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IN THIS ISSUE

Addressing the Advocacy Gap—

Medicaid Recipients Filing for Medicaid Benefits

By Ann Shy

First the good news…

There are several particularly good things about Medicaid in North Carolina. For one, we have traditionally had some of the highest reimbursement rates in the country for healthcare providers serving Medicaid recipients.[1] That translates into more providers and better access to services for recipients. Another highlight is that the state has implemented a mediation program[2] whereby roughly 80% of all claims brought for Medicaid benefits by recipients are resolved through mediation, eliminating the need for an administrative hearing before an administrative law judge.[3] Approximately ten percent of claims are dismissed, either because of post-mediation settlement or because the party dropped the case (for reasons not examined here). For those recipients who proceed to a hearing, due process procedures were improved in 2009 which greatly increase efficiency for all parties.[4] Protracted litigation is not the model here. Finally, because our state has a large number of Medicaid recipients, many are well-served by these advantages.[5] These benefits aren't just nice, they're significant.

The not-so-good news…

What happens to Medicaid recipients whose problems aren't resolved in mediation? Fortunately, the process is efficient thanks to the recent legislation that condenses the timelines.[6] Resolving problems quickly is beneficial for all. The petitioner's time is no longer tied up in the dispute, and Medicaid, which must continue paying for disputed services throughout the hearing process, can stop paying an invalid claim if that's the case.[7] An expedited process reduces expenses from all sides. However, recipients rarely have legal representation at the hearing, so the *pro se* litigant faces off with the Attorney General's Office. To further complicate matters for the *pro se* Medicaid recipient, the administrative law judge's decisions are reviewed by the Department of Health and Human Services (DHHS), home to the Medicaid Agency. This is analogous to courtroom defendants having the power to overturn judges who rule against them. Technically, the Medicaid Agency can only reject the administrative law judge's ruling if the findings of fact are clearly contrary to the evidence presented in the hearing. This may seem like a limitation on the Medicaid Agency's power to overturn decisions; however, 81% of all decisions that favor the recipient have been overturned pursuant to Medicaid's power to render the final agency decision, and no decisions favoring Medicaid have been overturned. This suggests that either administrative law judges are prone to error in their decisions for recipients while correct at all times in their decisions for Medicaid,[8] or that *pro se* litigants are rarely capable of navigating the hearing in a way that will survive final agency review. The former explanation is unlikely, thus highlighting the critical need for advocacy for recipients during the hearing. A more detailed record from the hearing could offer greater protection of recipients' cases during final agency review. This simple fact to the legal profession may be entirely lost upon others, including Medicaid recipients claiming benefits rights.

After the Medicaid Agency overturns the administrative law judge's decision, the recipient can appeal in superior court for *de novo* review, again underscoring the need for a thorough record from the administrative hearing. In practice, recipients rarely have the resources to appeal. For those that do, the process comes to a screeching halt due to extremely overcrowded dockets. Of note, Medicaid stops paying for the disputed benefit once it renders its final agency decision unless the superior court grants a stay. I was recently told that a Medicaid case filed for appeal in mid-July 2009, and fully briefed back in September, was not argued until early February 2010. The wait time between that final agency decision and the appeal in superior court (seven months) was longer than the five month lifespan of a Medicaid denial running the full gamut of mediation, hearing, agency review, and filing an appeal.

Children can become Medicaid ineligible by turning 18 or 19 years old. A stalled appeal could render a claim moot if the petitioner becomes ineligible for the benefit due to age while waiting for the appeal process to run its course.[9] Worse still, the long-term effects of untreated and under-treated physical and mental health problems can extend and exac-

erbate long into adulthood. Put bluntly, there is bigger bang for the buck in healthcare dollars spent on children, and worse outcomes for longer periods when services are denied to young patients in need. This result underscores how the burden is not only on the individual family, but also eventually escalates into a burden on the state as a whole.

The best news yet…

One solution has been identified that could foster improvement beyond what's already in place. A group of legal professionals from law schools, from the judiciary, and practitioners recently discussed how post-mediation claimants fall through the cracks. The group crafted a fresh approach to expand the already notable success of North Carolina's response to handling claims against Medicaid.

Here's how it could work…

North Carolina is home to seven law schools and 24 Legal Aid of NC offices. Rather than a single law school developing a Medicaid law clinic, the group envisioned a network model that coordinates existing resources. Each law school would work on an ongoing basis with a particular set of Legal Aid offices in which the school's externship coordinator would place its externs. For example, if all seven schools participated in the network, each school would develop a placement relationship with three or four Legal Aid offices. First, externs would undergo a one-week substantive training on Medicaid procedure and appeals, then take those Medicaid-specific skills to the Legal Aid office. Externs would be assigned clients at whatever stage in the continuum claimants are in (i.e., pre-mediation, negotiation, hearing, appeal). A network coordinator would oversee the system, working closely with schools, Legal Aid, and trainers to ensure that academic requirements are met, court schedules are kept, clients are reached, cases are handed off smoothly between students, and attorney-to-student practice ratios are satisfied.

Why bother?

1. ***Legal Advocacy for Medicaid Recipients:*** A clear need has been identified. Medicaid recipients are already medically and economically burdened. The additional burden of navigating alone through the legal process is frequently too great despite the best efforts of the current system to assist them.

2. ***Improved Due Process:*** Petitioners are further disadvantaged by a system whereby final agency decisions overturn the vast majority of administrative law judge decisions favoring recipients. Without adequate legal representation, this routine practice may continue, creating an unfortunate appearance of bias. Further, the hearing record is often insufficient for adequate *de novo* review in superior court for those few petitioners who pursue an appeal.

3. ***Clinical Opportunity for Law Students:*** Students would have the opportunity to handle actual cases with attorney guidance and supervision. A single case can span alternative dispute resolution, an administrative hearing, and superior court review. With teleconferencing, these future lawyers would get early exposure to bringing geographically distant parties together through technology. Students would be exposed to public interest practice, health law, discovery with the Attorney General's Office, advocacy before administrative law judges and potentially in superior court.

4. ***Economic Benefit for Medicaid Agency:*** A coordinated network that manages claims for Medicaid benefits would further decrease the financial burden on Medicaid to continue paying for disputed services throughout the mediation, hearing, and review process by enhanced efficiency of process. Additional cost savings could occur for Medicaid if a formal network of legal expertise could eliminate the burden on Medicaid to train recipients (over 1.5 million in NC) on the hearing process. The October 2009 DHHS legislative report describes Medicaid's intent to provide due process training for providers and recipients, and its inability as of 2009 to provide that training to recipients.[10]

5. ***Benefit to Attorney General's Office:*** The Attorney General's Office could streamline its pre-hearing communication directly to the extern rather than juggle communications with the parent, healthcare provider, and any other party acting in a supportive role in the child's case.

6. ***Benefit to the State:*** The number of North Carolinians on Medicaid is increasing. The economic downturn, lack of employment growth, and health insurance reform appear to suggest an increase in eligible applicants beyond the normal trajectory.[11] Setting up a network of expertise in existing Legal Aid offices to handle claims now while the numbers are still manageable can mitigate future dispute backlog.

This network model proposes a response that goes beyond fractional progress. By involving as many law schools and Legal Aid offices as are willing to participate, the burden does not fall on a single institution to build a clinic or secure a niche, and the educational opportunity is spread to each participating institution. According to 2009 statistics, as many as 300 hearing claims are filed each month. That represents substantial opportunity to get lawyers-in-training involved in pre-mediation preparation (in the interest of keeping the mediations straightforward, attorneys do not participate in the mediations). About 20% of claims are not resolved in mediation—that's about 60 cases a month where negotiations might be appropriate. Roughly 30 of those claims are set for hearing, and decisions that favor the recipient (about one third) would be overturned if the trend continues, leaving about ten cases a month to be briefed for superior court if appropriate. These numbers will grow as more families qualify for Medicaid.

It would be unreasonable to pursue benefits for everyone with a claim. The good news is that the goal discussed here is to secure benefits for those who rightly qualify but lack the legal resources to work their way through the system that lies beyond mediation. This is not a proposal to increase Medicaid spending. It is a proposal to accurately spend according to recipients' benefit rights.

Disputes around claims and benefits are often the result of miscommunication, misplaced paperwork, or inattention to detail between the parties. Mediation has proved to be the right remedy to address these problems. The result is increased assurance that services are being correctly delivered or correctly denied, as the case may be. Unfortunately, for those who pursue a claim against Medicaid, existing statistics suggest that even if they win at the hearing, the agency is very likely to overturn the decision. While the right to an appeal in superior court exists, going *pro se*, hiring an attorney, or securing *pro bono* help may be far-fetched for an already medically-burdened child living in poverty. A network approach that systematically places trained, supervised externs in the community on an ongoing basis to provide advocacy at each stage of every recipient's legal journey with Medicaid is certainly possible. ■

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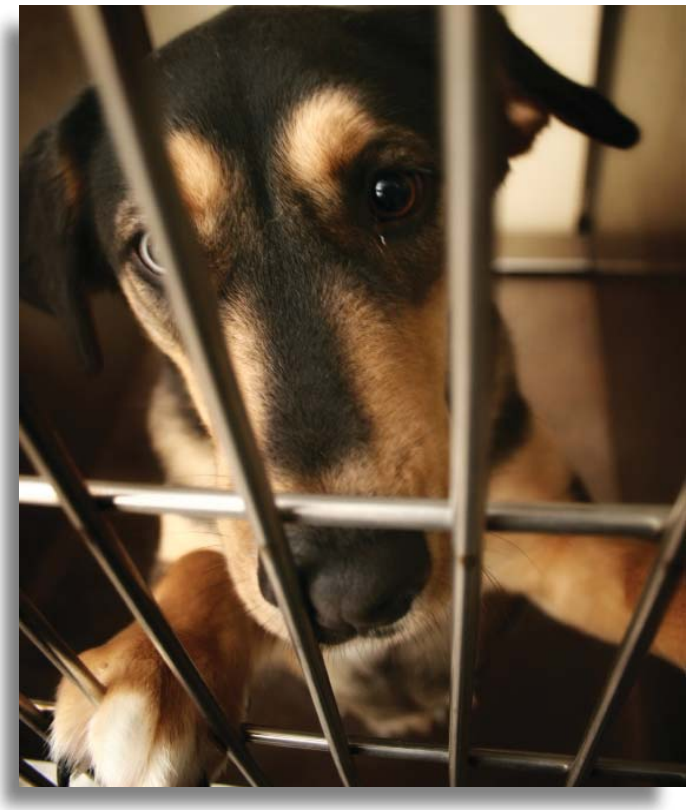
Recent Developments in North Carolina Animal Law

By Calley Gerber and William Reppy Jr.

Animal law continues to be a controversial and changing area in North Carolina. In 2009, an unprecedented number of bills addressing animal issues were filed in the General Assembly. The most significant recent[1] developments in the evolution of animal law in North Carolina arise out of amendments to core statutes by the General Assembly plus its enactment of a new law, and out of new or amended city and county ordinances. At least two packages of administrative rules impacting animals are worthy of note, along with a few judicial decisions.



Cruelty to Animals

The state's primary animal cruelty statute, G.S. 14-360, was amended in 2007 to make malicious killing of an animal by depriving it of sustenance a class A1 misdemeanor,[2] following affirmance in 2004 of a cruelty conviction based on evidence that dogs had been intentionally starved.[3] In 2005, cockfighting was upgraded from a class 2 misdemeanor to a class I felony.[4]

In 1893, the Supreme Court held that conducting a pigeon shoot violated the state's criminal animal cruelty statute,[5] but a century later, the statue having been substantially rewritten, a pigeon-shoot operator sought a declaratory judgment that the statute, as applied to the activities he wished to conduct, was unconstitutionally vague.[6] One of G.S.14-360's exemptions related to birds subject to hunting, but this did not extend to birds the Wildlife Resources Commission classified as not "wild birds," which by a rule of the commission included "the domestic pigeon (Columba livia)." The court of appeals agreed with the plaintiff that—because of use of the word "domestic"—the statute as applied resulted in a

denial of due process for failing to advise whether it removed from the statutory exemption feral pigeons that the plaintiff might use in a pigeon shoot.[7] The commission responded by deleting from its rule the word "domestic."[8]

It is generally believed that pigeon shoots are now as illegal as they were in 1893.

