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# ERISA Claims Against Settlement Funds Since *Great-West vs. Knudson*

BY ARTHUR J. DONALDSON

**T**rying to understand the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C.

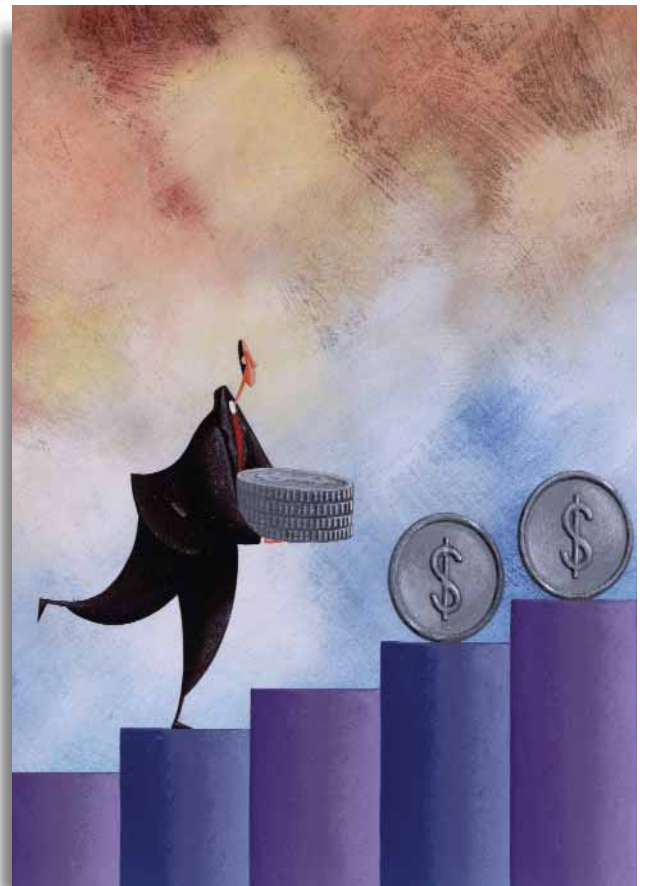
§ 1001, et seq., as it relates to claims of reimbursement or subrogation out of the proceeds recovered for injured plaintiffs from third parties, is often an exercise in frustration for the personal injury practitioner. This article cannot address all the complex and troubling aspects of ERISA but it will try to give a “heads-up” to those who must attempt to decipher this sometimes cryptic Act.

## Introduction

ERISA is a comprehensive statute that regulates retirement and other welfare benefit plans provided by an employer<sup>1</sup>—excluding church<sup>2</sup> and governmental<sup>3</sup>

employers which are not subject to ERISA's provisions. Although the rules, regulations, and oversight provided by ERISA are all-encompassing with respect to pension plans, they are not abundant with respect to other

employee welfare benefit plans such as health insurance plans. As for employee welfare benefit plans, the statute contemplates the development of federal law through the federal courts. Unfortunately, uniformity



has not been achieved, and we have ended up with a patchwork of rulings by the federal circuits with the Supreme Court from time-to-time settling some of the differences. To complicate the practitioner's work one cannot be complacent with just knowing the Fourth Circuit cases as venue, and applicable circuit law, in an ERISA case is not necessarily dependent upon where the injury occurred.<sup>4</sup>

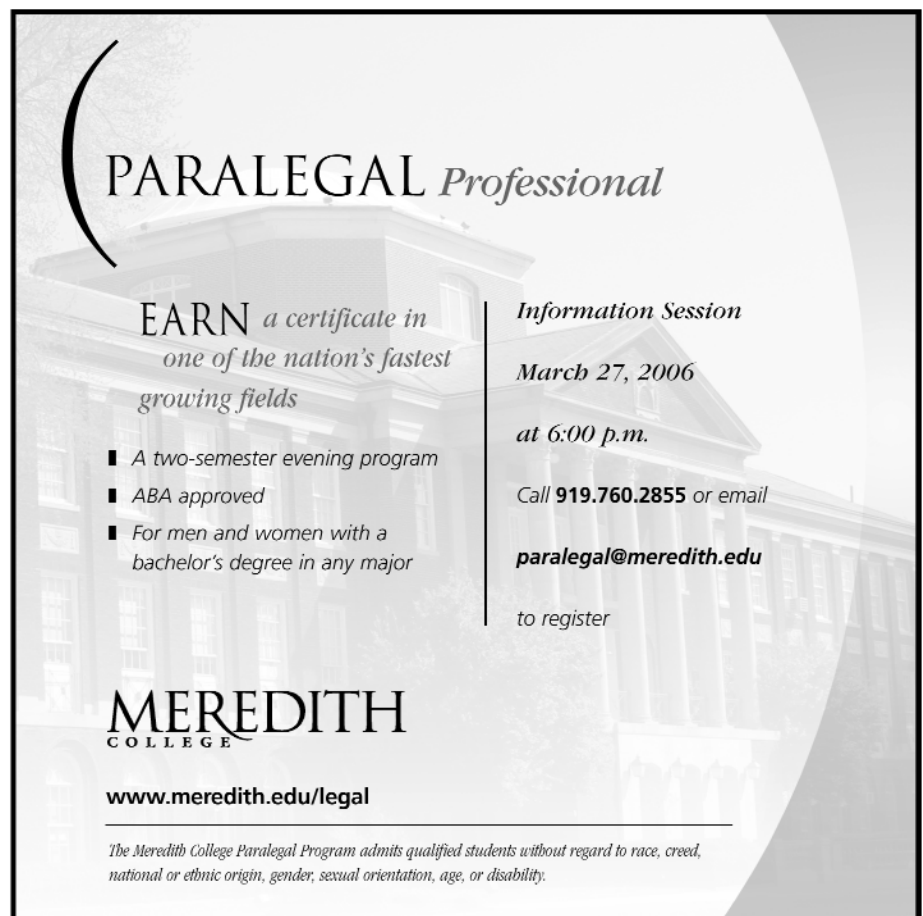
### Significance of plan being self-funded or insured

Every health insurance plan provided by an employer must be analyzed to determine whether or not it is an ERISA governed plan.<sup>5</sup> Most health insurance plans provided by employers are governed by ERISA. Assuming the plan is ERISA governed, the pivotal issue in North Carolina is whether it is a self-funded plan. If the plan is self-funded, the terms of the plan documents control the breadth and width of its reach including the extent, if any, of its claimed right of subrogation or reimbursement.<sup>6</sup>

If the plan is not self-funded but rather fully insured, North Carolina's anti-subrogation prohibition contained in the Administrative Code prevents subrogation in contracts of health insurance policies.<sup>7</sup> There are instances when a fully insured plan contains subrogation language. This occurs most often when the employer is a national or regional company and obtains a single health insurance policy from an out of state health insurance company. In such an instance the subrogation or reimbursement provision probably would not be effective in North Carolina.

### Determining whether a plan is self-funded or insured

Determining whether or not a plan is self-funded is not always easy. To simplify, if the employer purchases an insurance policy and pays a premium and the insurance company assumes all of the risk, then it is an insured plan (and, as previously noted, if it is an insured plan there can be no subrogation or reimbursement). But, if the financial risk falls in any way to the employer (or to a combination of employer and employee funding) then it is a self-funded plan. The purchase of stop-loss coverage does not convert an otherwise self-funded plan into an insured plan.<sup>8</sup>

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In order to determine whether a plan is self-funded, it is useful to obtain an authorization from the beneficiary to request information from the plan.<sup>9</sup> The request for plan documents must be made of the plan administrator.<sup>10</sup> The plan administrator is usually identified in the Summary Plan Description (SPD). Most often, but not always, the plan administrator is the employer. The third party administrator or the subrogation company representing a plan is not a plan administrator within the meaning of ERISA.

