to John McClintock Dick (pictured below) who was born in eastern Guilford County in 1791. His father was a farmer and when John reached manhood, his father offered him the choice of a good farm or a college education. John chose an education and went to the University of North Carolina and then read law and acted as a clerk in a lawyer's office. He obtained his law license and began to practice in Greensboro, where he lived and worked until his death in 1861. During his lifetime he was in the North Carolina Senate on two separate occasions for four terms, and served as a Superior Court Judge from 1835 to 1861.

Judge Dick and his wife Parthenia Williamson Dick reared a large family, one of whom was Robert P. Dick. Robert Paine Dick (pictured above), born in 1823 in

John McClintock Dick



Robert Paine Dick

Greensboro, attended the Caldwell Institute and entered the University of North Carolina in 1840 from which he graduated in 1843. He returned to Greensboro and spent the next two years studying law under his father and George C. Mendenhall. Obtaining his law license in 1845, he began practicing in Wentworth but upon his marriage in 1848 to Mary Eloise Adams, he moved back to Greensboro where he continued to live until his death in 1898.

In 1853 he was appointed United States District Attorney for North Carolina where he continued service until February 1861. He served as a delegate to the National Democratic Convention in Charleston, South Carolina, in 1860. During the Civil War he was a member of the Council of State, and in 1864 he was elected state senator from Guilford County.

On May 29, 1865, he was appointed United States District Judge for North Carolina by President Andrew Johnson, but he declined the appointment. In April 1868 he was elected an associate justice of the State Supreme Court where he continued to serve

until 1872. On June 7, 1872, he was appointed by President Grant to be judge of the United States District Court for the Western District of North Carolina where he served until his death in 1898. In 1878, in conjunction with Superior Court Judge John H. Dillard, he founded the Greensboro Law School, commonly known as the Dick & Dillard Law School.

Judge Dick had a daughter, Jessie Madelyn Dick, and in June 1874 Ms. Dick married Robert Martin Douglas (pictured below). Douglas's father was Stephen A. Douglas, United States Senator from Illinois, candidate for the Democratic party for president, a participant in the famous Lincoln-Douglas debates, and served as a judge in Illinois. Judge Douglas, as he was often called, married Martha Martin, who was the

Robert Martin Douglas



daughter of Robert Martin and the grand-niece of Alexander Martin, first governor of North Carolina under the Constitution. Robert Martin Douglas was born in 1849 and was educated at Georgetown University. After serving as a private secretary to

President Grant, he was appointed United States Marshall for North Carolina until the state was divided into two districts, at which time he became marshall for the Western District. At the expiration of his term of office he studied law, was admitted to the Bar in 1885, and began to practice in Greensboro. In 1896 he was elected associate justice to the Supreme Court of North Carolina. Upon expiration of his term of office he resumed the practice of law in Greensboro, dying in 1917.

The Douglas' had two sons, Robert Dick Douglas and Martin F. Douglas, both of whom became lawyers and practiced in Greensboro. Robert Dick Douglas was educated at Georgetown Law School and was admitted to practice in North Carolina in 1897. In addition to being a practicing lawyer, he served as postmaster of Greensboro, attorney general of North Carolina, and was the author of *Douglas Forms*, an invaluable practice tool for lawyers in North Carolina for many generations. He also served as a trust officer of a bank during the late 20's and early 30's.

On July 23, 1912, Robert Dick Douglas Jr. (pictured above, right) was born, the son of Robert Dick Douglas and Virginia Land

Brown Douglas. Dick, as he is still known at age 95, was educated at Georgetown University and licensed to practice law in 1936. After practicing law for several years, he entered the FBI and continued until 1947, when, at the invitation of his father, he returned to Greensboro and commenced practicing with the firm Douglas & Douglas. In the mid 1950's Thomas P. Ravenel joined the firm, and in 1960 the firm became known as Douglas, Ravenel, Josey & Hardy. The firm continues to practice under the masthead Douglas, Ravenel, Hardy, Crihfield & Hoyle.