Since 1969, legislation unique to North Carolina[9] has granted private citizens and organizations standing to enjoin the same kind of animal cruelty that can be prosecuted criminally.[10] These are often referred to as "19A suits." In 2007, the court of appeals rejected the contention that granting standing to a person who had suffered no injury was unconstitutional under of the state constitution's provision that there exists "but one form of action for the enforcement or protection of private rights...."[11]

In 2003 and 2006,[12] the General Assembly amended the citizen-standing act to:

- clarify that cities and counties can be plaintiffs;
- authorize the court to appoint the plaintiff as custodian for animals at issue, with authority to provide them veterinary care and place them in foster homes;
- authorize the court to tax as costs the defendant owes the plaintiff sums spent by the plaintiff caring for the animals at issue;
- empower the court to terminate the defendant's ownership of the animals and vest ownership in the plaintiff or other suitable successor owner; and
- permit the court to enjoin the defendant from acquiring new animals for a specified period of time.

In recent years, over a dozen jurisdictions in North Carolina have passed anti-tethering ordinances to regulate or entirely ban the chaining of dogs while unattended. Some jurisdictions, such as New Hanover County, have completely banned tethering dogs while unattended.[13] Other jurisdictions, such as the City of Raleigh, have placed restrictions on tethering. Under the Raleigh ordinance, a dog cannot be tied outdoors for more than three hours in any 24-hour period and any device used for tethering must be at least ten feet long, attached in a manner to prevent strangulation or entanglement.[14]

Crimes Involving Dogs

Fleeing from policemen, a suspect ran into his sister's backyard and stationed himself behind his sister's German Shepherd mix. When an officer approached, the suspect pushed the dog at the officer, called the dog by name, and said "bite him."[15] After tackling the suspect, the officer was bitten by the dog, who later bit another officer. The suspect was convicted of assault with a deadly weapon, the dog, and appealed on the ground of insufficiency of the evidence. Over the dissent of Judge Elmore, who stressed that the appellant did not own the dog and that the animal was not large in comparison to the police officers, the appellate court affirmed.

But a Wake County trial court in 2010 held the precedent—the defendant there, also charged with assault with a deadly weapon, had let run without restraint two pit bulls he owned, which attacked a child.[16] Dismissing the charge, the superior court focused on the absence of evidence that the defendant intended the dogs to attack their victim.

With rising attention to dog bites, several North Carolina jurisdictions have responded by enacting bans on certain breeds. The North Carolina General Statutes already provided for determination and regulation of dangerous dogs based upon their behavior.[17] The new local ordinances ban dogs solely on their breed, regardless of behavior. The breeds most commonly banned are pit bulls, rottweilers, wolf hybrids, and any mix thereof.[18]

Animal Shelters

Part of the state's Rabies Control Act, G.S. 130A-192, has long provided that stray animals picked up for not wearing rabies tags had to be held for 72 hours before being euthanized or adopted out, to give the owner of the animal a chance to reclaim the lost pet. Amendments to this statute effective in 2010 provide that:

- the shelter staff must, if it can be done at a reasonable cost, scan the animal for a microchip that might have information leading to locating the animal's owner;
- before an animal at the shelter can be euthanized, it must be put up for adoption unless found to be unadoptable due to injury, health problems, or temperament;
- members of the public be allowed to view all animals at the shelter for at least four hours a day, three days a week;
- dogs and cats wearing rabies tags that are picked up for other violations (e.g., of a leash law) must be held for 72 hours, as must animals surrendered to the shelter by someone claiming to be the owner unless that person presents proof of ownership and signs a writing that authorizes euthanasia before the 72-hour period has elapsed.

Some counties[19] claim that feral cats are not subject to the 72-hour holding period. The issue was before the court of appeals in 2005[20] and focused on the definition at that time of "cat" in G.S. 130A-184(2)—"a domestic feline." Whether this included feral cats—if so, they had to be held for 72 hours—was not decided by the majority, which held the 19A suit should be dismissed on a procedural ground. But Judge Levinson's separate opinion convincingly explains why section 130A-192 covers feral cats:

> The 72-hour hold is one small item in a comprehensive rabies control statute, which applies the same definitions [i.e., of "cat"] to all statutes in the rabies control section. Consequently, if stray...cats are excluded from the provisions of G.S. § 130A-192 [because they are feral], then they are excluded from the rest of the rabies section. In that event, the animal control officer would have no authority to take crucial measures to reduce the spread of rabies—a truly absurd interpretation....[21]

This analysis would apply as well after the General Assembly in 2009 redefined "cat" in the Rabies Control Act[22]—"A domestic feline of the genus and species Felis catus."

In general, if the owner of property (such as a pet) loses the property, which is taken into possession by someone else, the owner has three years under G.S. 1-52(4) to sue to recover possession. After that, title effectively shifts to the new possessor. But if the lost animal is taken to a county animal shelter, under G.S. 130A-192(a), the owner's title is forfeited to the county if the owner does not claim the animal within 72 hours. (The period can be made longer by county ordinance.) Before the recent amendments to G.S. 130A-192, a private rescue organization taking in lost animals could not effectively adopt them out, as the true owner would have up to three years to sue to reclaim the pet from the party who thought he or she had adopted the animal from the rescue organization.

As of 2010, the statute authorizes rescue organizations approved by the county to partner with it to bring a lost animal to the

county shelter. It can take the pet back to the organization's premises while posting at the shelter a photo of the animal. After 72 hours the shelter is authorized to transfer ownership of the animal to the organization,[23] which now can place it with an adopting family that need not fear a claim-and-delivery action by the former owner.

Enacted in 2005, G.S. 19A-70[24] creates a procedure applicable in criminal prosecutions for animal cruelty and in 19A suits brought by a city, county, or a government-appointed cruelty investigator, after a county animal shelter has taken physical custody of animals allegedly subject to cruelty. A court may order the defendant owner or possessor of the animals to post funds to pay for the upkeep of the animals while trial is pending. The amount to be posted is for 30 days of care (renewable until the trial ends), determined at an evidentiary hearing.

If the defendant does not pay the funds to the clerk of court within five days of being ordered to do so, his or her ownership of the animals "is forfeited by operation of law," after which the shelter may adopt out the animals that are adoptable and euthanize others not needed as evidence in the pending litigation.

In 2005, the definition of "animal shelter" in the Animal Welfare Act was amended to include not only privately owned and operated shelters, but also shelters owned, operated, or under contract with local governments.[25] Additionally, the North Carolina Department of Agriculture and Consumer Services amended the North Carolina Administrative Code's Animal Welfare Section to provide greater reporting and protection requirements for animals in all such shelters. The new requirements addressed many facets of the shelter, from the facilities in which animals are housed to how those facilities shall be maintained.[26] They further require a written program of veterinary care shall be established and each dog and cat shall be observed daily by the animal caretaker or someone under his direct supervision. "Sick or diseased, injured, lame, or blind dogs or cats shall be provided veterinary care or be euthanized,..."[27] An unfortunate consequence of the Animal Welfare Section of the administrative code has been the burden placed on private rescue groups, where animals are housed in foster situations in private residences that cannot except at great expense comply with the separation, sanitation, and structural requirements of animal shelter facilities.[28]

A new shelter staff position, certified euthanasia technician (CET), was recently created. CET's are closely regulated by the Department of Agriculture and Consumer Services.[29] Only a CET and veterinarian are permitted by law to euthanize animals at county shelters.

Miscellany

A Nashville town ordinance bans maintaining more than three dogs (limit two on small lots). The court of appeals in 2009 rejected an argument that it was unconstitutionally arbitrary for not permitting more than three small dogs whose total weight was less than that of three dogs of normal size.[30]

A lease clause authorized Landlord to order Tenant to remove any dog that "creates a nuisance." Landlord learned that Tenant's rottweilers had attacked neighbors, but took no action. Later, one of the dogs lunged at a visitor lawfully on the premises, causing him to fall and suffer injuries. Reversing the dismissal ordered by the court of appeals, the NC Supreme Court in 2004 held that, although Landlord could not be held strictly liable for injuries inflicted by a dog known to be vicious as can an owner or keeper of the dog, in this case Landlord had enough control to be liable on a negligence theory.[31]

Conclusion

In recent years animal law in North Carolina has evolved to provide increased protections. Lawmakers are recognizing that many animals deserve a certain standard of care and are willing to write that into law. In the 2010 short session, the General Assembly will consider at least one major animal-protection bill, seeking to regulate puppy mills. Advocates of a bill, filed but not passed in 2009, that would have banned euthanasia of dogs and cats at animal shelters by administering carbon monoxide gas have plans to reintroduce the bill in 2011. Yet North Carolina was recently ranked, nationally, with respect to the extent of protection provided animals by law, in only the middle tier of states, along with such states in our region as South Carolina, Georgia, and Florida.[32] There will thus be even more legislative battles to be fought for animals in North Carolina.

Meanwhile, North Carolina cities and counties may enact more local laws perceived by some to be anti-animal—those limiting the number of pets a person may keep and banning various breeds of dogs. Battles over these kinds of issues are being fought in many other states as well. ■

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Endnotes

1. This article updates Reppy, *A New Specialty: Animal Law*, NC State Bar *Journal*, spring 2002, at p. 12.
2. 2007 N.C. Stats, ch. 211, § 1. Section 2 added to the broad list in G.S. 14-360 of actors who are exempt from even felony prosecution for malicious infliction of suffering and for torture one who physically alters livestock to "conform[ ] with breed or show standards." Reppy, *Broad Exemptions in Animal-Cruelty Statutes Unconstitutionally Deny Equal Protection of the Law*, 70 Law & Contemp. Prob. 255 (2007), argues that G.S. 14-360's many exemptions make it unconstitutional because there is no rational basis for denying exemptions to unfavored actors who interact frequently with animals (such as horse trainers, dog groomers).
3. *State v. Coble*, 593 S.E.2d 109 (N.C. App. 2004).
4. 2005 N.C. Stats. ch. 437, § 1, amending N.C. Gen Stat. § 14-362.
5. *State v. Porter*, 16 S.E. 915 (N.C. 1893).
6. *Malloy v. Cooper*, 592 S.E.22d 17 (N.C. App. 2004). For the initial legislative response, see *Reppy*, supra n. 3, at 14.
7. 592 S.E.2d at 21-22.
8. 15A N.C. Admin Code 10B.0121, as recounted in *Malloy v. Cooper*, 678 S.E.22d 783, 785 (N.C. App. 2009).
9. N.C. Gen Stat. §§ 19A-1 *et seq*, discussed in detail in Reppy, *Citizen Standing to Enforce Anti-Cruelty Laws by Obtaining Injunctions: The North Carolina Experience*, 11 Animal Law 39 (2005).
10. *See* N.C. Gen. Stat. § 14-360. Oddly, cruelty is defined in this criminal statute so as to include inflicting of mental suffering on animals, but in the civil remedies legislation, the cruelty must be "physical." N.C. Gen. Stat. § 19A-1(2).
11. N.C. Const. art. IV, § 13, quoted in *Animal Legal Defense Fund v. Woodley*, 640 S.E.2d 772 (N.C. App. 2007).
12. 2006 N.C. Stats ch. 113; 2003 N.C. Stats, ch. 208.
13. Code County of New Hanover, North Carolina Sec. 5-4.
14. Raleigh Ord. No. 2009-552, § 2, 3-3-09, eff. 7-1-09.
15. *State v. Cook*, 594 S.E.2d 819, 820 (N.C. App. 2004).
16. The *News & Observer*, Jan. 21, 2010, p. B1.
17. N.C. Gen. Stat. § 67-4.1 and 67-4.2.
18. *Fayetteville Pets Examiner, Dog Breed Bans Taking Effect On More Military Bases,* www.examiner.com/x-5984-Fayetteville-Pets-Examiner-y2009m4d17-Dog-breed-bans-taking-effect-on-more-military-bases (2009).

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Red Dog Farm to the Rescue

By Mike Dayton

The Red Dog Farm Animal Rescue Network, established by Greensboro lawyer Garland Graham in 2006, draws its name and inspiration from Graham's golden retriever. As of February 2010, the nonprofit organization had rescued a menagerie of animals—887 and counting, including 346 cats, 343 dogs, 74 goats, 43 chickens, 23 horses, 14 rabbits, seven miniature horses, seven ducks, seven sheep, six pigs, five donkeys, four cows, three alpacas, two ponies, one turtle, one parakeet, and one emu.