The request to the plan administrator must be specific. Copies of the following documents should be specifically requested: the plan's three digit identification number, the summary plan descriptions (and amendments) for all relevant years, all contracts or agreements establishing the plan, the declaration pages of all insurance contracts with the plan including reinsurance and stop-loss coverage, the IRS Form 5500 for each relevant year, written policies, memoranda, minutes of meetings, and any other written documentation addressing reimbursement

or subrogation, enforcement or waiver of the same, from the date of establishment of the plan until the present.

Failure of the plan to provide the requested information within 30 days exposes the plan to a penalty of \$110.00 per day.<sup>11</sup>

IRS Form 5500 is the Annual Return/Report of Employee Welfare Plan. Part 1 section 9a reflects the plan's funding arrangement as reported by the plan. If the funding arrangement is indicated as "Insurance" then it would reflect, absent a mistake in filling out the form, that the plan is insured and North Carolina's anti-subrogation rule would prevent the plan from seeking reimbursement. Quite often the Form 5500 indicates that insurance and the general assets of the sponsor (employer) fund the plan. In such a case the plan is probably self-funded and has stop-loss coverage. A valid argument can be made that the amount of recoupment to which the plan is entitled is only the amount not covered by stop-loss insurance. An online source for IRS Form 5500s for

most companies can be found at FreeERISA.<sup>12</sup>

Studying the plan documents is crucial. If the plan has no provision for subrogation or reimbursement, then there is no subrogation or reimbursement. If the plan states that it seeks subrogation or reimbursement from just a liability carrier, then that would be the extent of its recovery. Unsurprisingly, most often plans seek recovery from all sources.

### If self-funded, what remedy does a plan have

Having established that the plan is a self-funded ERISA plan, and that the language in the plan covers the sources of recovery by the injured person, the next inquiry is: what remedy does the plan have against the injured person or the attorney for the injured person? That question was answered in *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 122 S. Ct. 708, 151 L. Ed. 2d 635 (2002). The plan sought reimbursement from the plan beneficiary out of funds already disbursed. The Supreme Court found that only an equitable remedy is available to the plan and held that ERISA plans cannot seek reimbursement from the client after settlement and disbursement in an action at law. The Court based its decision on the remedy portion of the statute<sup>13</sup> which the court interpreted as providing that the only remedy available to a plan was an equitable remedy. And that equitable remedy must be against identifiable funds.<sup>14</sup>

In response to *Great-West*, ERISA plans often seek the imposition of constructive trusts—an equitable remedy—against specifically identifiable funds from settlement or verdict either in an attorney's trust account, in possession of a court, in an escrow account, or otherwise not commingled with client funds.<sup>15</sup>

The Federal Circuits have split regarding whether a constructive trust may be imposed against identifiable funds. The Fourth,<sup>16</sup> Fifth,<sup>17</sup> Seventh,<sup>18</sup> and Tenth<sup>19</sup> Circuits have focused solely on the remedy sought and concluded that it was appropriate for plans to seek imposition of a constructive trust on identifiable proceeds because that was equitable in nature. On the other hand, the Sixth<sup>20</sup> and Ninth<sup>21</sup> Circuits have focused on the basis for the remedy and concluded that because the

basis was contractual in nature, there can be no remedy seeking imposition of a constructive trust.

### Liability of attorney after disbursement

Generally there has been no personal liability placed on the attorney for the injured party who has disbursed settlement funds to the injured party.<sup>22</sup> However, a plan may pursue settlement funds in the trust account of a plan beneficiary's attorney.<sup>23</sup>

It has been opined that personal liability might be imposed on the injured party's attorney where the attorney acted in bad faith and breached some unspecified equitable duty owed to the plan, but, in the absence of such an ephemeral duty, the attorney is free to choose distribution options that appear to favor the client.<sup>24</sup>

### Liability of beneficiary of plan after disbursement

Prior to *Great-West v. Knudson* the Fourth Circuit held that a plan could, under the theory of unjust enrichment, sue at law to recover funds advanced by a plan to a beneficiary as compensation for injuries caused by a third party after the beneficiary recovers a compensatory award from the at-fault party.<sup>25</sup> However, the holding was questioned after *Great-West v. Knudson* when the Fourth Circuit stated "...the justification for the court's recognition of a federal common law unjust enrichment claim in *Waller* is in serious doubt, as it is no longer debatable that *Provident* has an 'explicit remedy' under § 1132(a)(3)."<sup>26</sup> It is now clear that the Fourth Circuit would impose a constructive trust on identifiable proceeds in the possession of the plan beneficiary as an equitable remedy but will not impose "personal liability" or a "money judgment" against an individual beneficiary as such a remedy at law is beyond the purview of the ERISA equitable remedy scheme.<sup>27</sup>

### Conclusion

From the plaintiff's perspective it is extremely important that the client be involved from the outset when the presence of a self-funded ERISA plan is suspected. The client should be given options such as allowing the attorney to negotiate with the plan to reduce the amount claimed by the plan. Should the client still be covered by

the health plan after settlement, the client should be informed that the plan might withhold future benefits as an equitable means of recoupment should it not be reimbursed.

An ERISA claim is not a lien and only the imposition of a constructive trust upon identifiable funds creates a lien. While cases interpreting ERISA refer to both "subrogation" and "reimbursement" the distinction, and the consequences of the distinction, are rarely recognized. The same is true with respect to cases which do not acknowledge the difference between a "lien" and a "claim."

If the client instructs her attorney to disburse the funds to her and not pay the plan, a written directive should be signed by the client.<sup>28</sup> ■

*Following a tour as a special agent with the Federal Bureau of Investigation, Donaldson has been a practicing attorney in Salisbury and Greensboro, North Carolina, since 1967.*

### Endnotes

1. 29 U.S.C. § 1002(1).
2. 29 U.S.C. § 1321(b)(3).
3. 29 U.S.C. § 1321(b)(2).
4. *Mid Atl. Med. Servs., LLC v. Sereboff*, 407 F.3d 212 (4th Cir. 2005), pet. for writ of cert. granted November 28, 2005.
5. 29 U.S.C. § 1003(a).
6. *Hampton Industries v. Sparrow*, 981 F.2d 726, 730 (4th Cir. 1992); *McGill Corp. v. Stinnett*, 154 F.3d 168, 172 (4th Cir. 1998).
7. N.C. Administrative Code T11-C12.0319 entitled SUBROGATION PROHIBITED provides:  
Life or accident and health insurance forms shall not contain a provision allowing subrogation of benefits.
8. *Thompson v. Talquin Building Products Company*, 928 F.2d 649 (4th Cir. 1990).
9. AUTHORIZATION FOR RELEASE OF EMPLOYEE WELFARE BENEFIT PLAN INFORMATION  
Pursuant to 29 U.S.C. § 1024(b)(4), the undersigned hereby authorizes my employer/former employer to furnish to my attorneys, \_\_\_\_\_, a copy of all employee welfare benefit plan documents in existence during my employment. This authorization includes any and all documents enumerated in Section 1024(b)(4), including but not limited to the latest updated summary plan descriptions, plan descriptions, latest annual reports, terminal reports, applicable collective bargaining agreements, trust agreements, contracts, or other instruments under which any of the plans at issue were established or are presently operated.  
NOTICE: Neither the employee welfare benefit plan administrators nor my employer/former employer is authorized to disclose to any third party including insurance adjusters, insurance companies, or any other person or entity, any personal information pertaining to me or the medical treatment I received or the cost thereof. The undersigned claims every confidentiality

privilege whether federal or state and whether created by statute, rule, or case law. Such personal information includes any information in my personnel file or any other information obtained by my employer/former employer, the plan, or its agents in the course of administering the plan and paying benefits pursuant to the plan.