Dick Douglas has three children, two girls and a son—Robert Dick Douglas III. Bob, as he is known, was educated at the University of North Carolina and was admitted to the Bar in 1968. He practiced with his father's firm for several years and was selected as one of two assistant public defenders. He served in that position for a number years, then returned to practice in his father's firm where he continues to this date. Thus Bob is the sixth generation of lawyers from this family to have practiced in Guilford County. Rumor has it that Bob's son, Robert Dick Douglas IV, and his daughter, Landy, are both now thinking of practicing law! How long will this go on?

Another family descendant is Martin



Robert Dick Douglas Jr.

Douglas Berry, known as Doug Berry, practicing law in Greensboro. He is a grandson of Martin F. Douglas mentioned above. ■

Steve Crihfield is a State Bar Councilor and member of the State Bar's Publications Committee.

President's Message (cont.)

will face over the next several decades as our population increases. My remarks (in part) on the occasion of the court's birthday event were as follows:

I am honored to bring you greetings from all the lawyers of NC on this special day. Happy birthday to the court of appeals, and thank you to the judges, clerks, and court personnel who have served it over its 40 year history. Their hard work and devotion to duty have established and maintained the court of appeals' reputation as a citadel of judicial excellence in NC and across the country.

It is hard for me to believe that over three decades have passed since my first appearance in this courtroom.

I was in awe then and even more so today because I now know first hand how significant the court's decisions are to the people of NC. Because of the volume and nature of its

docket, the court of appeals speaks regularly through its published opinions to the people of the state about what the law is and what the law means regarding the everyday problems of our people. Such matters as divorce, property settlements, land title issues, business disputes, personal injuries, workers' compensation claims, administrative rulings on governmental decisions, and the jurisprudence of our criminal justice system are its bread and butter. The "green books" in which its opinions are published were few in number when I began to practice, but now number 181. The work of this court provides the intellectual food for thought consumed by the lawyers of our state in deciding how to advise their clients about legal issues that arise each day in all 100 counties of NC.

Today, the population of NC is about twice as large as when the court of appeals was created in 1967. The court itself has grown by more than 100% from its original size of six judges. Needless to say, the work load of the court of appeals will continue to grow and likely require the court to expand again.

The creators of the court of appeals were prophetic in recognizing the need for an intermediate appellate court in NC. Its value has been proven. It is an oracle for the rule of law. I don't know how we could operate without it. I hope that the citizens of NC and their elected representatives will always see that it must be well supported, because it is an essential element of our judicial system for the benefit of all NC citizens.

Like the court of appeals, the State Bar Council is celebrating a birthday in 2008, its 75th. The council and the Bar staff are busy with the regular business of the Bar, and as you can see, we are also working on T-2 (Transition) projects. I think we can be excited about our future while we celebrate our history. ■

Irvin W. Hankins III is a partner with the Charlotte firm of Parker Poe Adams & Bernstein, LLP.

Fiona the Redtail Hawk

BY JUDGE JOE CRAIG

As I've gotten older, I've felt several compelling urges to try new hobbies and experience things that I've dreamed of doing, but something always intervened betwixt the preparation and the fulfillment. Perhaps it's my version of a mid-life crisis; my wife Kari says it was a latent but virulent form of Attention Deficit Disorder that finally took hold of me. Whatever the reason, during the last two years I've become a falconer, or more accurately an "austri-nger"—one who trains and flies hawks (but because no one has ever heard of that term, we'll just stick with the more mundane usage).

During the autumn of 2006, while spending as much time as possible with Fiona, my newly captured wild Redtail hawk, I was holding court in the northwestern counties of Ashe, Alleghany, Wilkes, and Yadkin. Because a daily commute to and from High Point would cut into my available training time, I carried her with me to court in a specially designed travel box and would take her outside for exercise during the lunch break. In the evenings after court ended, we'd pick a suitable flying spot and work on whatever portion of her training to which she'd progressed. Needless to say, the word got out that "Judge Craig's got a hawk with him," and I'd attract a sizeable crowd during some of the training sessions. I even showed her off in my chambers to the court personnel and lawyers. At home, word got back to Steve Crihfield, State Bar councilor for the 18th District and member of the Publications Committee. He approached me about doing an article for the *Journal*. I agreed, but since this topic is extremely tangential to the world of legal affairs, I urged the editors to print it only if they were really hard up for something to print. Well, here it is, so I'm assuming that times must be



Judge Craig in chambers with Fiona, a Redtail hawk.

tough for this formerly august publication. I decided that an "FAQ" format would be best.