When she's not rescuing animals in need, Graham practices law with Schell Bray Aycock Abel & Livingston PLLC, focusing on mergers and acquisitions, lending and finance, and general corporate. Graham has managed to find the balance between her law practice and a thriving nonprofit.

Graham's younger years were a million miles from farm life. She grew up at a beach in Florida, where she played tennis and swam on the local swim team.

"I had never been around any farm animals like horses or goats," she says.

Graham moved to North Carolina after college to be near her future husband. She brought her beloved golden retriever with her and immediately got involved with a golden retriever rescue group in the Greensboro area. Graham occasionally fostered other animals in search of a new home, and the word slowly got out.

"Somebody's daughter in college would find a stray dog, or somebody would find a litter of kittens in a parking lot, and they'd come find me," she says. "It was very informal, but we pretty much always had an extra dog or cat, or a litter of kittens in the house."

In 2003, Graham and her husband moved to his hometown of Summerfield, a small community about 12 miles north of Greensboro. They bought a house which adjoined a horse farm.

The couple's animal acquisition started innocently. Since there was more space on the new property, it felt natural to continue fostering other dogs and cats, Graham says.

"I said, 'Let's get a couple of chickens,'" she says. "Then I picked up two stray dogs that I found beside the road as I was returning from a business law seminar. We ended up keeping one of those dogs."

Then came the farm animals.

"People began to call us and say, 'My granddad just died and he had two old goats and an old horse, where do I take them?'" Graham recalls. "I did a little research and discovered there really wasn't anywhere to take them."

The United States Equine Rescue League accepted horses when room was available, but that group would not take

Above—Garland Graham with Red Dog Rescue Farm's mascot, Tallulah LaMoo. Tallulah (who is meeting some of her adoring fans in the photo below) was surrendered last year after being rejected by her mother due to being born with a cleft palate.

Above—Recently, Garland introduced her foster goat, Bella, (who she is currently bottle-feeding after she was surrendered by a farmer because her mother rejected her) to a friend's horse.

other farm animals.

"So my answer became, 'Bring them to me and I'll see if I can find a home for them,'" Graham says.

That's how the first goats and horses appeared at the Grahams' home. Graham knew very little about horses, so she learned as much as she could from the Equine Rescue League. She also began riding nearly every weekend, and she then bought a colt, which quickly became part of the expanding animal family.

"Then my husband bought a horse, because he figured out pretty quickly if he wanted to spend any quality time with me, he needed to start riding also," she says.

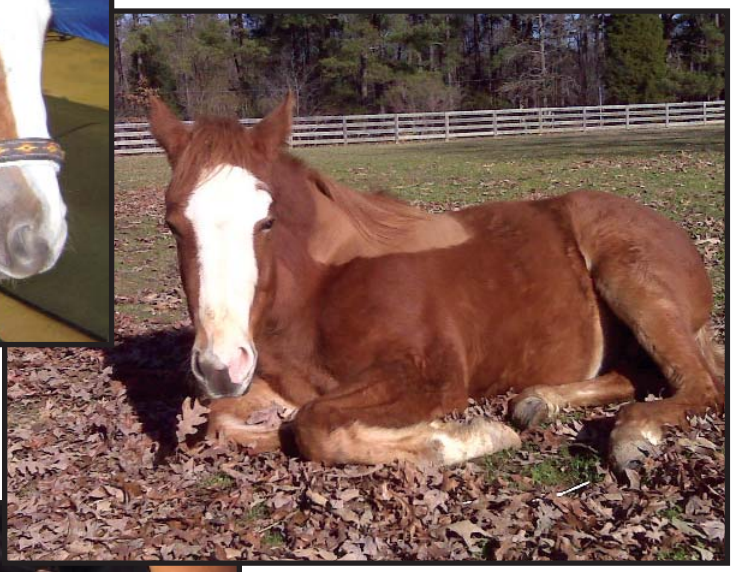
As the two fell in love with their horses, they became more concerned about the plight of other farm animals that could no longer be cared for or that were being neglected.

The Grahams suddenly found themselves with 18 animals, including two horses, two donkeys, an old pony, four goats, a pig, and four dogs. They also realized they had already adopted out 50 animals.

"We saw that the number coming in was quickly exceeding the number going out—and vet bills and feeding costs were getting exorbitantly expensive," she says. "And frankly, we were just running out of space. There was a need for another foster organization because the local groups could not handle the load, and no one could handle farm animals such as goats."

The idea for a nonprofit group took root from those realities. Jennifer L.J. Koenig, a trust and estate lawyer at Graham's firm who also handled nonprofit work, told Graham, "'You're running a nonprofit, but the difference is that you're paying for everything.'"

Nugget came to Red Dog Farm Rescue as a starvation case with four broken bones in his withers (shoulders). The photo to the left is from the day Nugget came to Red Dog (last September). "It breaks my heart to look at these now," Garland says.



You can see in the picture to the right where the veterinarian had to shave Nugget for surgery and his fur is now growing back in. According to Garland, "He is the sweetest horse ever!"

The time had come for an official organization. Graham sent out a letter to about 100 friends asking for their financial help in forming a nonprofit for animals of all sizes, with a special focus on farm animals.

"The response was overwhelming," she said. "We got pledges of well over $10,000, and that gave us the boost of adrenaline we needed," she says.

By September 2006, Graham had formed a North Carolina nonprofit and also applied for and received 501(c)(3) status.

Red Dog Farm's first big investment—a website.

"We spent about $2,000 of the money getting a website up and running," she says. "That seemed like a lot, but people told us you are only as good as your website. So we did that right."

The website allowed the group to post pictures and other updates of the foster animals coming in and being adopted by new families.

The group did not have a boarding facility, so instead it developed a patchwork of volunteers and foster homes, with the nonprofit covering all veterinary and food expenses. The nonprofit was run out of the Graham's home through the first half of 2008.

"It quickly took over our personal lives," Graham says. "With the organization outgrowing us, we needed to figure out a way to get our dining room back."

Thus began a search for inexpensive space where the organization could set up shop and adopters could come and meet volunteers and pick up animals.

In the summer of 2008, a Red Dog Farm volunteer saw the Guilford Sheriff's Department moving out of an old house it had been using as a substation in Bur-Mill Park. The park is a county-owned, city-operated facility on the north side of Greensboro. Within 48 hours, Red Dog Farm had signed a lease. The group has used the house as its headquarters since June 2008.

As Red Dog Farm expanded, Graham realized the nonprofit's day-to-day administration was outstripping her abilities to keep up.

"I was getting 30 to 40 e-mails a day and 50 calls a day," she says. "I was an attorney, and this is what I do for fun, but I can't do it all."

The group hired Lauren Riehle, who had been working with the Humane Society of the Piedmont, to help out three hours a day. Riehle's role was expanded to a full-time executive director by June 2009. Graham now handles the large animals, such as horses,

while Riehle manages the group's small animal program.

Even with full-time help, the nonprofit was now consuming about half of Graham's time. Graham had made partner in her law firm in 2006, but the day came when she had to sit down with her managing partner and discuss her role in the firm.

"I felt like my firm was getting the raw end of the deal because I was out of the office a lot meeting with people about the nonprofit," she says. "I had a heart-to-heart with my managing partner and said I'd been here eight years. I loved the firm and wanted to stay but felt the nonprofit was cutting into some of the firm's time. I didn't feel right about it. I told him I could do both, but not on a full time basis."

The partnership worked out a plan, reducing her billable hour target and her compensation to a level where both parties were comfortable. They have been in that arrangement for two years.

"In December, when we're really busy at work, I must step back and be a full-time lawyer," she says.

The nonprofit is stable financially thanks to monthly fundraising events and several bigger fund raisers, including a dog fashion show, Dogs on the Catwalk, at a downtown theater.

Red Farm sends out a monthly e-letter and also mails a year-end letter to everyone who has adopted an animal or made a donation. This year, Red Farm sent out about 1,000 letters.

"The letter was short and sweet, saying this is where we are and what we've done in adopting out 1,000 animals," Graham says. "We included a pledge form and again raised about $10,000."

Graham and her husband have now personally fostered more than 250 animals.

"Right now I have an extra horse and three goats living with me," she says.

Asked about success stories, Graham lists the very sick, emaciated, and mistreated animals that flourish once they come under Red Farm's care.

"When I first saw the horse Coco, I thought she would not make it back to our farm alive," Graham recalls. "She was just that sick and thin. But she gained 330 pounds in 10 weeks living with us. She ended up being a stunning mare and now has a good home in Apex."

Red Farm still does not have a central kennel. The group's long-range goal is a consolidated location where it can care for all of the animals.

"Having animals in multiple foster locations is pretty inefficient," Graham says, "especially for animals that need to be quarantined until we have their shots in order. So five years down the road is about when we will be in the throes of a capital campaign and a building phase to build Second Chance Ranch." ■

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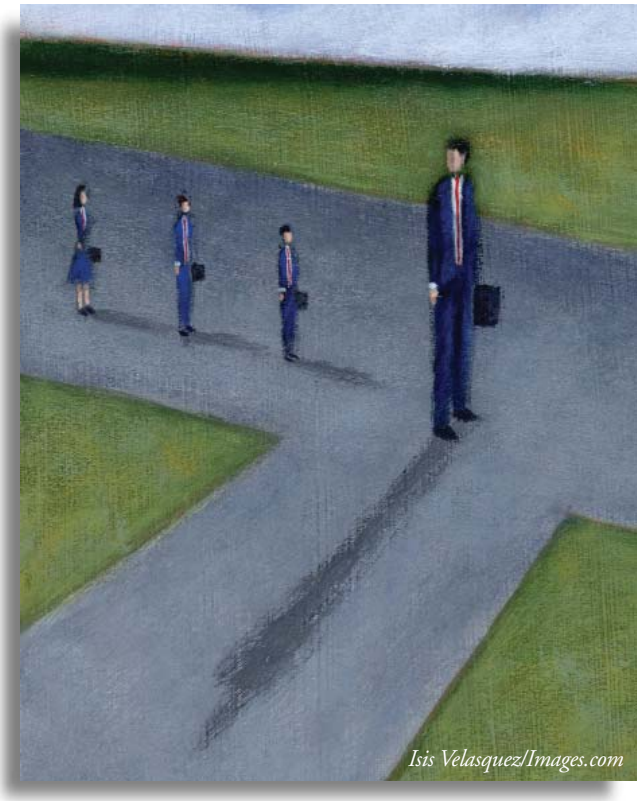
For additional information on Red Dog Farm Animal Rescue, please visit their website—www.reddogfarm.com.

The Intersection of the First Amendment and Professional Ethics for Government Attorneys

By Christopher B. McLaughlin

First Amendment protection exists for government employees, but not to the same extent as it does for everyone else. The ability of government employees to exercise their First Amendment rights is limited by their employers' interest in providing effective and efficient services to the public. Government employees who are also attorneys face additional limitations on their speech due to their professional responsibility obligations under State Bar rules.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Speech that would generally be protected by the First Amendment may be prohibited by an attorney's duty of confidentiality. Other speech required by an attorney's professional responsibility obligations may not be protected by the First Amendment. This imperfect overlap between the First Amendment and an attorney's ethical duties creates two interesting constitutional conundrums, which are analyzed at the end of this article.

The First Amendment and Government Employees

Until the mid-twentieth century, governments could condition public employment on the near-complete waiver of First Amendment rights. As Oliver Wendell Holmes observed when sitting on the Supreme Court of Massachusetts, "A policeman may have the constitutional right to talk politics, but he has no constitutional right to be a policeman."[1]

Beginning in the 1950s, the Supreme Court began to expand First Amendment protection for government employees. The court first struck down loyalty oaths banning membership in particular political parties and later invalidated statutes prohibiting public agencies from hiring members of "subversive" organizations.[2] In 1968 the Supreme Court expanded First Amendment protection for government employees when it ruled unconstitutional

the firing of a public school teacher for publicly criticizing the spending decisions of the local board of education. *Pickering v. Board of Education*, 391 U.S. 563 (1968), was the first high court case to make clear that public employees do not relinquish their First Amendment rights to comment on matters of public concern simply because they are employed by the government.