ALL PRIOR AUTHORIZATIONS ARE HEREBY CANCELED, and I hereby waive any privilege I have regarding release of said information to my attorneys. A photocopy of this authorization shall be considered the same as the original

Employee/Plan Participant: \_\_\_\_\_

Date: \_\_\_\_\_

10. 29 U.S.C. § 1024(b)(4).
11. 29 U.S.C. § 1132(C)(1)(B); 29 C.F.R. § 2575.502c-1.
12. Available at www.freeerisa.com.
13. 29 U.S.C. § 1132(a)(3). A civil action may be brought by a fiduciary  
(A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan.
14. *Primax Recoveries, Inc. v. Carey*, 2002 U.S. Dist. LEXIS 15818, 2002 WL 1968339, (S.D.N.Y. 2002); *Primax Recoveries v. Goss*, 240 F. Supp. 2d 800 (N.D.Ill. 2002); *Mid Atl. Med. Servs., LLC v. Sereboff*, 407 F.3d 212 (4th Cir. 2005), pet. for writ of cert. granted November 28, 2005.
15. *Wellmark, Inc. v. Deguara*, 257 F. Supp. 2d 1209 (S.D. Iowa 2003).
16. *Mid Atl. Med. Servs., LLC v. Sereboff*, 407 F.3d 212 (4th Cir. 2005), pet. for writ of cert. granted November 28, 2005.
17. *Bombardier Aerospace Employee Welfare Benefits Plan v. Ferrer et al.*, 354 F.3d 348 (5th Cir. 2003).
18. *Admin. Comm. of Wal-Mart Stores, Inc. Assocs.' Health & Welfare Plan v. Varco*, 338 F.3d 680 (7th Cir. 2003).
19. *Admin. Comm. of Wal-Mart Assocs Health & Welfare Plan v. Willard*, 393 F.3d 1119 (10th Cir. 2004).
20. *Qualchoice, Inc. v. Rowland*, 367 F.3d 638 (6th Cir. 2004).
21. *Westaff (USA) Inc. v. Arce*, 298 F.3d 1164 (9th Cir. 2002).
22. *Hotel Employees & Restaurant Employees International Union Welfare Fund v. Gentner*, 50 F.3d 719, 720-22 (9th Cir.1995); *Chapman v. Klemick*, 3 F.3d 1508 (11th Cir.1993), cert. den., 510 U.S. 1165 (1994); *Health Cost Controls of Illinois, Inc. v. Washington*, 187 F.3d 703, 709 (7th Cir. 1999), cert. denied, 528 U.S. 1136 (2000); *Southern Council of Industrial Workers v. Ford*, 83 F.3d 966 (8th Cir. 1996); *Md. Elec. Indus Health Fund v. Levitt*, 155 F. Supp. 2d 482 (DMD 2001); *Mid Atl. Med. Servs., Inc. v. Do*, 294 F. Supp. 2d 695 (D. Md. 2003); *Great-West Life & Annuity Ins. Co. v. Bullock*, 202 F. Supp. 2d 461 (E.D.N.C. 2002).
23. *Bombardier Aerospace Employee Welfare Benefits Plan v. Ferrer et al.*, 354 F.3d 348 (5th Cir. 2003)(section 1132(a)(3) authorizes a cause of action against an attorney who holds disputed settlement funds on behalf of a participant in an ERISA plan); *IBEW-NECA Southwestern Health & Benefit Fund v. Douthitt*, 211 F. Supp. 2d 812, 816 (N.D. Tex. 2002)(finding that the settlement funds at issue, which were being held in the attorney's trust account for the plan beneficiary, were



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within the plan beneficiary's possession and control); *see also Great-West Life & Annuity Ins. Co. v. Smith*, 180 F. Supp. 2d 1311 (M.D. Fla. 2002).

24. *Mank v. Green*, 368 F. Supp. 2d 102, (D. Me., 2005).
25. *Provident Life & Accident Insurance Co. v. Waller*, 906 F.2d 985 (4th Cir. 1990).
26. *Provident Life v. Cohen*, 423 F.3rd 413 (4th Cir. 2005).
27. *Primax Recoveries v. Young*, 83 Fed. Appx. 523; 2003 U.S. App. LEXIS 25786 (unpublished decision).
28. The undersigned client acknowledges being advised by my attorney that a self-funded welfare benefit plan may have paid some or all of my medical and hospital expenses associated with the treatment of the injuries for which I am receiving proceeds. My attorney has informed me that the plan may, but is not required to,

seek reimbursement, restitution, or subrogation from these proceeds or from me personally.

I have been advised by my attorney that

- the plan may cut off (or draw down) future benefits to me or other beneficiaries of the plan until its claim is satisfied
- the plan may sue me or other family members/beneficiaries of the plan seeking reimbursement
- if the plan files a lawsuit I may be liable for the plan's attorney fees and costs if I lose
- if the plan files a lawsuit my attorney is not obligated to represent me in such action

Having been fully informed of the consequences of my decision I authorize and direct my attorney to NOT disburse any funds to the plan and further direct my attorney to disburse to me such funds.

# Important “Firsts” in the North Carolina Legal Profession

BY ALAN D. WOODLIEF JR.

W

ith the recent announce-  
ment of another important  
“first” in the North  
Carolina legal field—the

appointment of the first African-American woman to the North Carolina Supreme Court—

it struck me how little I know about the history of the legal profession in North Carolina. The

legal history I recall from law school centered on the United States Supreme Court and the

evolution of our constitutional jurisprudence. I do not recall having learned any specific

North Carolina legal history, except the “history” that occurred while I was in law school and

since my graduation. This article details some of the North Carolina legal “firsts” that I have

uncovered recently.

## General Legal Firsts

The North Carolina Bar Association was founded in 1899.<sup>1</sup> It was well received from the beginning, securing the membership of a high percentage of the state’s attorneys, including many of the leading lawyers from across the state.<sup>2</sup> Its charter

class included 157 lawyers and, by the time of its first annual meeting, it had 251 members.<sup>3</sup> The Bar Association now boasts more than 12,500 members.

On April 3, 1933, the General Assembly passed legislation incorporating the North Carolina State Bar.<sup>4</sup> Prior to that

time, the North Carolina Bar Association had handled the examination, licensing and discipline of North Carolina lawyers, establishing the first board of law examiners in 1915. By 1932, the Bar Association decided that an incorporated State Bar established by legislative enactment was necessary to control the examination, licensing and disbarment of attorneys and to prevent the unauthorized practice of the law.<sup>5</sup> At present, the North Carolina State Bar has approximately 19,500 active members.<sup>6</sup>

## Court Firsts

In 1712, Christopher Gale became the first chief justice of the North Carolina general court, a precursor to the North Carolina Supreme Court. In 1776, the General Assembly appointed the first judges to the North Carolina Supreme Court.<sup>7</sup>

In 1790, James Iredell became the first and only North Carolinian to serve on the United States Supreme Court.<sup>8</sup> The Chief Justice at the time was John Jay, and the Court met in New York City, which was the national capital at the time.

## Female Lawyer Firsts

Tabitha Anne Holton of Guilford County became the first woman licensed to practice law in North Carolina in 1878.<sup>9</sup> North Carolina was only the sixth state to grant a woman a law license. Upon passing the North Carolina state bar, Holton also became the first female to be a licensed attorney in the south.<sup>10</sup> In 1919, Katherine Everett became the first female lawyer to argue a case before the North Carolina Supreme Court.<sup>11</sup> Reports indi-

cate that she won the case.<sup>12</sup> In October 2000, M. Ann Reed became the first female president of the North Carolina State Bar.