What is falconry?

Falconry is the sport of using trained raptors, such as falcons, hawks, or eagles, to catch game animals. It is generally acknowledged to be the world's oldest known sport, with written or pictorial evidence going back over 4,000 years. It got its start in China, spread to the Middle East and Africa, and was particularly popular in Europe during the Medieval and Renaissance periods. Currently in North Carolina, there are approximately 100 licensed falconers; of that number, about half possess birds at any given point.

How did you become interested in the sport of falconry?

I was always fascinated by raptors when I was a boy. When my aunt, an elementary schoolteacher in the foothills of North Carolina, gave me a taxidermy mount of a

juvenile Redtail hawk that one of her students had donated to her class, I gazed upon that hawk every day as it sat on the dresser in my room and I dreamed of owning a live hawk. Forty years later, when I turned 50 in late 2005, I happened to read a magazine article on falconry. I said to myself, "Old Man, if you're ever going to try this, you'd better hurry up!" I did a Google search for "falconry in NC," and the "North Carolina Falconers' Guild" turned up. I emailed the president, Larry Dickerson, who lives in Statesville, and asked if I could accompany him on a hunt. He graciously agreed, and from the last weekend in 2005 until the falconry season ended in late February 2006, we went squirrel hunting with his Redtail every Saturday, weather permitting. I was thoroughly hooked. The beauty, athleticism, and courage of these birds are remarkable. It's like having a little feathered fighter plane on your wrist!

What does it take to become a falconer?

Birds of prey are protected species under

federal law, and the sport is highly regulated. From the very beginning, every falconer I spoke with emphasized that obtaining one's apprentice falconry license was a long, time-consuming process that required lots of preparation. Then, once I had a hawk in my possession, daily care, training, and interaction with the hawk was compulsory. So I went into this pastime with my eyes open. I first had to find a sponsor, who must be a licensed general or master falconer. Larry Dickerson graciously agreed to carry this burden. Then I had to study for a federal examination, administered by the NC Wildlife Commission. I passed the exam in April 2006. Next, I began building my aviary, or "mews," which again had to meet certain federal regulatory specifications. I completed the construction of my mews in July 2006 and a NC Wildlife Commission biologist traveled from Raleigh to High Point to inspect it. When I passed that hurdle, the commission sent my application to the US Fish and Wildlife Service. In August, I was the proud owner of a permit from the US government that allowed me, now an official apprentice falconer, to trap and possess one wild juvenile hawk (known as a "passage" hawk).

As an apprentice falconer, what species of raptor can you possess?

One juvenile wild Redtail hawk, Red-shouldered hawk, Broad-winged hawk, or American Kestrel.

Why did you choose a Redtail hawk?

Redtails are plentiful, versatile, relatively easy to train, highly intelligent, and relatively docile. (I emphasize the word *relatively*, dealing with a wild critter wearing a perpetually indignant expression and armed with rapier-sharp beak and talons ain't a piece of cake.) I wanted it to be large enough to handle the primary species of prey I planned to hunt: cottontail rabbits and squirrels. Redtails are the most common species trained by apprentices, so there's plenty of instructional literature on how to train them. I've also learned they are very forgiving of rookie mistakes and don't hold grudges, despite having phenomenal memories. Fiona has met every one of my expectations; although she has her occasional "moments," she is a gentle and tolerant sweetheart of a bird.

How and where did you capture her?

On Labor Day, September 4, 2006 (the

first day my trapping permit allowed me to start looking), my sponsor, Larry, took me to the area surrounding the Piedmont Triad International Airport and we trapped her near the I-40/Highway 68 interchange. He had a domed cage made of wire mesh and he placed a live gerbil inside.