However, the government's authority to limit the free expression of its employees remains far greater than its ability to limit the free expression of common citizens. "Government employers, like private employers, need a significant degree of control over their employees' words and actions; without it, there would be little chance for the efficient provision of public services."[3]

Two Foundational Cases

Two Supreme Court cases deserve extended analysis because of their foundational roles in government employee free speech jurisprudence and because they involve attorneys as plaintiffs. *Connick v. Myers*, 461 U.S. 138 (1983), firmly established the current test for whether the speech in question touches on a matter of public concern, while *Garcetti v. Ceballos*, 547 U.S. 410 (2006), added a new requirement that the speech be outside of the employee's job duties to receive First Amendment protection.

Connick v. Myers—In 1980 Harry Connick Sr., the New Orleans district attorney, fired an assistant district attorney, Sheila Myers, for her vocal opposition to a proposed transfer. Myers distributed a survey to her colleagues concerning internal office operations, which included a question about whether employees felt pressured to work on political campaigns. After her termination, Myers sued under 42 U.S.C. § 1983, claiming she was terminated for exercising her First Amendment right to free speech. She prevailed at trial and at the United States Court of Appeals for the Fifth Circuit.

In the Supreme Court, the key question was whether Myers's in-office survey constituted speech on a matter of public concern. "When employee expression cannot fairly be considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices without intrusive oversight by the judiciary in the name of the First Amendment," stated the Court.[4] The five-justice majority concluded that the primary purpose of Myers's survey was to "gather ammunition" for a battle with her supervisors over the transfer. But for the question about forced participation in political campaigns, Myers's survey was not related to a matter of public concern and therefore was not deserving of First Amendment retaliation protection.

As for the question involving political campaigns, the majority believed it touched upon a matter of public concern minimally, at best. Myers's limited First Amendment interest in that one question was outweighed by Connick's interest in maintaining an effective and successful office, largely because of the manner, time, and place of Myers's speech. Accepting Connick's characterization of Myers's conduct as a "mini-insurrection" that justified a harsh response, the Supreme Court rejected Myers's attempt to "constitutionalize an employee grievance" and ruled for her employer.

Garcetti v. Ceballos—Nearly 25 years after *Connick*, the Supreme Court heard a free speech case involving another fired district attorney, Richard Ceballos. When a defense attorney complained about inaccuracies in an affidavit used to obtain a critical search warrant, Ceballos investigated the matter and determined there were serious misrepresentations in the affidavit. After Ceballos's boss rejected his recommendation that the criminal case be dismissed, Ceballos claimed that he was transferred and denied a promotion because of his speech about the affidavit. He sued under 42 U.S.C. § 1983, lost in district court on summary judgment, but prevailed in the Ninth Circuit Court of Appeals.

In the Supreme Court, the case turned on the five-justice majority's conclusion that Ceballos's speech was made pursuant to his duties as an assistant district attorney. "Restricting speech that owes its existence to a public employee's professional responsibilities does not infringe upon any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created."[5] To hold otherwise, wrote Justice Stevens, would be to commit the courts to an overly intrusive role of monitoring all business-related communications throughout all levels of government. The Supreme Court reversed the Ninth Circuit and found in favor of the government.

Current Five-Part Test

Since *Garcetti*, lower courts have applied a five-part test to First Amendment free speech claims raised by government employees. Although the order of the first two inquiries sometimes changes, these five questions now control claims similar to those brought by Myers and Ceballos:

1. Did the employee's speech touch upon a matter of public concern?
2. Was the speech made as part of the employee's job duties?
3. Did the government take adverse employment action that was substantially motivated by the employee's speech?
4. Did the government's legitimate interest in providing efficient and effective services to the public outweigh the employee's First Amendment rights?
5. Would the government have taken the adverse employment action even in the absence of the protected speech?

If the plaintiff produces enough evidence to answer the first three questions affirmatively, then the burden shifts to the government for the remaining two questions.[6]

1. Did the employee's speech touch upon a matter of public concern?

Connick makes clear that the speech in question must be more than simply a complaint about the employee's working conditions to warrant First Amendment protection. As the Fourth Circuit observed, "A government employee's right to gripe about the conditions of his or her job is protected to the same degree as that of private employees, as only under such condition is efficient government service possible."[7] Simply put, the First Amendment does not guarantee that all government employees will be treated nicely by their supervisors.[8] That said, speech that concerns public health and safety, corruption, or unconstitutional discrimination is almost always considered a matter of public concern, even if the speech also touches on individual working conditions.[9]

2. Was the speech made as part of the employee's job duties?

Garcetti held that speech within the scope of a government employee's official responsibilities does not warrant First Amendment protection. How should courts make this determination? Responding to criticism from a dissenting opinion in *Garcetti*, Justice Kennedy stated that formal job descriptions should not control; instead, "[t]he proper inquiry is a practical one."[10]

The *Garcetti* inquiry focuses on the *context* of the speech even more than its *content*. The same speech that is unprotected when uttered to a boss or coworker may be protected when uttered outside of the office, an "oddity" lower courts are obliged to respect after *Garcetti*.[11] As a result, courts generally treat internal speech different from external speech.

1. Internal speech generally is not protected, unless the speech concerns matters clearly outside the scope of the employee's job duties. Internal speech includes complaints directed up the employee's chain of supervisors, even to the agency's most senior officials, as well as comments made in response to an internal agency investigation.[12]

2. External speech, such as comments to the media, generally is protected regardless of content, unless the employee's job duties include the type of external speech at issue. Testimony in a civil or criminal judicial proceeding usually is considered protected external speech, even if the content of that speech is directly related to an employee's job duties.[13]

3. Did the government take adverse employment action that was substantially motivated by the employee's speech?

The definition of *adverse employment* action varies from circuit to circuit. All federal courts agree that this term includes a termination, demotion, or refusal to promote.[14] The Fourth Circuit is one of several that conclude the First Amendment also protects an employee who can show "that he was deprived of a valuable government benefit or adversely affected in a manner that, at the very least, would tend to chill his exercise of First Amendment rights."[15]

After producing evidence of an adverse employment action, the plaintiff must then demonstrate that the protected speech was a substantial or motivating factor behind that action. The protected conduct need not be the only reason or the primary reason for the adverse employment action, but merely one of the reasons.[16]

4. Did the government's legitimate interest in providing efficient and effective services to the public outweigh the employee's First Amendment rights?

The government's interests are most at risk when the contested speech occurs in the office and impedes other employees from accomplishing their job responsibilities.[17] The Fourth Circuit interprets this balancing test to require an analysis of the nature of the employee's position, the context of the employee's speech, and the extent to which it disrupts the department's activity.[18] Generally speaking, the more the employee's job requires "confidentiality, policy making, or public contact, the greater the state's interest in firing her for expression that offends her employer."[19]

5. Would the government have taken the adverse employment action even in the absence of the protected speech?

If the plaintiff produces evidence of an adverse employment action that was based at least in part on the plaintiff's protected speech, the government can still defeat the First Amendment claim by demonstrating that it would have made the same employment decision even if the plaintiff had not uttered that speech.[20]

The First Amendment and the Rules of Professional Conduct

When attorneys gain admission to the bar and enter into professional relationships with clients, they implicitly agree to restrain their speech on certain issues. The North Carolina Rules of Professional Conduct (RPC) do not trump the First Amendment, of course, but they can create additional limitations on when, where, and how a government attorney may engage in certain speech.

RPC Rule 1.6: Confidentiality

Attorneys are forbidden to disclose any "information acquired during the professional relationship" unless the client provides informed consent, a duty far broader than the attorney-client privilege. The privilege is an evidentiary rule that covers only confidential communications made for a non-criminal purpose between an attorney and client in the course of giving or seeking legal advice.[21] In contrast, the duty of confidentiality covers *all* information the attorney learns while working for the client, regardless of source, purpose, or context. The duty of confidentiality is so broad that it could forbid speech by a government attorney that would be protected by the First Amendment, a conundrum discussed in more detail below.

At least 13 states require disclosure by attorneys to prevent some types of criminal acts, usually those likely to cause injury or death.[22] North Carolina is not one of those states. North Carolina attorneys are permitted, but not required, to disclose a client's confidential information in seven situations, including when disclosure might prevent the commission of a crime by the client.

RPC Rule 1.13: Organization as Client

An attorney representing an organization must put the organization's interests above the interests of the organization's individual agents, employees, and officers. For example, an attorney representing a town must disclose to the town council a meeting involving the attorney, the mayor, and other parties despite the mayor's request that the attorney keep the meeting a secret.[23]

Unlike Rule 1.6, Rule 1.13 *requires* certain speech by organizational attorneys. A government attorney may be required by this rule to speak on subjects and in settings that do not trigger First Amendment protection, a second potential constitutional conundrum analyzed below. An attorney representing an organization is obligated to speak under Rule 1.13 when he or she knows that an employee, officer, or agent has acted or will act in a matter related to the attorney's representation and in a manner likely to cause substantial injury to the organization and the act is either (1) a violation of a legal obligation to the organization or (2) a violation of law that could be imputed to the organization.[24] When such a situation arises, the attorney is obligated to report the matter up the organization's chain of command to the "highest authority that can act on behalf of the organization," unless the attorney reasonably believes that such internal disclosure is not in the organization's best interests.

Are the voters the "highest authority" that can act on a government's behalf? Comment 5 to Rule 1.13 appears to rule out that interpretation by observing that an organization's highest authority is generally its "board of directors or similar governing body." For an attorney representing a local government, the highest authority should be the local governing board. For an attorney representing a discrete unit of local government, the highest authority is likely the head of that unit.[25] For an attorney representing the state, the highest authority could be a department secretary, the General Assembly, or the governor, depending on whom the attorney considers to be the client.[26]

If the issue is not resolved by the organi-

zation's highest authority, then Rule 1.13(c) permits, but does not require, the attorney to disclose the issue publicly if (1) it involves a clear violation of law and (2) it is likely to cause substantial injury to the organization. However, the attorney may do so only "to the extent permitted by Rule 1.6." This limitation, which does not appear in the American Bar Association's model version of the rule, means that unless the issue involves one of the exceptions to the Rule 1.6 duty of confidentiality discussed above, a North Carolina attorney is not permitted to make a public disclosure under Rule 1.13.

RPC Rule 3.3: Client Perjury

Under the RPC, the sanctity of the attorney-client relationship is trumped only by the integrity of the judicial process. The only situation in which a North Carolina attorney is obligated to disclose a client's confidences is when the client or the client's witness commits perjury or a similar fraud upon the court. Rule 3.3 requires an attorney to take all "reasonable remedial measures, including, if necessary, disclosure to the tribunal" once the lawyer realizes that the client has offered or will offer false material evidence or is engaged in fraudulent activity relating to the proceeding.

Could the obligation to remedy client perjury create a situation similar to that under Rule 1.13 in which speech is mandated by the RPC but unprotected by the First Amendment? Probably not. The mandated disclosure by a government attorney of a government client's perjury to the court would almost certainly be protected under the *Connick/Garcetti* test. First, the commission of a crime—perjury—by a government official should be considered a matter of public concern. Second, disclosing misconduct to an external agency—in this case, the court—is usually viewed as speech that falls outside of the scope of a government employee's duties. If either of these conditions apply, then the disclosure mandated by Rule 3.3 would be protected by the First Amendment.

RPC Rule 8.3: Reports of Professional Misconduct

Attorneys are required to report misconduct by another attorney "that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer." The North Carolina State Bar has applied this rule to the misappropriation of client funds, the deliberate violation of settlement conditions, and the abuse of a district attorney's trial calendaring authority.[27] Similar to Rule 1.13, the obligation to report another attorney's misconduct is restrained by Rule 1.6 and does not permit the reporting attorney to violate the duty of client confidentiality.[28] The obligation to report professional misconduct raises another possibility of an attorney being forced by the RPC to speak without assurance that the First Amendment will protect the attorney from retaliation from his or her government employer.

Two Constitutional Conundrums

Unfortunately for government attorneys, the First Amendment and the RPC are not perfectly aligned. Some speech may be protected by the First Amendment but still lead to adverse consequences under the RPC. Other speech may be permitted or even required by an attorney's ethical obligations but not protected by the First Amendment.