In 1949, Susie Sharp became North Carolina's first female superior court judge.<sup>13</sup> In 1962, she went on to become the first woman to serve on the North Carolina Supreme Court.<sup>14</sup> In 2003, Allyson Duncan became the first woman from North Carolina to serve on the Fourth Circuit Court of Appeals.<sup>15</sup>

### African-American Lawyer Firsts

In 1871, James Edward O'Hara, became the first African-American man licensed to practice law in the state.<sup>16</sup> He was a Howard University law graduate and a Republican activist.

There is some question about who was the first African-American woman licensed to practice law in North Carolina. One source indicates that Elreta Alexander became the first African-American woman to be licensed as a lawyer in North Carolina in 1947.<sup>17</sup> However, another source indicates that Ruth Whitehead Whaley holds this distinction, having been licensed in 1933.<sup>18</sup>

In 1939, North Carolina Central University School of Law was founded to provide an opportunity for a legal education to African-American students in North Carolina. It enrolled its first students in 1940.<sup>19</sup> In June 1951, the law school at the University of North Carolina at Chapel Hill enrolled its first African-American students.<sup>20</sup>

In 1971, Sammie Chess, Jr. became the first African-American to be appointed a Superior Court Judge in North Carolina.<sup>21</sup> In 1983, Henry E. Frye of Greensboro was appointed as an associate justice of the North Carolina Supreme Court. He was the first African-American to serve on the Court and, of course, the first African-American Chief Justice of the Court.<sup>22</sup>

In October 1999 Cressie H. Thigpen Jr. became the first African-American president of the North Carolina State Bar.<sup>23</sup> Twenty years later, in 2003, Allyson Duncan became the first African-American woman to serve on the Fourth Circuit Court of Appeals.<sup>24</sup> Now, in 2006, Patricia Timmon-Goodson of Fayetteville is the first African-American woman to serve on the North Carolina Supreme Court.<sup>25</sup>

### Legal Education Firsts

While there may have been some small, independent law schools in North Carolina prior to 1894, that year marked the formation of the first law schools at the established colleges and universities of the state. The law school at the University of North Carolina at Chapel Hill was incorporated into the university that year.<sup>26</sup> Wake Forest School of Law was also founded that year.<sup>27</sup> Anyone with information establishing which law school was first and breaking this tie is invited to e-mail the author.

Willis Whichard, Dean of the Campbell University School of Law, holds the distinction of being the first person to serve in both houses of the North Carolina legislature and on both of the state's appellate courts. He is now also the first person to hold all of these positions and a deanship at a North Carolina law school.<sup>28</sup>

Finally, Leary Davis, the founding Dean of the new Elon University School of Law in Greensboro, is the first person to serve as the founding dean of two North Carolina law schools, having previously served at Campbell. As impressive as that accomplishment is, it is rivaled by that of Maurice T. Van Hecke, who was the first person to serve as the Dean of two North Carolina law schools at the same time, serving at both the University of North Carolina at Chapel Hill and North Carolina Central University from 1939 to 1942.<sup>29</sup>

### Conclusion

Obviously, this article has just skimmed the surface of North Carolina legal history and leaves many "firsts" for potential future articles. Some of the items briefly touched upon here would make good topics for full-length articles in and of themselves. If you know of other interesting "firsts" in the North Carolina legal profession or further information about some of the firsts listed here, please e-mail the author at awoodlief@elon.edu.

*Alan Woodlief is the associate dean for admissions and an associate professor of law at the Elon University School of Law. He received his BA in Journalism and Mass Communications from the University of North Carolina at Chapel Hill and his JD from Campbell University School of Law.*

### Endnotes

1. <http://www.ncbar.org/about/history/excerpts.aspx>, quoting Chapter 3 of the Centennial History Book-Seeking Liberty and Justice: A History of the North Carolina Bar Association, 1899-1999.
2. Id.
3. <http://www.ncbar.org/about/history/whyBoth.aspx>
4. <http://www.ncbar.org/about/history/excerpts.aspx>, quoting Chapter \_\_\_ of the Centennial History Book-Seeking Liberty and Justice: A History of the North Carolina Bar Association, 1899-1999.
5. Id.
6. [http://www.martindale.com/xp/Martindale/professional\\_Resources/Bar\\_Associations/State/profiles/NCbar.xml#profile](http://www.martindale.com/xp/Martindale/professional_Resources/Bar_Associations/State/profiles/NCbar.xml#profile)
7. <http://www.jomc.unc.edu/executiveeducation/handouts/2002aoc-brochure.pdf>
8. <http://usgovinfo.about.com/blcthistory.htm>
9. <http://www.ncbar.org/about/history/excerpts.aspx>, quoting Chapter 2 of the Centennial History Book-Seeking Liberty and Justice: A History of the North Carolina Bar Association, 1899-1999.
10. <http://www.ncmuseumofhistory.org/nchh/women-shist.html>
11. <http://www.ncmuseumofhistory.org/nchh/women-shist.html>
12. <http://carolinafirst.unc.edu/distprofs/everett.htm>
13. <http://www.ncmuseumofhistory.org/nchh/women-shist.html>
14. Id.
15. [http://dole.senate.gov/index.cfm?FuseAction=FloorStatements.Detail&FloorStatement\\_id=6&Month=7&Year=2003](http://dole.senate.gov/index.cfm?FuseAction=FloorStatements.Detail&FloorStatement_id=6&Month=7&Year=2003)[http://dole.senate.gov/index.cfm?FuseAction=FloorStatements.Detail&FloorStatement\\_id=6&Month=7&Year=2003](http://dole.senate.gov/index.cfm?FuseAction=FloorStatements.Detail&FloorStatement_id=6&Month=7&Year=2003)
16. <http://www.ncbar.org/about/history/excerpts.aspx>, quoting Chapter 2 of the Centennial History Book-Seeking Liberty and Justice: A History of the North Carolina Bar Association, 1899-1999.
17. <http://www.ncmuseumofhistory.org/nchh/women-shist.html>
18. <http://www.jtbf.org/firstlawyers.htm>
19. <http://www.nccu.edu/law/aboutus/hisfacts.htm>
20. <http://www.unc.edu/news/archives/nov01/bsm112601.htm>
21. <http://www.nationalbar.org/pdf/nbamag9-12-05.pdf>
22. <http://www.aoc.state.nc.us/www/copyright/sc/facts.html> (Martin Brinkley)
23. <http://www.nccu.edu/publicrelations/news/376.htm>
24. [http://dole.senate.gov/index.cfm?FuseAction=FloorStatements.Detail&FloorStatement\\_id=6&Month=7&Year=2003](http://dole.senate.gov/index.cfm?FuseAction=FloorStatements.Detail&FloorStatement_id=6&Month=7&Year=2003)[http://dole.senate.gov/index.cfm?FuseAction=FloorStatements.Detail&FloorStatement\\_id=6&Month=7&Year=2003](http://dole.senate.gov/index.cfm?FuseAction=FloorStatements.Detail&FloorStatement_id=6&Month=7&Year=2003)
25. <http://www.newsobserver.com/114/story/390572.html>
26. <http://www.unc.edu/about/history.html>, quoting Carolina - A Brief History, which was adapted from an article by William S. Powell, Professor Emeritus, Department of History.
27. <http://law.wfu.edu/x47.xml>
28. <http://www.lawweb.campbell.edu/facadmin/facbio.cfm?staffid=19>
29. <http://www.nccu.edu/law/aboutus/history1.html>

# Lawyers as Good Sports

BY H. LANDIS WADE JR.