On the outside of the cage were about 100 loops of monofilament fishing line, tied into little nooses. We drove around looking for juvenile Redtail hawks (born the previous spring), which typically perch in dead trees or power poles, surveying the immediate area for rodents. "Juvies" are easily identified and distinguished from the adult. Even though they are full-sized at four to five months, they don't possess the characteristic red tail feathers (actually burnt orange in color) until they molt their feathers after their first birthday. Fiona was atop a power pole, and as we drove by, we tossed out the cage. It took her about 20 minutes, but she finally sailed down to check out the gerbil. She got her talons entangled in the nooses, and we moved in, throwing a blanket over her to calm her. We then undid the nooses and took her home! (And no gerbils were harmed.)

How big is she?

When Fiona was trapped, she weighed slightly over three pounds. She stands about 22 inches tall and has a wingspan in excess of 45 inches. She can exert 250 pounds per square inch of pressure with her talons and her beak can crack open a squirrel skull. The female Redtail is approximately one-third larger than the male of the species. She's a big ol' gal, all right. But really, she's a sweetheart around people. Just don't let her see the family Chihuahua.

How do you train a wild hawk?

The training starts immediately after you



Fiona in her second hunting season with mature plumage.

get her to her mews. Before the blanket is lifted, she is fitted with leather gauntlets and two long straps called jesses. A length of braided rope is clipped to the jesses, and when she is released, she is held firmly by the jesses, using a heavy leather glove. The first 48 hours or so, I spent as much time with her as I possibly could, sitting with her in a quiet, dark place, talking to her and calming her. Fiona was terrified, as I'm sure it seemed to her that she'd been captured by space aliens and taken to the mother ship! She was never aggressive, but every time I came around, she kept her mouth open and her feathers puffed up, much like a cornered cat. The next major step was to get her to avert her eyes from me momentarily and bend over to take food from my glove. As I gained her trust, we progressed to getting her to hop to my fist to take food, then to flying across the room. All this time, I was bringing her weight down from her trapped weight of 49.5 ounces to around 41 to 42 ounces. After a couple of weeks of daily work, her weight had dropped to the point where she was totally focused on me as her source of food. I tied her to a light tether and we went outdoors for the first time. Eventually, she was flying approximately 100 feet to me while tethered. Then we began free flights; she learned to follow me around the neighborhood like a flying dog, coming to my fist to accept a tidbit of meat every time I blew a special whistle. We eventually progressed to hunting flights in the country. The first few months I had her, I took her to court with

me often, and now she is thoroughly used to large crowds of people. So far, she has visited seven courthouses.

What do you feed her?

I give her a varied diet: mice, squirrel, rabbit, chicken necks, dove breasts, goose meat, pheasant, and venison are among the meats she enjoys. The meat doesn't have to be live, but it must be fresh. I keep a freezer full of dead critters and thaw them out one at a time. Now that she's actively hunting, she gets to eat the squirrels she catches. I have to be careful not to let her eat too much or else her weight balloons to the point that she won't respond to me and I can't fly her. With a full craw, she would likely ignore me and fly off, never to return!

How often do you hunt with her?

During falconry's hunting season (October 15 - February 28), I try to average around three times per week, but this varies depending on my schedule and the weather. During the 2006 Christmas holidays, we were lucky enough to fly almost every day.

If you can't hunt on Sundays and you're holding court during the week, how can you average three times per week?

Lawyers and DA's don't like me to hold court after 3:00 on Friday afternoons. Then there's all day Saturday. And why do you think we don't open superior court until 10:00 on Monday mornings? It's a vestige of the old days, when all superior court judges had hawks or falcons on their wrists as they "rode the circuit" from courthouse to courthouse. Don't be so nosy.

What has she caught and killed?

So far, she's tallied ten squirrels and a rabbit. She's capable of taking quail and pheasant, and even ducks, while geese or turkeys would probably be too large and heavy to subdue. Cats and small dogs often pique her curiosity, and so I have to be careful in that regard. Infants and small children do not interest her.

Isn't falconry a blood sport like cock-fighting or dog fighting?

No. While it does involve the capture and killing of small animals, I am merely opening a window and entering the natural world of the hawk, where killing for food is essential for survival. Fiona would be catching rabbits, squirrels, and other rodents on her own in the wild, and she has come to view me as a trusted partner who helps her find prey. The so-called "blood sports" pit animals of the same species against each other in fights to the death while people place bets on the combatants; falconry isn't about competition or winning, and it certainly doesn't involve "hawk vs. hawk" fights. It's about building an intimate relationship with a wild animal, which allows me to experience the thrill of observing and assisting one of the most beautiful and deadly aerial creatures as it flies about in search of prey.