Speech protected by the First Amendment but prohibited by the RPC. The broad scope of Rule 1.6 means that a government attorney is prohibited by ethical considerations from speaking about many topics that would be protected by the First Amendment. Consider a scenario in which Attorney Smith, the recently hired county attorney for Carolina County, is terminated after disclosing to a newspaper reporter a pattern of "secret" business meetings by a majority of the county commissioners.

Smith's speech to the newspaper would probably be protected by the First Amendment. The commissioner's willful violation of state open meetings law is clearly a matter of public concern, and Smith's speech to the media seems likely to be outside the scope of normal job duties for a county attorney.[29] However, it seems equally likely that Smith's speech to the newspaper violates her duties under the RPC. Public disclosure of a violation of open meetings law does not appear to satisfy any of the exceptions to client confidentiality under Rule 1.6. The remedies for a violation of the open meetings law are civil in nature, not criminal.[30] Thus the most likely Rule 1.6 exception, that intended to prevent the commission of a crime by the client, would not apply.

Nor does Rule 1.13 offer any help to Attorney Smith. The county commissioners are the highest authority that can act on behalf of the county, meaning there is no opportunity for Smith to report the matter up the internal chain of command. The rule's option of reporting the misconduct externally is limited by the attorney's obligations under Rule 1.6; because no exceptions to the duty of client confidentiality apply, Rule 1.13 would not authorize external disclosure by Smith.

Could the county fire Smith for conduct protected by the First Amendment but prohibited by the RPC? The answer must be yes—it is almost unimaginable that a client would have the ability to seek ethical sanctions against an in-house attorney for violating the RPC but would not have the ability to terminate its employment relationship with that attorney.[31]

Speech required by the RPC but not protected by the First Amendment. The RPC mandates speech by attorneys in at least three circumstances:

1. to report serious wrongdoing up the internal chain of command (Rule 1.13);

2. to remedy client perjury or fraud upon the court (Rule 3.3);

3. to report another attorney's serious misconduct if the misconduct can be reported without violating the duty of confidentiality (Rule 8.3).

Is any of this compelled speech protected by the First Amendment? As discussed above, speech mandated by Rule 3.3 would likely be protected by the First Amendment because it would touch on a matter of public concern and be outside the scope of the attorney-employee's duties. The same is not always true of speech mandated by Rule 1.13 or Rule 8.3.

Consider the example of Attorney Jones, an assistant city attorney fired after informing the city manager of what Jones believes to be the inappropriate destruction of evidence by the city attorney. Does Jones have a viable First Amendment retaliation claim against the city? Probably not. Jones's reporting to the city manager of the city attorney's misconduct was likely required under Rule 1.13, but such speech is not necessarily protected by the First Amendment. Certainly destruction of evidence by the government should constitute a matter of public concern. But reporting legal misconduct by a supervisor up the internal chain of command could be considered part of the expected duties of an assistant city attorney. If so, then Jones's speech to the city manager would not be protected by the First Amendment, despite

the fact that it was required by the RPC.

Even if the First Amendment offers no protection, Jones still might be able to attack the city's decision to terminate his employment through a wrongful discharge claim. Most jurisdictions recognize these claims by in-house attorneys.[32] However, North Carolina appears to be one of several states that permits wrongful termination claims by in-house attorneys only if they can be proved without the disclosure of confidential information, a requirement that could effectively bar such claims.[33] State whistleblower statutes could provide an alternative for wronged government attorneys, but in North Carolina this option exists only for state employees, not local government employees.[34] ■

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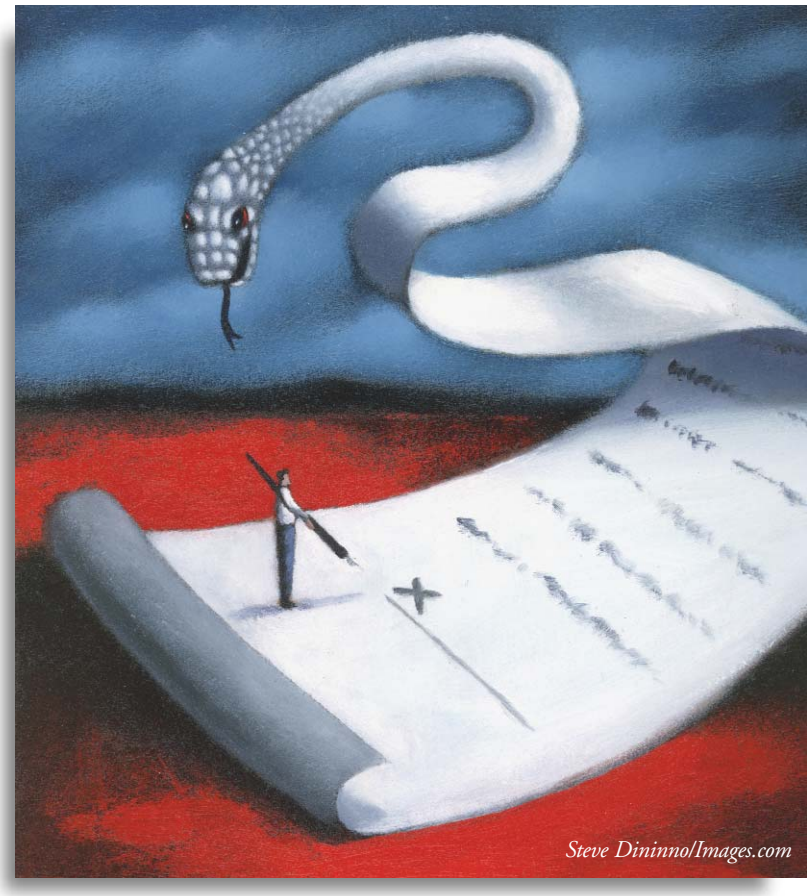
Endnotes

1. *McAuliffe v. Mayor of New Bedford*, 155 Mass. 216, 220, 29 N.E. 517, 517 (1892).
2. *See Wiemann v. Updegraff*, 344 U.S. 183 (1952) (striking down loyalty oaths); *Keyishian v. Board of Regents*, 385 U.S. 589 (1967) (striking down subversive organization statutes).
3. *Garcetti v. Ceballos*, 547 U.S. 410, 418-19 (2006).
4. *Connick v. Myers*, 461 U.S. 138, 146, 147 (1983).
5. *Garcetti*, 547 U.S. at 421-22, 424.
6. *See Eng v. Cooley*, 552 F.3d 1062 (9th Cir. 2009).
7. *Arvinger v. Mayor and City Council of Baltimore*, 862 F.2d 75 (4th Cir. 1988).
8. *Ruotolo v. City of New York*, 514 F.3d 184, 190 (2nd Cir. 2008) (concluding that "a generalized public interest in the fair or proper treatment of public employees" does not alone trigger First Amendment protection).
9. *See Jones v. Quintana*, F. Supp. 2d, 2009 WL 3126544 (D.D.C. 2009), in which the court concluded that a 911 dispatcher's complaints about a new system for routing 911 calls were intended to protect public safety and not simply to minimize the dispatcher's workload.
10. *Garcetti v. Ceballos*, 547 U.S. 410, 424-25 (2006).
11. *Morales v. Jones*, 494 F.3d 590, 598 (7th Cir. 2007) (speech by police officer to assistant district attorney part of job duties and therefore unprotected, but same speech as part of civil deposition testimony outside of job duties and therefore protected).
12. *Davis v. McKinney*, 518 F.3d 304 (5th Cir. 2008) (complaints made to both the employee's immediate supervisor and the president of her university division were not protected because the complaints concerned matters within employee's job responsibilities); *Vila v. Padron*, 484 F.3d 1334 (11th Cir. 2007) (complaints to university president and board of trustees about legal improprieties made by university vice-president/general counsel not protected); *Jackson v. Mecklenburg County*, 2008 WL 2982468 (W.D.N.C. 2008) (holding that allegations made during internal investigation of discrimination not protected because all agency employees were expected to cooperate with the investigation as part of their job duties); *Wright v. City of Salisbury*, F. Supp. 2d, 2009 WL 2957918 (E.D.Mo. 2009) (police officer's letter to city council about city's drunken driving enforcement policies protected because police officer's job duties did not include policy making).
13. *Andrew v. Clark*, 561 F.3d 261 (4th Cir. 2009) (indicating police officer's release of internal memo to newspaper could constitute protected speech); *Casey v. West Las Vegas Indep. Sch. Dist.*, 473 F.3d 1323 (10th Cir. 2007) (school superintendent's reports to supervisors and federal agency about problems in the Head Start program not protected because her job duties required such reports, but complaints to state attorney general about open meeting law violations were protected because her job duties did not involve reporting such legal problems to external agencies); *Reilly v. Atlantic City*, 532 F.3d 216 (3rd Cir. 2008) (finding that police officer's testimony in a criminal prosecution of fellow officer was protected, after reviewing case law and noting that *Garcetti* did not address the plaintiff's testimony in that case). *But see Nixon v. City of Houston*, 511 F.3d 494 (5th Cir. 2007) (police officer's comments to media while on duty and in uniform at the scene of an accident were part of officer's job duties, despite fact that the comments were unauthorized and made against the wishes of his superiors).
14. *Ridpath v. Board of Governors Marshall Univ.*, 447 F.3d 292, 316 (4th Cir. 2006).
15. *Goldstein v. Chestnut Ridge Volunteer Fire Dep't Co.*, 218 F.3d 337, 352 (4th Cir. 2000) (suspension of volunteer firefighter constituted adverse employment action). In a footnote sometimes dismissed as dicta, the Supreme Court seemingly blessed an expansive definition of adverse employment action: "Moreover, the First Amendment, as the court below noted, already protects state employees not only from patronage dismissals but also from even an act of retaliation as trivial as failing to hold a birthday party for a public employee...when intended to punish her for exercising her free speech rights." *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 76 n.8 (1990) (internal citations omitted). *But see Benningfield v. City of Houston*, 157 F.3d 369 (5th Cir. 1998) (reprimands and false accusation of criminal wrongdoing do not constitute adverse employment actions under First Amendment).
16. *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977); *Speigla v. Hill*, 371 F.3d 928, 942 (7th Cir. 2004) (citing unanimity among the circuits on this interpretation).
17. *Connick v. Myers*, 461 U.S. 138, 146, 151 (1983).
18. *McVey v. Stacy*, 157 F.3d 271, 278 (4th Cir. 1998).
19. *Sheppard v. Beerman*, 190 F. Supp. 2d 361, 374 (E.D.N.Y. 2002) (holding that a judge's interest in maintaining an effective workplace trumped the First Amendment interest of the judge's clerk because "a law clerk is often privy to a judge's thoughts and decision-making processes").
20. *See Eng v. Cooley*, 552 F.3d 1062 (9th Cir. 2009).
21. *In re Miller*, 357 N.C. 316, 335 (2003).
22. See Susan R. Martyn, Lawrence J. Fox & W. Bradley Wendel, *The Law Governing Lawyers: National Rules, Standards, Statutes, and State Lawyer Codes* (2009-2010 ed.).
23. N.C. Ethics Op. CPR 154.
24. RPC Rule 1.13(b).
25. *See NC State Bar v. Koenig*, 04 DHC 41 (2005) (disciplining attorney representing sheriff's office for failing to pursue allegations of sexual harassment to a final decision by the office's highest authority, the sheriff).
26. RPC Rule 1.13, Comment 9.
27. 89 NC Disciplinary Hearing Committee 5; NC Ethics Op. RPC 127; NC Ethics Op. RPC 243.
28. RPC Rule 8.3, Comment 3.
29. Even if an employee is expected to respond to media inquiries on certain topics, self-initiated comments to the media about topics the employer has demanded the employee keep confidential probably would be considered outside of the scope of that employee's job duties. *See Snelling v. City of Claremont*, 931 A.2d 1272 (N.H. 2007) (fact that tax assessor's job duties included talking to the media about certain tax issues did not mean that all comments to the media by the assessor were within his scope of employment).
30. *See* N.C. Gen. Stat. (hereinafter G.S.) § 143-318.16 (authorizing injunctive relief for violation of open meetings laws) and G.S. 143-318.16A (authorizing the invalidation of acts by a public body made in violation of open meetings laws).
31. *See Douglas v. DynMcDermott Petroleum Operations Co.*, 144 F.3d 364 (5th Cir. 1998) (public disclosure of client confidences by an in-house attorney that violated State Bar rules justified the termination of the attorney, despite the fact that the disclosures would have been considered "protected activity" under Title VII had they been made by a nonattorney employee). A lower court later relied on *Douglas* to conclude that an attorney most likely could not base a First Amendment retaliation claim on speech that violated the attorney's duty of confidentiality. *Washington v. Davis*, 2001 WL 1287125 (E.D.La. 2001).
32. *See Crews v. Buckman Laboratories Int'l, Inc.*, 78 S.W.3d 852 (Tenn. 2002) (permitting wrongful discharge claim by in-house counsel who alleged she was terminated after satisfying State Bar ethics obligation to report her supervisor's practice of law without a license); ABA Formal Ethics Op. 01-424 (Model Rules do not prohibit former in-house counsel from suing former employer for wrongful termination and from revealing confidential information necessary to establish claim).
33. *See Considine v. Compass Group USA, Inc.*, 145 N.C. App. 314 (2001) (dismissing attorney-employee's wrongful discharge action for failing to state a claim and, in the view of the dissent, "deny[ing] in-house attorney-employees the ability to allege with particularity their wrongful termination of employment claims" because of fear they will violate confidentiality duties under Rule 1.6). *Considine* appears to ignore a 2000 ethics opinion from the North Carolina State Bar that concluded an attorney-employee should be able to pursue a wrongful discharge claim by alleging just enough to put the employer on notice of the claim and then obtaining permission of the court to reveal confidential client information in further support of the claim. NC Ethics Op. 2000-11.
34. G.S. 126-84 and G.S. 126-85 prohibit the state from retaliating against employees for their disclosure of government misconduct. Importantly, the statute protects only reports to the employee's "supervisor, department head, or other appropriate authority," not disclosure to the media or public generally.