W

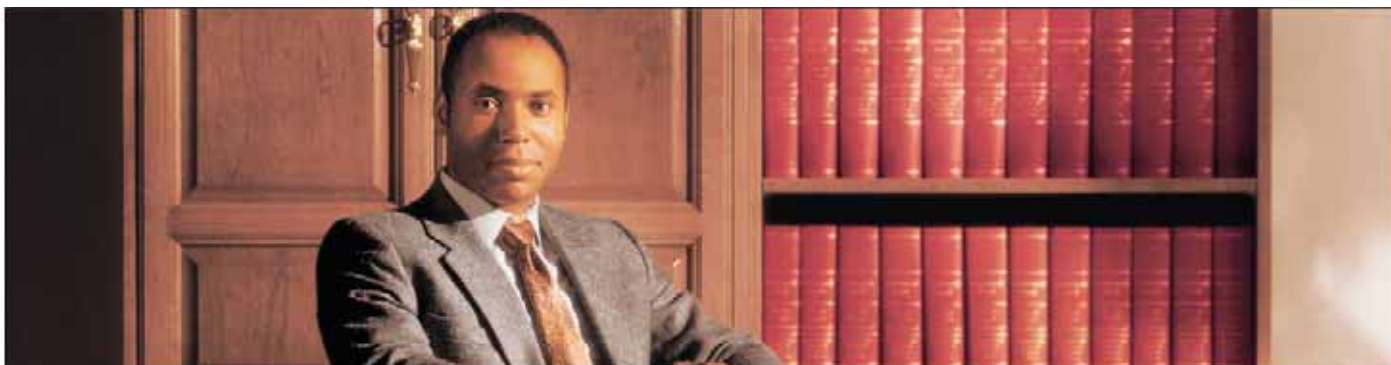
hile watching the last football game of the day on Thanksgiving, I thought about the idea of lawyers as good sports. A month or so before, I witnessed a very successful high school football coach in the area run up the score on the opposing team. Rather than have his quarterback

take a knee when the game was won, he opted instead to run a quick sweep to add a useless touchdown as time expired to end the game.

A few weeks went by, and I mentioned this act of unsportsmanlike conduct to a few of my fellow Optimist Club members as we were discussing sportsmanship in our youth work program, Pop Warner football. I made the observation that the mindset of this high school coach was trickling down to the younger levels of athletics.







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To make my point, I commented that I had seen a Pop Warner coach in a recent game elect to pass the football to try to get an unnecessary touchdown with less than a minute to go in the game. His team was leading by two touchdowns at the time and the game was clearly out of reach. This started a discussion about whether such conduct could or should be punished. One member commented that there was no specific rule that seemed to address the behavior. I thought about this comment and about how different people have different opinions as to what constitutes good and bad sportsmanship.

Having played high school and college sports, having been a little league baseball coach for 20 years, having been a Pop Warner Commissioner for 11 years, and having seen two children play youth sports on recreation and travel teams, I have had the opportunity to witness my share of poor sportsmanship by coaches, parents, and participants. I thought about some of what I had observed.

I thought about coaches and players

who were not respectful to one another before, during, and after games. I thought about excessive arguments with officials and lack of respect for their authority. I thought about the cursing and blaming of others and the refusal when the game was over to give credit where credit was due. I even thought about a few times when I had made mistakes in the heat of battle, either as a player or as a coach, and I thought about why good people with good intentions can get so caught up in the moment that they sometimes forget about good sportsmanship.

Then my mind shifted to the idea of sportsmanship in the practice of law. I began to think about the similarities between sports and the law and whether those similarities justify the ideal notion of lawyers as good sports.

### The similarity between sports and the law

The most obvious connection between sports and the law is the competition inherent in both. Sports is filled with com-

petition. In fact, competition in sports is the gasoline which fuels the games and which allows participants to excel.

Lawyers, like athletes, are highly motivated people who feed off the same form of energy—competition.

Competition for lawyers begins with the law school application process and does not stop there. Would be lawyers fight to get into the best law schools, then they fight as law students to be the best in their class, then they fight to get the best jobs, then they fight to get the best work, and then they fight to move up within their law firms. Such competition in the practice of law is not limited, however, to the personal goals of the lawyers.

Competition is just as obvious in the courtroom as it is in the stadium. A player with a football will try to put it past a defender to score a touchdown. A lawyer will try to put a point of law past his or her opponent to score a favorable decision. Lawyers are, plain and simple, competitive people, just like athletes and coaches, and the law, like sports, brings out hard fought

competitive battles between lawyers.

### The pressure to win in sports and the law

Athletes and coaches, at all levels, must deal with the societal fascination with winning. Most participants in sports are self-driven to win. This pressure and will to win, fueled by the competitive spirit, is not a bad thing. It encourages hard work and sacrifice and it may result in an athlete being able to do things not thought to be physically or mentally possible.

The flip side of the pressure to win in sports is that it will sometimes cause athletes, coaches, and observers to do things in the heat of the moment that they would not do if they were thinking rationally. These same pressures exist in daily law practice.

Everyone loves a winner and law practice is no different. Clients don't hire losers. They want their lawyers to win.

How do I know this? Experience! I have never (ever) been high fived by a client for losing their case. In fact, just like in sports, when I have lost a case, my client (my "team owner") has tended to be a bit surly with me. Oh, the client will sometimes say an encouraging word and suggest that I am still part of the team, but inevitably, just like in sports, the client is likely to question my play calling and may even quietly decide to place me on waivers.

Fortunately, just like in sports, there are victories in the law, and just like in sports, winning at law is great fun. There is no better feeling when battling for your client in court than hearing the jury or judge rule for your client, and no better feeling when advancing your client's causes in negotiations and helping achieve their goals. When you win a case, just like in sports, the client is very happy. A win is a win is a win. Clients, like sports fans and sports team owners, will appreciate your work. They may even pay your bill.

### The indifference to sportsmanship

In sports, the average fan will engage in a discussion about sportsmanship from time to time, and sometimes fans will applaud good sportsmanship. More often, fans applaud good plays, not good sportsmanship. During the Super Bowl, or the World Series, or the World Cup, where the home team has a chance to be king of the

hill, most fans could not care less about sportsmanship. At that point, it is all about winning.

In the practice of law, lawyers are given the responsibility of guarding their clients' money, time, and reputations. Each of these tangible and intangible items is very valuable to clients.

For most clients, their legal case also is very personal. It is the Super Bowl of their limited legal experience and there is no doubt that they want to win. Sportsmanship likely is at the bottom of the client's list of things to be accomplished.

And for the lawyer who makes a living at the law, the pressure to win and achieve results for the client is always present. In fact, winning has a lot to do with whether a lawyer will get another case, either from that client or from referrals by that client.

Winning even for the sake of winning is not to be criticized. The will to win causes positive behavior, like advance preparation and hard work. Unfortunately, the pressure to win in both sports and the law has caused the participants in both venues to behave at times like poor sports and to display an indifference to the concept of sportsmanship.

One possible reason for the indifference to sportsmanship in the law lies not in the fact that winning is so important, but in the fact that sportsmanship is supposed to be, well, for sports. The law, on the other hand, is real, and the court cases and legal transactions that flow from the law, have real consequences. Clients can win or lose much in a legal contest. In sports, playing the game can be fun, and losing is tough on the ego, but except where athletes are paid for their efforts, sports are meant to be a game.

On the other hand, very few people who go to see a lawyer will ever equate the experience as being fun, or like a game. It is stressful, full of pressure, and expensive. But fun and games? Not a chance.

### Opinions vary on what constitutes good and bad sportsmanship but you know it when you see it

In sports, coaches, players, and spectators all have different opinions about what constitutes good and bad sportsmanship.