How long do Redtail hawks live and will you eventually breed her?

In captivity, they can live 15 to 20 years. In the wild, it would be unusual for a Redtail to live more than five to seven years. Although Redtails have few natural predators, it's a tough life out there: poor hunting or flying ability, damage to feathers while hunting, injuries, disease, a natural decline in the available food population, extreme weather conditions, loss of habitat, collisions with cars, and electrocutions from transformers all take their toll. A surprising but well-documented statistic on Redtail mortality is that 75% of first-year hawks do not make it to their first birthday. So in a very real sense, I'm granting Fiona a reprieve by removing her from this grim statistical scenario.

I do not plan to breed her because the regulations make it tough to attempt this with wild Redtails; besides, they're so plentiful that it's much easier just to go out and trap another rather than putting oneself through the time-consuming ordeal of breeding and raising raptors, with no assurance of success.

Do you plan to keep her after the hunting season, and if so, how long?

After February 28, when the falconry

hunting season officially ends, the birds are traditionally put up in their mews and fed back up to their original "trapped weight" to ensure sufficient nutrition for them to shed and re-grow their feathers successfully ("the molt"). Throughout mid-spring to late summer of 2007, Fiona gradually shed all of her old feathers and new ones grew in. I reacquainted her with the routines of hunting and slowly brought her weight back down to around her "flying weight" of 41 ounces so that she was ready to hunt again by early November 2007. At virtually any time, I have the option of feeding her a big meal, taking off her leather gauntlets and jesses, and setting her free. She'll go right back to being a wild hawk, but as a much-improved hunter for squirrels and rabbits. Since they are so readily available as menu items, she'll never go hungry. Such an option nearly became a necessity when I broke my leg on December 17, 2007, during an outing with Fiona. Fortunately, Larry agreed to keep her until I recovered.

As a result of our abbreviated 2007-08 hunting season, I'll probably "redshirt" her, keeping her through the molt and hunting with her at least one more season this autumn; but a large part of the fun of this sport is training a wild juvenile hawk to let you be her hunting companion. I'll most likely let her go and trap another young Redtail in 2009, beginning the process all over again.

How long do you plan to be a falconer?

Fiona has captured my heart to such an extent that my wife Kari calls her "The Other Woman." As long as Kari will let me, and as long as I'm physically able to run around in the dense woods and briar thickets, I intend to stay involved in this captivating pastime. Got a patch of mature hardwoods or some overgrown fields in the Piedmont? Give me a call between October and February, and let's go hawkin'! ■

Judge Craig is the resident superior court judge for District 18-B, Guilford County, in High Point. He was in private practice for 20 years before being elected to the bench in 2002.

American Voices (cont.)

Lauren M. Collins is head of Reference

Services at Duke University Law Library. She received a Master of Science in Information from the University of Michigan in 2003 and her JD from the University of North Carolina in

1994. She has practiced employment law in North Carolina and Michigan and provided anti-harassment training to union employees for a national law firm.

A Ghost Story

BY BLANEY E. HINES

"I want to tell you a story," I said.
My wife looked up from her plate of spaghetti. "What?" she said.

"A story. I want to tell you a story about why I've decided I'm not going to quit."

Sharon put her fork down on her plate and give me the *here we go again* look. "Is that all we are ever going to talk about for the rest of our lives?" she said. "You do realize that is all we talk about, don't you?"

I pushed the plate of food in front of me away. "Not any more," I said.

"And not eating either, this must be serious," Sharon said.

"A ghost came into my office today," I said. "That's why I'm not going to quit...."

Sharon was right. Quitting was just about the only thing we had talked about for the last three months. At least, it was all I ever talked about. And I had been thinking about it a lot longer than that. I had had enough. It was time to do something else.

It's not that there wasn't enough time in a day; after ten years I was over the idea that, as a legal aid attorney, I was sent into the world to save every soul languishing below the federal poverty guidelines. I could pack up my sword and shield most days and go home after the obligatory eight hours, and on weekends I drank my beer without too many glances back toward the files piled up on my desk at the office. That wasn't it.