Bad Faith in North Carolina Insurance Contracts: A Growing Part of Insurance Practice

By Constance A. Anastopoulo

As insurance contracts and the obligations associated therewith grow more complicated and far-reaching, courts have witnessed an increase in the number of bad faith claims being filed and litigated, both nationally and regionally. It is important to realize that with each decision, the doctrine of bad faith—a judicially created doctrine—is subject to potential change. Since the business of insurance is greatly affected with public interest policies, this escalation in claims raises substantial implications regarding the insurer-insured relationship.



Steve Dininno/Images.com

At the heart of most insurance contract disputes are several competing interests. Insureds, who lack equal bargaining power with the insurer, contract only to protect themselves against the specter of accidental or unavoidable loss. To the insured, therefore, a policy of insurance is only as good as the insurer's willingness to pay claims in whatever context the claim arises. Stated another way, the insured's confidence in the insurance contract is only as secure as his or her reasonable belief the policy will ade-

quately provide him or her protection. At the same time, insurance companies have a vested interest in being able to accurately predict their obligations and make appropriate business decisions that will foster economic success, which translates into its ability to pay its obligations for the benefit of its policyholders. This article seeks to provide an overview of bad faith in insurance contracts in general and as it presently exists in North Carolina.

Bad Faith in General

A claim for bad faith typically arises in either the first- or third-party context. *See, e.g., Rakes v. Life Inv. Ins. Co. of Am.*, 582 F.3d 886, 895-96 (8th Cir. 2009).

First-party bad faith deals with the insurer's conduct in determining whether to indemnify the insured for loss suffered personally. *See generally George J. Kefalos, et al., Bad-Faith Ins. Litigation in the South Carolina Practice Manual*, 13-AUG S.C. LAW. 18 (2001). Historically, courts construed a denial of benefits as a breach of contract and limited recovery accordingly. The nature of the insured-insurer contractual relationship, however, led to the emergence of a tort claim, providing additional theories of recovery intended to address the unique characteristics of the insurance contract. California was the first state to recognize an action for bad faith handling of a claim for first-party benefits in *Gruenberg v. Aetna Insurance Company*, 9 Cal. 3d 566, 108 Cal.Rptr. 480, 510 P.2d 1032 (1973).

Third-party bad faith, on the other hand, concerns the insurer's conduct in handling the insured's claim for coverage under a liability insurance policy. In this context, an insured files a claim for a defense to a third party's suit instituted against the insured and indemnification for the costs of any judgment suffered. Stated another way, the insurer owes two duties: (1) to defend a claim even if some or most of the lawsuit is not covered by insurance; and (2) to indemnify—to pay the judgment against the policy holder up to the limit of coverage. As these are contractual obligations, insurers must act with the utmost good faith and fair dealing in determining whether to and ultimately carrying out these duties.

Once the insurer has assumed control of the defense, including the right to accept or reject settlement offers, the implied duty of good faith and fair dealing requires the insurer to put the insured's interests on equal footing with its own. Thus, there is a duty to settle a reasonably clear claim against the policyholder within the policy limits to avoid exposing the policyholder to the risk of a judgment in excess of the policy limits. *See, e.g., Frontier Insulation Constr. v. Merch. Mut. Ins. Co.*, 91 N.Y.2d 169, 175-78 (1997).

Closely tied to this "duty to settle" is the concept of the excess liability claim. The claim first arose in *Crisci v. Security Insurance Company*, 66 Cal. 2d 425, 426 P.2d 173 (1967), where a third party offered to settle within the policy limits. *Id.* at 428, 426 P.2d at 175. After the insurer refused the offer, the insured suffered a judgment at trial substantially exceeding the policy limits. *Id.* at 428, 426 P.2d at 176. The insurer thereafter paid out only the policy limit, which it considered the extent of its contractual obligation. *Id.* at 428, 426 P.2d at 176. Consequently, the insured sued the insurer for: (1) loss of property; (2) mental distress; and (3) the amount by which the judgment exceeded the policy limits, all of which were caused by the insurer's refusal to settle. *Id.* at 427, 426 P.2d at 175. The court looked to the insurer's conduct in handling the third-party claim to determine the insurer's excess liability. *Id.* Guiding this inquiry was whether a reasonably prudent insurer without policy limits would have accepted the settlement offer. *Id.* at 430-32, 426 P.2d at 176-78. Although inconclusive, a judgment in excess of the policy limits raises the inference that accepting the offer was reasonable. *Id.* at 430, 426 P.2d at 176-77. Furthermore, rejection of such an offer renders the insurer liable for the amount of the final judgment whether or not within policy limits. *Id.*

Bad Faith in North Carolina

As North Carolina courts carved out the state's own bad faith jurisprudence over the years, they wrestled with the bad faith tort-contract distinction as well as the type of damages recoverable in this peculiar cause of action. At the heart of this struggle, however, is a recognition that "[a]n insurance company is expected to deal fairly and in good faith with its policyholders." *Robinson v. NC Farm Bureau Ins. Co.*, 86 N.C. App. 44, 50, 356 S.E.2d 392, 395 (1987), *disc. review denied*, 321 N.C. 592, 364 S.E.2d 140 (1988). It is also axiomatic that damages for breach of contract should seek to place the injured party, as much as possible, in the position he or she would have occupied had the contract been performed. *See generally Burrell v. Sparkkles Reconstr. Co.*, 189 N.C. App. 104, 657 S.E.2d 712 (N.C. App. 2008). Logically therefore, a breach of contract claim should only yield the plaintiff damages in the amount of coverage called for by the policy. *Nationwide Mut. Ins. Co. v. Mabe*, 115 N.C. App. 193, 198, 444 S.E.2d 664, 667 (1994). Nevertheless, due to the ever-increasing number of claims for bad faith, the distinction between breach of contract and bad faith tort actions led courts to promulgate rules permitting recovery in tort, including punitive damages.

In 1976, the North Carolina Supreme Court in *Newton v. Insurance Company* reviewed the judicial history of attempts to obtain punitive damages in breach of contract cases and affirmed the trial court's dismissal of the punitive damages claim, reasoning:

> The breach of contract represented by defendant's failure to pay is not alleged to be accompanied by either fraudulent misrepresentation or any other recognizable tortuous behavior. [T]he allegations in the complaint of oppressive behavior by defendant in breaching the contract are insufficient to plead any recognizable tort. They are, moreover, unaccompanied by any allegation of intentional wrongdoing other than the breach itself even were a tort alleged. Punitive damages could not therefore be allowed even if the allegations here considered were proved.

291 N.C. 105, 114, 229 S.E.2d 297, 302 (1976). In other words, the plaintiff must show something more than a mere refusal to pay in order to recover punitive damages—the plaintiff must show: (1) a refusal to pay after recognition of a valid claim; (2) bad faith; and (3) aggravating or outrageous conduct. *Michael v. Metro Life Ins. Co.*, 631 F. Supp. 451, 455 (W.D.N.C. 1986). Generally, an insurer acts in bad faith when its refusal was "not based on honest disagreement or innocent mistake." *Daily v. Integon Gen. Ins. Corp.*, 75 N.C. App. 387, 396, 331 S.E.2d 148, 155 (1985), *disc. rev. den'd*, 314 N.C. 664, 336 S.E.2d 399 (1985). "Aggravation" has been defined to include fraud, malice, such a degree of negligence as indicates a reckless indifference to plaintiff's rights, oppression, insult, rude-

ness, caprice, and willfulness. *Newton v. Ins. Co.*, 291 N.C. 105, 112, 229 S.E.2d 297, 301 (1976). Thus, a bad faith refusal to provide the coverage or to pay a warranted claim may give rise to a claim for punitive damages. *von Hagel v. Blue Cross and Blue Shield*, 91 N.C. App. 58, 68, 370 S.E.2d 695, 691 (1988). A plaintiff satisfies the aggravation requirement by sufficiently pleading specific instances of willful or reckless conduct accompanying the breach of contract and the purported bad faith. *Payne v. NC Farm Bureau Mut. Ins. Co.*, 67 N.C. App. 692, 694, 313 S.E.2d 912, 913 (1984). This requirement stems, at least in part, from a desire to prevent surprise or confusion to the insurer and "to preclude recovery of punitive damages for breach of contract where there is no tortious conduct" accompanying the breach. *Shugar v. Guill*, 304 N.C. 332, 337, 283 S.E.2d 507, 510 (1981). Whether the alleged facts satisfy the aggravated conduct element so as to support a claim for punitive damages is ultimately a question for the trier of fact. *Smith v. Nationwide Mutual Fire Ins. Co.*, 96 N.C. App. 215, 219, 385 S.E.2d 152, 154 (1989), *disc. review denied*, 326 N.C. 365, 389 S.E.2d 816 (1990).

In addition to the potential avenues of recovery that rest primarily upon common law, the North Carolina General Statutes provide a mechanism by which wronged insureds can recover for the bad faith committed by their insurers. Working together, the Unfair Claim Settlement Practices Act, codified at N.C.G.S. § 58-63-15(11) (formerly codified at N.C.G.S. § 58-54.4(11)), and the Unfair Trade or Deceptive Practices Act [the UTPA] codified at N.C.G.S. § 75-1.1, *et seq.*, create a private right of action that allows a plaintiff to reference the behaviors outlawed by the Unfair Claim Settlement Practices Act in her claim brought pursuant to the UTPA. To understand how these statues work together, it is helpful to address each statue separately.