Unfortunately, some coaches do not teach good sportsmanship or do not discourage poor sportsmanship, either

because there are no hard and fast rules on the subject or because good sportsmanship is not important. Too often, in the age in which we live, it is better for an athlete to get the better of the opponent and let others know about it publicly than it is for the athlete to respect and battle the opponent with good sportsmanship.

The famous quote from our Supreme Court about "knowing pornography when you see it" applies equally to the doctrine of sportsmanship.

How often have we seen the athlete make a play, only to taunt his opponent? How often have we seen coaches and players curse and blame officials? How often have we seen trash talking among athletes? How often have we seen on-field fights, off-field arguments, and threatening gestures?

By the same token, haven't we seen lawyers taunt opposing parties? Haven't we seen lawyers show disrespect for the authority of court officials? Haven't we seen lawyers write unnecessarily, mean, and vicious letters? And, haven't we also seen lawyers engage in verbal cat fights and petty arguments?

On the other hand, we have been fortunate to witness good sportsmanship in sports. We have witnessed athletes give a helping hand to one another after plays have ended. We have seen players congratulating one another after games and coaches disagreeing respectfully with officials when they question calls. And, when games have ended, we have seen athletes and coaches respectfully accepting the outcome without gloating as winners or blaming others as losers.

We also have seen the same type of good conduct among lawyers. We have seen lawyers in hard-fought cases acting professionally. We have seen lawyers who refuse to be drawn into the pettiness that is the hallmark of some forms of advocacy. We have seen lawyers who play by the spirit and not just the letter of the rules. And, even when the legal battles have been tough ones, we have seen lawyers extend professional courtesies, engage in cooperative behavior, and show respect to opposing counsel.

### Good sportsmanship in the law is not just compliance with ethics rules

I don't know of any ethics rule, written

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or unwritten, that requires one lawyer to shake hands with another lawyer after a case or argument is over. In youth sports leagues, however, one of the great unwritten rules of the game is shaking hands after the game. Why? It is this simple act of civility that gives balance to the competition.

Don't get me wrong. I am not for the development of a rule requiring lawyers to shake hands or even a set of rules which attempt to define what constitutes good and bad sportsmanship among lawyers. First off, I don't think it would work, nor is it possible. The essence of being a good person, like the essence of being a good sport, cannot be captured with a few written rules. And, you can't make someone be a good sport. A person has to buy into the idea.

The North Carolina Revised Rules of Professional Conduct tend to support this approach. In the Preamble to the Rules, Section 0.1 [12], there is a concluding sentence which sounds familiar. It states that it is "the lawyer's obligation zealously to pro-

tect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous, and civil attitude toward all persons in the legal system." It might just as easily have said, in a way that any sports fans would understand, "it is the lawyer's obligation strenuously to compete to win on behalf of his or her client, within the framework of the rules, while maintaining at all times good sportsmanship toward all the participants."

#### Don't follow the lead of the misguided coach or client

In the journey toward sportsmanship in the law, lawyers have to be wary of undue influence by their clients. Here's why. Clients will at times, like a misguided coach, urge the lawyer to behave in an unsportsmanlike manner.

Like the coach in one of the Karate Kid movies who instructed his pupil to hurt the opponent to win the match, there will be clients who will coach their lawyer to show no measure of good manners in the legal process. Some lawyers believe that this is

the pathway to success. Others may not, but may relent to this pressure to look good in the eyes of the client.

Lawyers need to resist the urge to be guided by such foolish direction. Poor sportsmanship is not something that should be condoned.

#### Resist the urge to fight fire with fire

How often have we seen athletes penalized or ejected from games for responding to acts of poor sportsmanship with similar acts of bad behavior? Usually, a player from one team will get a bit more physical than the rules allow with a player from another team, and the offended player will then strike back in retaliation. Unfortunately, the one who strikes back is usually the one who gets caught.

In the legal world, the punches that get thrown are usually the oral and written kind. Lawyers who are faced with unsportsmanlike behavior do lose their tempers from time to time and say and do things that they may later regret. However, while it is human nature to fight back with



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more than 200 years and be the guiding force for the rule of law in this county.

Lawyers can continue their tradition of being leaders by promoting the unwritten rule of law of good sportsmanship. Lawyers can do this in sports and in the practice of law.

This is true because lawyers serve not just their clients but their communities. Lawyers play in athletic contests. Lawyers are parents and coaches of athletes. Communities are filled with athletes who one day will be leaders and some may even aspire to be lawyers.

Whenever a lawyer practices good sportsmanship in the profession, and encourages others to do so in sports and in the community, he or she makes an important statement. That statement is that civility and respect matter, whether on the field of play or in the field of law.

### Sportsmanship matters

I am proud to report that I have been the beneficiary of good sportsmanship on the playing field and in the practice of law and that I have tried to practice good sportsmanship in both, although not always as successfully as I would like. Good sportsmanship is something that is worth working hard to achieve and to get right, in both sports and in the law. Without question, lawyers should practice hard and strive to win their cases, but just like in sports, where sportsmanship is encouraged but not always achieved, lawyers should remember to play by the unwritten rule of good sportsmanship.

Lawyers should not behave like the coaches on the sideline who should know better, or the emotional athlete who lets the competitive moment get the best of her, even if others are urging such behavior. A little bit of civility, a dose of humility, a respectful tone, a professional demeanor, and a touch of dignity may be just what is needed during and after giving it your all on behalf of your client.

Good sportsmanship does matter. If practiced by lawyers, it may just make a difference, for lawyers, for clients, for the community, for sports and for the legal profession. ■

*Landis Wade is an employment lawyer, commercial litigator, and sometimes arbitrator and mediator with Helms Mulliss & Wicker, PLLC, in its Charlotte office.*

a swift and emotional response, such conduct simply brings the contest down to the initiator's level.

Some of the most respected athletes in the games have been the ones who responded to cheap shots with strength of character and athletic ability rather than loud mouths and clenched fists. Jackie Robinson is one such icon. Here was a guy, the first African American to play major league baseball and possibly one of the greatest baseball players of all time, who had every reason to fight fire with fire. The people he played against, and even some of his own teammates, displayed the worst of sportsmanship toward him when all he wanted to do was play the game of baseball. They cursed him, called him names, cleated him when he stole bases, threw at his head in the batter's box, and showed contempt for him only because of his race. He would admit years later that the hardest thing for him to do was to sit there and take it. How he would have loved to use his brute strength to knock a few of those fellows out. Instead, he put all his energy into getting base hits, stealing bases, making plays, and hitting home runs. Eventually,

the detractors realized their tactics were of no effect and that he was, after all, a darn good ball player.

Lawyers are also fighters, making it hard to walk away from the sucker punch. But being a good sport sometimes means having the presence of mind and the ability to fight back in a different way. It also means putting your heart, your mind, and your drive into winning the contest the right way, like Jackie Robinson and others like him.

### Lawyers can be leaders in promoting good sportsmanship

Lawyers have been the brunt of jokes and public criticism to the point that many in the public would question whether lawyers have the ability to be good sports, much less leaders in promoting good sportsmanship. But there is more to lawyers than what is reported in public opinion polls. As the old story goes, as told to me by one of my law school professors, while the doctors of the past were treating the sick with leaches, the lawyers of the past were spending their time writing a Constitution that would live for

# Letters from the Woods—A Book Review and Excerpt

REVIEWED BY DANA AND SARAH ROSS, BOOK WRITTEN BY MIKE HURLEY

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## Review

By Dana and Sarah Ross

Michael Hurley, in his latest book *Letters from the Woods*, explores what it means to be an authentic person. With homage to philosophy and a backdrop of wilderness, the author shares an intimate portrait as he grows from a difficult boyhood into an adult world as a loving husband, devoted father, and successful attorney. Hurley's hard work, dedication to family and friends, and his strong relationship with God provide a solid foundation upon which he boldly attempts to redefine how one can uniquely fit within, and contribute to, society. Time and time again, he boards a boat, embarks on a quest, and diligently pushes himself physically and mentally to pursue the secret of life. Eventually, he forges a comfortable alliance with biblical teaching where self-rewards are derived from a faith in God and serving others.