It was the client who filed a complaint with the Bar because I refused to put up a trial witness who told me he was going to lie—he owed my client a favor, he said. It was the client who left my office in a screaming rage because I told her that she wasn't going to get \$500 a month in child support from a father who made seven dollars an hour. It was the person who ripped the rearview mirrors off my

car, and let the air out of the tires, in the courthouse parking lot during an even nastier than usual child custody hearing. It was . . .

Well, multiply them all by a factor of about ten. I had had enough. It was time to move on; it was time to quit. . . .

"A ghost?" Sharon said.

"Yes," I said. "A ghost."

Sharon stood up from the table.

"Don't get up," I said. "I mean it, I saw a ghost."

Sharon picked up her plate and took it into the kitchen. "I'm listening," she said.

I didn't say anything. Sharon came back to the table. She looked at me; she stood there for a second, looking, standing behind her chair. "What is it?" she said.

"Sit down - please."

She sat down.

"Her name was Dolly Blanchard. She's dead. Died ten years ago. She walked into my office today," I said.

"Eliot—?"

"I know, I know. It's crazy. Just let me finish."

"Okay," Sharon said. "Like I said, I'm listening."

I started again, "There was a difference between Dolly Blanchard and her ghost though. The ghost had all her teeth. Dolly was missing most of hers. When she smiled, there were holes in her face, that's one of the things I remember about her.

"And the ghost was younger, too, about ten years, I'd say. But it was her all right. Right down to the way Dolly always hung her head and looked at the floor when she talked to you."

I stopped to see if Sharon would say anything or show any response on her face. She didn't, so I went on. . . .

"It actually scared me a little, at first. The

The Results Are In!

In 2007 the Publications Committee of the State Bar sponsored its Fourth Annual Fiction Writing Competition. Ten submissions were received and judged by a panel of six committee members. A submission that earned second prize is published in this edition of the *Journal*. The first place story will appear in the next edition of the *Journal*.

ghost sat in the chair across from my desk and I could close my eyes and hear Dolly's voice clear as day. The voice was exactly the same. The same way of talking.

"You see, Dolly never finished a sentence. She always had her head down, looking at the floor, and she always stopped somewhere in the middle of what she was saying; sometimes she actually got close to the end before she stopped, but she always stopped somewhere and then she would look straight at you. It was like a plea; *please understand, please make it make sense, please help me*.

"And her ghost did exactly the same thing. That's why I know who it really was," I said.

"Who it *really* was?" Sharon said.

"Yes. Oh, she was disguised, all right, but I know who she was."

"Eliot—?"

"Oh, don't worry. I'm not losing it. You'll see," I said. "You'll see."

"You're confusing me," Sharon said. "You said the ghost was ten years younger, so how could it be—?"

"Her daughter. The ghost said she was Dolly's daughter. I mean, it was Dolly's daughter, but Dolly was there too—that's what I mean."

"Oh," Sharon said, softly. "What did she, or *they*, want?"

"She wanted to know what happened when Dolly was my client ten years ago."

"Who?"

"The daughter."

"Couldn't Dolly the ghost tell her that?" Sharon said.

"Sharon, don't be a smartass," I said. "Let me tell my story."

"Sorry. Go on. I don't suppose you can tell me about it, about Dolly's case?" Sharon said.

"No."

"Did you tell her? The daughter?"

"Yes. Maybe I shouldn't have. But her mamma is dead, so I did. Besides, Dolly was right there with her. I could swear she was. So I told her. . . ."

"They're not going to let you see the kid," I said.

Dolly looked at me; she looked at my face as if she was searching it for some meaning beyond the words.

"I'm sorry," I said. I put out my cigarette and lit another one right behind it. Dolly was, as usual, passive and uncomprehending on the surface, but the tension in the air between us told me that a lot was going on behind that catatonic face. She looked down at the ground again. People walked around us, going in and out of the courthouse.

"I know," Dolly said. "It ain't like I don't know. I know I can't be her momma."

Dolly was a drunk. A bad drunk. She stayed drunk for five years. Her daughter was seven, and she hadn't seen her since she was four.