First, the Unfair Claim Settlement Practices Act, N.C. Gen. Stat. § 58-63-15 (2009), has 14 subparts which detail practices and acts by insurers that the North Carolina legislature recognizes as constituting unfair claims practices. N.C. Gen. Stat. § 58-63-15 (2009). The factors may also constitute bad faith in North Carolina. *See generally Robinson v. North Carolina Farm Bureau Ins. Co.*, 86 N.C. App. 44, 49-50, 356 S.E.2d 382, 395-96 (N.C. Ct. App. 1987). Of particular note are subsections (f), (h), (m), and (n) which provide:

- (f) Not attempting in good faith to effectuate prompt, fair, and equitable settlements of claims in which liability has become reasonably clear;
- (h) Attempting to settle a claim for less than the amount to which a reasonable man would have believed he was entitled;
- (m) Failing to promptly settle claims where liability has become reasonably clear;
- (n) Failing to promptly provide a reasonable explanation of the basis in the policy in relation to the facts or law for denial of the claim or for the offer of compromise settlement; *Id.*

However, the Unfair Claim Settlement Practices Act, N.C. Gen. Stat. § 58-63-15 (2009), does not provide for a private right of action; in fact, it specifically provides that "no violation of this subsection shall of itself create any cause of action in favor of any person other than the commissioner." *Id.*

An aggrieved insured, however, is not without recourse because conduct that violates the Unfair Claim Settlement Practices Act also violates the UTPA. *See Gray v. NC Ins. Underwriting Ass'n*, 352 N.C. 61, 71, 529 S.E.2d 676, 683 (2000) (holding "conduct that violates subsection (f) of N.C.G.S. § 58-63-15(11) constitutes a violation of N.C.G.S. § 75-1-1, as a matter of law."); *see also United States Virginia Bank v. Air-Lift Assocs.*, 79 N.C. App. 315, 319020, 339 S.E.2d 90, 93 (1986) ("The purpose of G.S. 75-1.1 is to provide a civil means to maintain ethical standards of dealings between persons engaged in business and the consuming public within [North Carolina] ...."). Therefore, a plaintiff harmed by an insured engaging in actions outlawed by the Unfair Claim Settlement Practices statute may pursue her claim by filing a private right of action alleging violations of the UTPA; however, the allegations must be plead properly. A notable benefit to bringing a bad faith claim under Chapter 75 is

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Impact of Sit-Ins on American Civil Rights Movement Explored at Elon Law Forum

By Philip Craft

Franklin McCain, one of the four NC A&T students who energized the civil rights movement in 1960 by sitting at a segregated lunch counter in Greensboro, NC, was the featured speaker at Elon University School of Law's second annual Martin Luther King Jr. forum on January 14.

Photo courtesy of the International Civil Rights Center & Museum

The forum took place two weeks prior to the 50th anniversary of the sit-ins, which began in Greensboro on February 1, 1960. The importance of the sit-ins in American history is underscored by the fact that 50 years later, to the day, Greensboro celebrated the opening of the International Civil Rights Center and Museum in the exact location where McCain and his three friends, Ezell Blair Jr. (also known as Jibreel Khazan), David Richmond, and Joseph McNeil, initiated the historic sit-ins.

The focus of Elon Law's forum was on the legal and societal hurdles that sit-in participants had to overcome, as well as the historical and legal context of the civil rights movement within which the sit-ins took place.

Historical Context

Duke University historian William H. Chafe began the forum by describing what he called the "progressive mystique of the South, a much more genteel form of social control where the thinking was, 'we should be nice to people but not necessarily change the status quo.'"

"Manners became a substitute for progress, and that is one of the difficulties that people like Franklin McCain faced when they had to find some way to puncture that aura of civility, which was basically a very effective means of keeping things quiet and maintaining social control," Chafe said.

Chafe explained that the sit-ins were preceded by a well-established tradition of protests for equality by African Americans in North Carolina, particularly at colleges and high schools. In a news report about the Elon Law forum, *Carolina Peacemaker* editor Afrique I. Kilimanjaro wrote that Chafe, "cited Bennett College President David D. Jones, who refused to hire construction firms to work on the campus unless the firm had black construction workers; and Dudley High School science teacher Vance Chavis, who told his students that he never sat at the

back of the bus and encouraged them to stand up and be assertive."

Even while acknowledging the contributions of a broad set of individuals in the region for civil rights, Chafe said that the sit-ins were unique in their approach and impact.

"What happened on February 1 was the decisive tipping point which led to so much else happening, including basically the creation of the direct action student civil rights movement, which is responsible for the 1964 Civil Rights Act, the '65 Voting Rights Act, and the '68 Housing Act. All that really had its inception in the direct action started by Franklin McCain and others," Chafe said.

A Personal Account

Franklin McCain then described how he and his friends arrived at the decision to initiate the sit-ins, noting how angry they had become at a system that denied them equal rights.

"We determined that to be decent human beings and to get that respect, we had to demand it, because it represented power in the eyes of a lot of people in the opposition, and we knew full well that the opposition does not give up power, you had to take it," McCain said.

Knowing about the injustices of segregation but doing nothing about it was intolerable, McCain said.

"We concluded that we were probably the worst of the lot," McCain reflected. "We are aware of all these things and we do absolutely nothing? You don't feel good when you take that kind of inventory and make that kind of assessment. I had to find a way to redeem Franklin McCain and find some sense of relief and manhood, and I thought I owed something to the legacy of my parents, my grandparents, and my ancestors."

McCain also explained the group's thought process in choosing the sit-ins as a form of protest.

"We didn't pick the Woolworth's counter just out of a hat," McCain said. "We picked Woolworth's because it represented a real dichotomy of treatment and offerings and service. It was a representation of another big lie, meaning that you could go to a Woolworth's in New York City or Philadelphia, and visit all 44 counters, including the lunch counter. You could come a little farther south, to Greensboro, and do your business at 43 counters and not number 44. And we thought, this is sinister. This is a place where we have a legitimate right and a way to attack it."

Asked if he was afraid as he walked toward the Woolworth's that day, McCain responded, "Hell no, I wasn't afraid. I was too angry to be afraid. Anxiety, yes—one of two things could happen. I knew my days as a student were going to be over. If I were lucky, I would go to jail for a long, long time. If I were not quite so lucky, I could come back to campus in a pine box. But it did not matter, because the way we were living was probably worse than either of those options."

McCain concluded by explaining the rewarding feeling he had in taking action for a just cause.

"Twenty seconds after I sat on that dumb stool, I had the most wonderful feeling. I had a feeling of self-fulfillment. I had a feeling of dignity 100 feet tall. I had a feeling of invincibility. I was somebody through my own accord and through my own action," McCain said.

Elon Law student Samantha Gilman said McCain's account of the sit-ins was inspiring.

"As an undergraduate at Elon, I took a civil rights class, read books about the sit-ins, and visited sit-in locations, but to talk to someone who participated in it was really meaningful," Gilman said. "You can see it in movies and you can read all the books you can, but to hear it first-hand and feel what they were feeling at the moment really makes an impact."

Legal Context

Romallus Murphy, former general counsel for the North Carolina NAACP and past-president of the Guilford County Black Lawyer's Association, reviewed 1950s civil rights litigation preceding the sit-in movement.

Murphy said that legal actions taken by the NAACP under the leadership of Charles Hamilton Houston and Thurgood Marshall began with a strategy Houston called Equalization Theory, and ended, ultimately, in overturning the separate but equal doctrine of *Plessy v. Ferguson*.

"They concluded that *Plessy v. Ferguson* had no basis in law and therefore they should make an attack upon separate but equal. Well, there was a disagreement. There were those who felt that would be a fatal attack, based upon *steri decisis*, the Supreme Court precedent, they should not attack separate but equal head on—they should use *Plessy v. Ferguson* to put the 'equal' along with 'separate' because they really had separate but unequal."

In cases spearheaded by the NAACP, Murphy said, Houston and Marshall won equal pay for teachers and upgraded higher education facilities for minorities all over the south.

"The idea was that it would become too costly to have duplicate equal facilities all over the country, and therefore *Plessy v. Ferguson* would just die on its own, but that did not happen," Murphy said.

Describing the plaintiffs in these cases, Murphy said they deserved more credit for their contributions to civil rights in the United States.

"The plaintiffs were young black males or females who had recently graduated from college," Murphy said. "If you were to sue the state of Texas or the state of Maryland in those days, your name and picture would be in the paper, they would know who your mother and father are, they would know where you live and where they work, and in some cases you may be subjected to economic reprisals."

Elon Law student Jeremy Ray said he valued Murphy's account of cases that laid a foundation for the sit-ins.

"Without hearing from those who were directly involved in the legal actions of the civil rights movement, you don't really get an idea of the true players who actually created the larger change that happened, especially some of the plaintiffs who took these law suits and just wore down the states until equal rights was finally developed," Ray said.

The Future of Civil Rights

Concluding the forum, panelists discussed political and social matters they thought law students and the broader public should address as part of the civil rights legacy in the country.

McCain said he was disappointed to see so many residents in the region "practicing casual citizenship." He urged all residents, and particularly women and minorities, to take advantage of the hard-won right to vote in democratic elections.

Chafe said the nation is at a critical moment in its history, and that citizens should reflect on the philosophy of its founders for inspiration to become more open

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Advocates for the Arts: The Mahler and the State Bar

By Susan Friday Lamb

Did you know that the building which now houses the North Carolina State Bar in downtown Raleigh was a bustling department store more than 25 years ago? In 2001, in the midst of renovations, the State Bar decided to enhance the building's large storefront windows, once filled with the latest fashions. These windows facing Fayetteville Street provided an ideal showcase in a prime location.

Rory Parnell (left) and Megg Rader

The renovation architects came up with an intriguing idea. Why not feature a changing display of paintings by different contemporary North Carolina artists? Not only would this provide visual interest to passers-by, it would also promote the state's artists and creative industry.

Pursuing this idea, Alice Neece Mine, assistant executive director of the State Bar, soon turned to Rory Parnell, owner of Raleigh Contemporary Gallery (now The Mahler Fine Art). Parnell agreed to take on the task of selecting one artist's paintings to highlight every three months. Additionally, she would send information about each artist to the *Journal* for a feature article. And thus, a successful partnership was born.

"As an advocate for the arts, I was impressed with the State Bar's commitment to promoting the work of North Carolina artists," recalls Parnell.

When Megg Rader joined Parnell as a professional partner in 2005, she brought her extensive arts experience into the picture. Now both women enjoy working with the State Bar while managing busy careers as owners of the sister galleries The Mahler and The Collectors Gallery, also located on Fayetteville Street.

"The Mahler specializes in fine art in multiple visual disciplines, and The Collectors Gallery focuses exclusively on North Carolina fine craft," says Rader of these thriving businesses.

Although they have 35 years of collective experience in the arts, you may be surprised to discover that Rader and Parnell have many ties to the legal community. For example, Parnell helped found Mediation Services of Wake Inc., after moving to Raleigh with her husband, Dr. Jerry Parnell, in 1981. She and a group of dedicated volunteers began this service because they believed in helping people settle disputes outside the court system with assistance from a trained mediator. Parnell volunteered with the organization for a decade.

"It was a very rewarding experience," states Parnell, who also managed Raleigh Contemporary Gallery at the time. "It was a

way for me to balance my advocacy of art with my interest in social service work."

Rader graduated from Campbell University School of Law in 1987. Prior to law school, she earned a degree in art history and art administration from Mary Baldwin College in Virginia. On a personal note, her husband, Wake County Chief District Court Judge Robert Rader, is a past-chair of the State Bar's CLE Board.

During the 1990s, Rader poured her energy into serving as executive director of Artspace, a non-profit visual art center in the heart of the capital city. She and Parnell continue to serve on numerous boards and committees of non-profit organizations, such as Artspace, the Raleigh Arts Commission, the Visual Art Exchange, and the Conservation Trust of North Carolina. They are also active members of the Downtown Raleigh Alliance.

"We believe that giving back to our community also helps to enrich the cultural life of North Carolina," emphasizes Rader.

Similarly, the State Bar is investing in the state's culture by promoting works by North Carolina artists through its partnership with Rader and Parnell.

"This partnership has really been a win-win for the State Bar, the galleries, and the artists," remarks Mine. "It has worked beautifully." ■

Susan Friday Lamb is a freelance writer.

The Mahler and The Collectors Gallery are distinctive showplaces with unique and diverse offerings. The Mahler opened its doors in 2009 in the carefully restored 1876 Mahler Building. The high ceilings and wooden floors of the historic building provide a pleasing setting for the visual treats within—paintings, sculptures, pottery, mixed media pieces, and more.

"The Mahler offers the best in regional and national fine art by emerging and established artists," says Rader. The gallery's professional staff provides art consulting for residential and corporate clients, which includes numerous Raleigh law firms. For more information, call 919-896-7503, e-mail info@themahlerfineart.com or go to www.themahlerfineart.com.