The author chronicles a series of decisions that significantly change his professional and personal life. As soon as the author achieves secure footing as an attorney he catapults himself freestyle to yet another unchartered shore. In one leap of faith he leaves a prominent law firm to open a private practice with his wife. A pattern of taking calculated risks allows this fiercely independent author to see anew, and wonder aloud, where the road to the American Dream leads us and leaves us.

Experience and accumulated wisdom allow Hurley to evolve from an absolutist doctrine to self-reflection and a realm of open observation. His window to understanding himself and the world is found in the shape of a canoe. Using wilderness canoeing as a metaphor for an inward journey, Hurley doc-

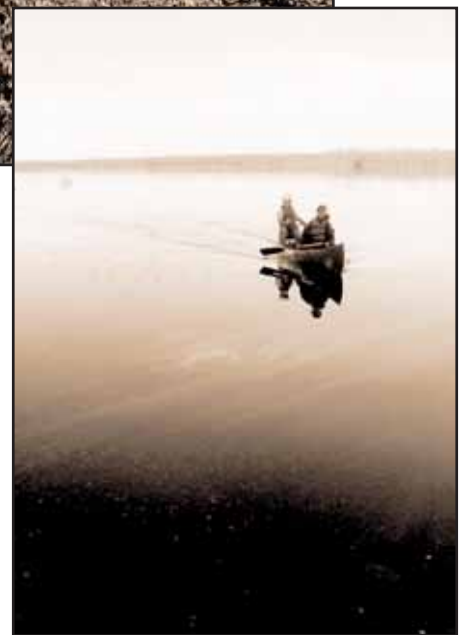


*Above: The author's son Kip searches an island in Canada's Algonquin Provincial Park for blueberries.*

*Right: The author took this photograph of fellow travelers at dawn, after being wind-bound in Thoreau's camp on Chamberlain Lake in Maine for two days.*

uments a personal odyssey as he paddles, portages, fishes, and camps. His honest and intimate dialog is clear and straightforward, yet his words encourage each reader to uniquely relate to the broader questions.

*Letters from the Woods* gives us an open invitation to seriously contemplate what is most important to each of us, and encourages us to thoughtfully recalibrate our priorities. You don't need to paddle a canoe to understand Hurley's discourse. He encourages us to pause and think, refresh our mind and body, look beyond ourselves, spend time with family and friends, and to



get out there and go fishing.

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## Excerpt from Letters from the Woods

*Letters from the Woods* collects the "slice-of-life" essays that Hurley wrote for a canoeing journal published between 1995 and 2004 for



*Left: The author's daughter Caroline inspects a lily pad in the Adirondacks.*

*Below: The author prepares to leave camp on the Moose River in Maine.*



subscribers in 48 states and Canada. In addition to these essays, Hurley wrote detailed travelogues of his trips on remote and nearby rivers and lakes. The journal also featured photography, hand-drawn maps, and illustrations. The following essay and photographs from the journal appear in the book.

Law and Wilderness  
Summer 2002

As I have related in the story about Maine that begins on the next page of this journal, the writings of Henry David Thoreau had an influence on my life that began early and lasted long. He sounded the clarion call to simplicity long before the Kennedys gave us casual chic. Minimalism was his watchword decades before that concept came to symbolize a hip design trend in upscale furniture and art—purchased mostly by people with non-minimalist incomes and lifestyles.

Simplicity and minimalism were for me, in my growing years, mottoes of convenience. It is easy to be simplistic and a minimalist when one hasn't the means to be otherwise. But for all that Thoreau so eloquently tried to tell us about those virtues, I was more struck by Thoreau himself and the ethos of the intellectual rebel that he seemed to embody. His life, more so as I imagined it than likely as he lived it, seemed so defiantly unafraid of convention. And convention, to a teenage boy, is the Lord High Master to be feared and obeyed above all else. To know this we have only to recall our darkest fears of wearing the *wrong* outfit to the dance, getting the *wrong* haircut before going back to

school, and saying something stupid in front of the whole class. Thoreau's quiet world on Walden Pond seemed to shrug all of that off, and the notion that someone could live that way—with only his thoughts and principles to condemn or acquit him—was intoxicating to me as I contemplated the power in my hands to shape my own life.

The ability to shape one's life is, of course, the fleeting illusion of youth and the brief luxury of old age. Soon enough we are overtaken by events that shape us and our lives until the mold hardens round about us, immovable and unyielding. The tyranny of the human condition and our need for food, clothing, and comfort lead us onward. Decisions are made. Choices are foregone. Doors close softly behind us. Accidents of geography and genetics work their quiet influence. Soon the trail has narrowed beneath our boots, and before we know it, we can only gaze upon the distant mountains to which other paths less traveled might have led. It was there, on those distant peaks, where Thoreau seemed to stand and beckon to me as an idealistic student reading these words:

Let us consider the way in which we spend our lives. . . . I foresee that if my

wants should be much increased, the labor required to supply them would become a drudgery. If I should sell both my forenoons and afternoons to society, as most appear to do, I am sure that for me there would be nothing left worth living for. I trust that I shall never thus sell my birthright for a mess of pottage. I wish to suggest that a man may be very industrious, and yet not spend his time well. There is no more fatal blunderer than he who consumes the greater part of his life getting his living.

These are lofty ideals, to be sure. What I failed to see as a younger man, though, was a certain hypocrisy in Thoreau's words that became clearer to me as a husband and father. Thoreau's own father had sold pencils from his home to support young Henry's ascent to Harvard and beyond—and I dare say he didn't do it for the love of wood and lead. He did it for the love of Henry, as do we all, in our daily labors, for the love of the children and families whom we are privileged to call our burden. Still, I am not prepared even at this



*The author's son waits for dinner in camp on a Canadian lake.*

jaded age to toss Thoreau onto the ash heap of youthful illusions. What Thoreau tried to express was a sentiment more purely distilled in the famous essay of his contemporary and fellow-philosopher, Ralph Waldo Emerson, entitled *Self-Reliance*.

There is a time in every man's education when he arrives at the conviction that envy is ignorance; that imitation is suicide; that he must take himself for better or worse as his portion; that though the wide universe is full of good, no kernel of nourishing corn can come to him but through his toil bestowed on that plot of ground which is given to him to till. The power which resides in him is new in nature, and none but he knows what that is which he can do, nor does he know until he has tried.

As for me, growing up in an alcoholic family on the outskirts of normalcy, the plot of ground I was given to till, as it were, seemed covered in brambles. There was never enough money—or any money. I harbored this deep-seated suspicion that the other guy *really* was smarter than I, and that unlike him, I would become Thoreau's "fatal blunderer," who sells his birthright for a pottage. It was not until I had blundered my way through two colleges, abandoned two majors, and turned four years of undergraduate study into five that the lights went on.

In 1981 I had landed, most improbably, with a wife and a U-Haul van at a Jesuit university in St. Louis to study law. Terrified and broke, I applied myself. Astonished, I succeeded in small ways where I had been accus-

tomed to failure. Encouraged and emboldened, with the support of a wife who loved and believed in me, I applied myself harder still. Doors opened, and the path beneath my boots widened a bit.