"Can't you tell them I don't want to take her away? Can't you tell them that? I know I ain't fit—I just want to see her. Just once in a while. I can't be her mamma. But can't they let me see her once in a while? She don't have to be alone with me." There were tears in Dolly's eyes.

And Dolly tried to kill herself, too. Twice. The second time she tried it with a shotgun. But she was drunk and the shotgun went off next to her ear, making her deaf in that ear, instead of taking her head off.

"I know I ain't fit," Dolly said.

Once Dolly sat in my office for half-an-hour and cried. She sat in the chair across from my desk and hugged herself, and shook with crying. I left her there. When she was done, I brought her a cup of coffee.

"I'll try," I told her. "I'll try."

We tried for a year. The court ordered evaluations. The evaluations took nine months. We

went to court at least five times. Motions for this, motions for that. Dolly saw her daughter once, for 20 minutes, supervised by the Department of Social Services.

"I don't think we can agree on any more visitation. I'm sorry, Mr. Davis," was all the father's lawyer would say. And when he said it, the father's whole clan looked on with sullen hatred. They smiled when Dolly and I slunk away.

So finally, we were going to fight it out. Have our day in court. I told Dolly that the best we could hope for would be supervised visits with the child. I know Dolly lived for that small hope. Now, the day of battle was here.

But, Dolly dropped dead. I went to court on the day of the trial and the bailiff took me aside and told me they found my client dead in her trailer, the TV blaring away with reruns of *Happy Days*.

"What killed her?"

"Don't know yet."

I left the courthouse, and all I could see was Dolly sitting in my office, hugging herself, and crying. . . .

"She wanted to know what happened. She's 17 years old now. So, I told her," I said.

"The ghost?" Sharon said.

"Her daughter."

"You keep confusing me," Sharon said. "Who are we talking about? Dolly or her daughter? Please make up your mind."

"I haven't got it all figured out myself yet," I said. "It was her daughter, but Dolly was there too. I could see Dolly in her daughter's eyes. Anyway, her daughter looks just like her now, except for all the missing teeth. And, like I said, she had the same way of looking down when she talked, and, if I closed my eyes, it was the same voice."

"What did she say? The daughter, I mean?" Sharon said.

"Since the girl wasn't a client, maybe I can tell you at least that . . ."

"You don't know me," the girl said.

"Yes, I do," I said.

The girl, sitting in the chair in front of my desk, the same chair where ten years before her mother sat and cried, looked at me, surprise showing in her eyes.

"You look just like your mother," I said.

"You remember?"

"I remember," I said.

"That's why I come," she said.

"I'm not sure I understand," I said.

"They told me my momma was bad, that she was no good."

I didn't say anything.

"They said she didn't care nothing about me."

That's when I really did see Dolly Blanchard. Her daughter morphed, melted, and reformed into her mother—sitting in front of my desk again. It was only for a second, maybe the time it took my heart to beat three or four times, but it was there. When it was gone, when Dolly was gone, I saw her daughter again, still talking. . . .

"They lied to me," she said.

"Yes, they lied to you," I said.

"She come here, didn't she?"

Tears were streaming down the girl's face.

"Yes," I said.

"She come here because she wanted you to help her, didn't she?"

"Yes, she did."

"She wanted to see me."

"Yes."

"You tried to get visitation."

"Yes."

I left the girl for a while. I let her cry. Then, after a few minutes, I brought her a cup of coffee.

"I tried," I said. "I tried."

"Thank you," she said. . . .

"So, you see, Dolly was there, with her daughter. They were together, in my office. A ghost. . . ." My voice trailed away.

"Yes," Sharon said. "And you're not going to quit now."

"No."

We were quiet then, sitting at our dining room table. We were quiet for a long time. Then Sharon smiled at me. "Eat your spaghetti," she said. ■

Gene Hines is an attorney with the Asheville office of Legal Aid of North Carolina and primarily represents clients in child custody and unemployment benefits matters. His stories have appeared in various small press literary journals, and one story has been nominated for a Pushcart Prize. He currently has one completed novel looking for an agent and is suffering the joys and agonies of writing a second.