The Collectors Gallery relocated last fall to a brand-new glass pavilion located at the City Plaza. The gallery features fine craft made by North Carolina artists. Shoppers discover treasures at every turn: unusual and one-of-a-kind pottery, sculpture, jewelry, and glass and wooden objects. Check out the online store at www.thecollectorsgallery.com. Call 919-828-6500 or e-mail info@thecollectorsgallery.com for additional details. ■

Addressing the Gap (cont.)

she worked in health policy and research. Please send comments to Ann Shy at Ann@DisputeRedesign.com

Endnotes

1. While reimbursement recently dropped due to severe constraints to federal and state budgets, both of which are sources of funding for NC Medicaid, rates remain within 95% of Medicare; fee-for-service prevails rather than a managed care model; and physician input remains central to reimbursement and care plan policies.
2. S.L. 2008-118 s.3.13 requires NC Department of Health and Human Services (DHHS) to transfer $2 million to the Office of Administrative Hearings to effectuate a mediation and appeals process.
3. Multiple mediation centers participate. No uniform reporting mechanism exists, hence the estimate.
4. Changes and clarifications were made in the Medicaid appeals process and passed into law as part of S.L. 2009-550/House Bill 274, effective August 28, 2009.
5. In NC, more children are covered by Medicaid (62% of all NC children) than the national average (59.7%), and fewer children are uninsured (18.7% of all NC children) than the national average (19.7%). However, more children in NC are living in poverty (26% of all NC children) than the national average (23%). These data refer to 2007-2008, taken from Medicaid Fact Sheets from the Kaiser Family foundation at http://www.kff.org/MFS/.
6. *See* note 4.
7. According to DHHS' legislative report on the appeal process submitted in October 2009, the new efficiencies (specifically, the expedited hearing process and accompanying document management system) saved $10.3 million in ten months in maintenance of service costs by eliminating 165,200 days of service that would otherwise have been paid for by Medicaid under the previous appeal process. *See* www.dhhs.state.nc.us/dma/legis/100109Appeal.pdf page 4 and Table VI on page 13.
8. Of the decisions adopted by the Medicaid Agency since 2009 as their final agency decision, 89% were ALJ rulings in favor of the Medicaid Agency and 11% were ALJ rulings in favor of the recipient. One hundred percent of the decisions overturned by the Medicaid Agency were ALJ rulings in favor of the recipient. The Medicaid Agency overturned 81% of all cases that favored the recipient. OAH-generated report, updated March 1, 2010.
9. If an existing service was denied, Medicaid would be compelled to continue paying for the service until a final decision was rendered. But if a request for a new service was denied, the child may never receive that service if their Medicaid eligibility expired due to age before a final decision to initiate the service was rendered.
10. State of N.C., Dep't of Health and Human Serv., Div. of Med. Assistance, Appeal Process for Medicaid Applicants and Recipients Established Under S.L. 2008-118, Sec. 3.13 and S.L. 2008-107 Sec. 10.15A (h6), at 5 (2009).
11. Estimates now say an additional 16 million low-income people will be added to Medicaid including parents and some childless adults. "Proposed Changes in the Final Health Care Bill," *The New York Times*, March 22, 2010.

Sit-Ins (cont.)

to the needs and perspectives of minorities in the country.

"By 2050, we will no longer be a majority white nation," Chafe said. "Our own state has seen a 600% increase in the Latino population in the last ten years, and we are facing a cultural test of where our values are. Do we actually believe in the common good and what is the common good? Our country was founded, the white part of the country, by the Puritans who talked about a model of Christian charity, about caring for each other, about loving each other, about bearing each other's pain. We haven't been there for a while, we haven't really understood the importance of hearing the other side."

Asked about current social movements, including the gay rights movement, Chafe concluded saying there was a need to "recognize the indivisibility of human rights."

Elon Law student Tiffany Atkins said the forum sent the right message to law students.

"They each gave a different perspective on the importance of the sit-ins and how the law played a part in a movement that shaped our country," Atkins said. "I thought it was great that they challenged us to be empowered to really make change."

Elon Law student Amanda Tauber said the forum was important in helping law students consider their roles as attorneys.

"It was a great charge to all of us to be active," Tauber said. "We can't sit on our hands and wait for change to happen. As lawyers, we will have the influence, the intelligence, and the creativity to really make an active change in our communities and in the world."

Elon Law presented the forum in partnership with the law school's Black Law Students Association and Phi Alpha Delta chapter, and with support from the Law School Admission Council as part of DiscoverLaw.org Month. The Admissions Office at Elon Law sponsored this forum, inviting college and high school students from minority communities currently underrepresented in the legal profession to attend, providing an opportunity to consider what careers in the law can achieve. ■

Philip Craft is the director of communications for Elon University School of Law.

Bad Faith (cont.)

that a successful plaintiff may seek both treble damages and attorney's fees. *See generally* N.C.G.S. Chapter 75-16, *et. seq.*; *see also Marchall v. Miller*, 302 N.C. 539, 548, 276 S.E.2d 397, 403 (1981).

To succeed in a claim for unfair or deceptive trade practices under the UTPA, a plaintiff generally must show: "(1) defendants committed an unfair or deceptive act or practice; (2) in or affecting commerce; and (3) that plaintiff was injured thereby." *First Atl. Mgmt. Corp. v. Dunlea Realty Co.*, 131 N.C. App. 242, 252, 507 S.E.2d 56, 63 (1998). *See also* N.C. Gen. Stat. § 75-1.1 (2005). "A practice is unfair when it offends established public policy as well as when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers." *Marshall v. Miller*, 302 N.C. 539, 548, 276 S.E.2d 397, 403 (1981). Interpreting the Unfair Claim Settlement Practices statute, North Carolina courts have held that "[n]ot attempting in good faith to effectuate prompt, fair, and equitable settlements of claims in which liability has become reasonable clear," is "inherently unfair, unscrupulous, and injurious to consumers." *Country Club of Johnston City., Inc. v. US Fidelity & Guar. Co.*, 150 N.C. App 231, 247, 563 S.E.2d 269, 280 (2002) (quoting N.C. Gen. Stat. § 58-63-15(11)(f) (2005)). Therefore, a plaintiff alleging bad faith should allege the insurer's actions violate the Unfair Claim Settlement Practices Act and therefore constitute an unfair trade practice, which the UTPA creates a private right of action to pursue.

A final distinction worthy of note is that causes of action for unfair or deceptive practices are distinct from breach of contract actions. *Boyd v. Drum*, 129 N.C. App. 586, 593, 501 S.E.2d 91, 97 (1998), *aff'd per curiam*, 350 N.C. 90, 511 S.E.2d 304 (1999). The cause of action for violation of the statute exists independently of whether the contract was breached. *Bernard v. Cen. Carolina Truck Sales, Inc.*, 68 N.C. 228, 230, 314 S.E.2d 582, 584 (Ct. App. 1984), *disc. review den'd*, 311 N.C. 751, 321 S.E.2d 126 (1984). However, damages may be recovered either for the breach of contract claim, or for the violation of §75-1.1, but not for both. *United Laboratories, Inc. v. Kuykendall*, 437 S.E.2d 374, 379, 335 N.C. 183 (N.C. 1993). *See also, Vasquez v. Allstate Ins. Co.*, 529 S.E.2d 480, 137 N.C.App.741 (N.C.App. 2000).

Conclusion

Bad faith litigation continues to grow and expand and courts are faced with the question of defining what constitutes an insurer's obligation to act in good faith, or to not act in bad faith. While all courts are agreed that an insurer owes some duty in this respect, courts wrestle with what constitutes that duty, or a breach thereof. State legislatures have circumscribed those duties to some extent but questions remain. As the concept evolves, it is important to understand ways in which bad faith will be characterized and delineated. It is also important for practitioners on both sides to recognize the potential areas that create the greatest risk of a bad faith claim, and what steps can be taken to address those areas before the claim arises. Exploring these matters in detail will hopefully provide practitioners tools to assist them as they navigate this evolving area of law. ■

A graduate of the University of North Carolina School of Law, Constance Anastopoulo is an assistant professor of law at the Charleston School of Law. In addition to teaching Insurance and Torts, Professor Anastopoulo enjoys her role as a consultant in litigation involving novel and complex issues related to the obligation of insurers.

A Kinder, Gentler Bar—Take Two

By Suzanne Lever

In the Summer 2009 *Journal*, I wrote an article discussing a proposed amendment to Rule 1.8(e) then under consideration by the Ethics Committee. Rule 1.8(e) prohibits a lawyer from making or guaranteeing a loan to a client for living expenses. The impetus for the proposed amendment was regular calls to State Bar Ethics Counsel from lawyers seeking to assist clients who have become unable to provide for themselves or their families after a serious accident. The proposed amendment provided that a lawyer representing an indigent client could provide financial assistance for essential needs such as food, housing, and utilities, as long as there was no obligation to repay and there was no representation to the client prior to the legal representation that such financial assistance would be provided.

Lawyers were opposed to the proposed amendment on the ground that approval of the amendment would result in an unfair advantage to large firms with deep pockets. The fear was that clients would learn which law firms had a reputation for providing financial assistance to their clients and would select their lawyer based on that factor. The proposed amendment was not adopted.

The Ethics Committee is now considering an inquiry from a personal injury lawyer as to the feasibility of setting up a not-for-profit organization to assist needy clients. The inquiring lawyer states that the idea for the organization arose from his desire to help clients deal with the financial and emotional consequences of catastrophic injuries. The lawyer describes his proposed organization as similar to the North Carolina Crime Victim's Compensation Fund, but with the aim of assisting personal injury victims.

The proposed organization would accept tax-deductible donations and would be available to provide funding, housing assistance, and food to personal injury clients in need. Applications for assistance would be reviewed by the organization's review committee and assistance would be provided to those persons considered to be most worthy of need. The review committee would be made up of volunteer lawyers. Any law firm could submit applications for assistance for their clients.

Seems like a great idea. What could be wrong with something that makes you feel so warm and fuzzy? But wait, what if, just what if, some lawyers attempt to use the organization for personal gain rather than for the greater good? How can such an organization function without becoming a conduit for a lawyer's funds that are earmarked and disbursed to the lawyer's own client? And, what will prevent firms participating in the organization from gaining an unfair advantage in attracting clients?

The inquiring lawyer has recommended certain safeguards aimed to prevent such shenanigans. Safeguards suggested thus far include the requirement that application review be "blind" as to the amount of contributions made to the organization by a particular lawyer or firm. Lawyers serving on the review board would also not be allowed to participate in reviewing applications when they have a conflict of interest. In addition, lawyers would not be allowed to advertise their service on the organization's review board, their contributions to the organization, or their past successes in obtaining financial assistance for their clients from the organization.

What do you think? Would an organization established by lawyers to provide financial assistance to needy clients provide a solution to the current ethical/moral conundrum? Or is the State Bar being tempted by a wolf in sheep's clothing? The ethics inquiry will be discussed at the next quarterly meeting of the Ethics Committee. If you would like to comment on the ethical issues surrounding the establishment of a not-for-profit organization to assist needy clients, please send your written comments to Suzanne Lever, The North Carolina State Bar, PO Box 25908, Raleigh, NC 27611, slever@ ncbar.gov. ■

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Animal Law (cont.)

19. E.g., Burke. *See* the Morganton News Herald, Jan 28, 2010 (2010 WLNR 1860747), discussing a 2010 amendment to a county ordinance attempting to classify feral cats as wild animals to the end that they can be immediately euthanized upon arrival at the shelter.
20. *Justice for Animals v. Lenoir County SPCA, Inc.*, 607 S.E.2d 317 (N.C. App. 2005).
21. *Id.* at 324.
22. 2009 N.C. Stats ch. 327, § 1.
23. N.C. Gen. Stat. § 130A-192(c).
24. It was enacted partly in response to reports that Orange County incurred in one year $90,000 at its shelter caring for 45 pit bulls that were evidence in a pending felony dog-fighting prosecution [Chapel Hill Herald, July 6, 1999, at p l] and that Durham County's shelter spent over $40,000 in 13 months caring for 12 pit bulls that were evidence in a pending criminal prosecution [The *News & Observer*, Jan. 31, 2002, p A1 (Durham edition)].
25. N.C. Gen. Stat. § 19A-23.
26. 2 N.C. Admin Code 52J.0101 *et seq.*
27. 2 N.C. Admin Code 52J.0210.
28. 2 N.C. Admin Code 52J.0201 *et seq.* For example, a home with carpet or furniture cannot comply with the requirement under 52J.0201 that any interior surface with which animals come into contact shall be impervious to moisture.
29. 2 N.C. Admin Code 52J.0404 *et seq.*
30. *State v. Maynard*, 673 S.E.2d 877 (N.C. App. 2009).
31. *Holcomb v. Colonial Associates*, 597 S.E.2d 710 (N.C. 2004).
32. Based upon rankings by the Animal Legal Defense Fund. www.aldf.org/article.php?id=1142