That golden moment of epiphany about life's limitless possibilities, which comes to

most of us in some form or fashion, came to me in March 1983. I was approaching the podium of the law school courtroom. All around me were seated assorted dignitaries of the bench and bar and academe as well as family members—including my own mother—who had traveled great distances to witness the occasion. There were four of us, my partner Brian Konzen and I and our two opponents, nervously shuffling papers at the counsel tables. Law school faculty members whose sandal straps we students were not worthy to unfasten sat in the audience to witness the spectacle—as if any of the four of us could possibly have anything important to say to *them*. I had stolen away, hours before, to a classroom in the library just to collect my thoughts, alone, and try to bring the enormity of what I was about to face down to size. I had never *won* anything before. I had never been in a position to compete for the prize. Before this night, dozens of my fellow students—many from prominent, successful families and exclusive, private schools—had reached for and fallen short of this goal. Gradually, round by winning round, I had dispelled my suspicion that we had survived each preceding contest only by some mistake of good fortune. I was not even close, after all, to the top of my class. Were it not for an unexpected friend and unfailing ally I had encountered along the way, I might have crumpled at the podium when Justice William Rehnquist of the United States Supreme Court finally called upon me to deliver the respondent's argument. That friend and ally is *the law*. It was then and has

been lo these many years a marvel to me, a fearsome tool, and a thing of beauty in its own right. It is the great leveler of kings and commoners, and on that night in St. Louis it elevated a nervous young man from the brambles of his upbringing to the pinnacle of a legal education.

In the years since, I have taken the memory of our victory in that competition into dozens of other courtrooms, before the mightiest of opponents, before judges who wielded terrible, awesome power. And in each of these arenas, the miracle of our democracy—which is to say the rule of law, not men—has given me the confidence of David before Goliath. This is how I have chosen to spend my life, by and large. Although it has not been the career of contemplative solitude to which Thoreau beckoned me, at Walden Pond, it has had such moments. In fact, I have come to appreciate in my journey through the law that the wilderness is, likewise, a leveler of men.

The wilderness respects no title, fears no enemy, and grants no special privilege. To the unwary or unprepared it is unflinching and unforgiving. It offers no remedy or relief beyond what the laws of nature will allow. But to any mother's son who will apply himself to learn its precepts, great rewards await. You can lose your life in the woods if you are careless, but you can find life's meaning there, too. If you will but study and plan, map your course, and prepare for the journey, you can make your way through any forest of life or nature, no matter what difficulties or delays you have encountered on your journey thus far. Remember to scout the rapids and carry the rough ones. It is best to rise early and find camp before twilight. Gather your firewood before the rain comes, and share it with those who have none. Pitch your tent on high ground, and leave each camp a little better than you found it. These are the laws of the wilderness. These are the laws of life, as well. They are one and the same, and I have been privileged to measure myself against them. ■

*Michael C. Hurley is a partner at Yates, McLamb & Weyher, LLP, in Raleigh, where his wife Julie is of counsel. They attended the University of Maryland at College Park and Saint Louis University School of Law together and practiced for eight years in Texas before moving to North Carolina in 1992. They have two teenage children and will celebrate their 25th wedding anniversary this year.*

# NC Med Mal—A Year in Review

BY MARK B. CANEPA

**T**his article reviews North Carolina case law developments in 2005 that are of importance to attorneys handling medical malpractice cases. The discussion analyzes malpractice cases addressing peer review, expert testimony, *res ipsa loquitur*, nursing malpractice, recovery of costs, and other issues frequently encountered in malpractice cases. Most, if not all, of the cases are from the court of appeals, although at least one malpractice case of importance was granted review in the Supreme Court.



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## North Carolina Supreme Court

It does not appear that the North Carolina Supreme Court decided any cases specifically related to medical malpractice actions in 2005. However, as discussed below, the Court did grant review in a malpractice case involving expert qualifications that may lead to an important decision in 2006. *Barham v. Hawk*, 165 NC App. 708, 600 SE2d 1 (2004), *review allowed* 59 N.C. 410, 612 S.E.2d 316 (NC April 16, 2005).

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## North Carolina Court of Appeals

### I. Expert Testimony

The court of appeals reviewed a number

of cases in 2005 that dealt with expert testimony in medical malpractice cases. These cases included the admissibility of expert testimony pursuant to N.C.G.S. §90-21.12, cross-examination issues, and causation issues.

#### *N.C.G.S. § 90-21.12.*

N.C.G.S. § 90-21.12 has become a frequent source of opinions in recent years. The statute provides that, in a medical malpractice action, no expert may testify on the standard of care unless he or she is familiar with the standards in the “same or similar community” where the cause of action arose. The cases have generally rejected a national standard of care for North Carolina, and require experts to have some

familiarity with the community where the alleged malpractice took place.

*Billings v. Rosenstein* \_\_ N.C.App. \_\_, 619 S.E.2d 922 (2005), was a Wilkes County action arising out of treatment rendered to Jennie Lynn Billings in 2003. According to the Complaint, Ms. Billings suffered a stroke as a result of an allegedly undiagnosed eclampsia.

Plaintiffs retained Peter Kaplan, MD, a neurologist practicing in Maryland and a professor at Johns Hopkins University, as an expert on the standard of care. Dr. Kaplan testified that although he did not currently maintain an active practice in North Carolina, he had worked at Duke University Medical Center for three years



during his residency and fellowship. He also had a license to practice medicine in the state of North Carolina. However, he had not practiced here in more than 15 years.

During his deposition, Dr. Kaplan testified that he was familiar with the standard of care in Wilkes County. However, he admitted that he had never been to the facility where the alleged malpractice took place.

Following the deposition of Dr. Kaplan, the defendant moved for summary judgment on the grounds that Dr. Kaplan was not qualified pursuant to N.C.G.S. § 90-21.12. The trial court found that, although it is not necessary for an expert witness to have actually practiced in the same community as the defendant, he or she must demonstrate that they are familiar with that community or the standard of care of similar communities. The motion was granted, leaving Plaintiffs without an expert.

The court of appeals reversed. The court observed that Plaintiff's expert not only had large portions of his medical training in North Carolina, but he also was licensed here and had worked in Durham and in Fayetteville. The court found that the record disclosed that Dr. Kaplan had lectured in North Carolina and he had testified that he was familiar with the standard of care for a neurologist in Wilkes County and that this familiarity was based not only on his own experience, but also on the demographic data from Wilkes County. As such, he was qualified an expert under N.C.G.S. § 90-21.12.

The *Billings* case is significant in that it highlights the difficulty faced by trial judges and counsel trying to determine the meaning of the "same or similar community" language of the statute. The case is also important because it continues to recognize the recent trend by the court to allow experts to use demographic data to help them become familiar with communities in which they have not actually practiced. See generally *Pitts v. Nash Day Hospital, Inc.*, 167 N.C.App. 194, 655 S.E.2d 154 (2004), *Coffman V. Roberson*, 153 N.C.App. 618, 571 S.E.2d 259 (2002).

N.C.G.S. § 90-21.12 was also the subject of at least one unpublished opinion, decided earlier in 2005. *Ramirez v. Little*, 609 S.E.2d 499 (Table) was a case from Randolph County arising out of the death of an infant in February of 2000. The defendant, a family physician, had diag-

nosed the child with a minor stomach infection and had administered antibiotics that, although it is not clear from the court's opinion, apparently led to some type of convulsions or allergic reaction.

At the close of Plaintiff's case, Defendant moved for a directed verdict. Defense counsel argued that Plaintiff's expert, Dr. Peter Curtis, was not familiar with the standard of care in Randolph County, as required by N.C.G.S. § 90-21.12. The trial judge granted the directed verdict.

The appellate court affirmed. The court noted that the purpose of N.C.G.S. § 90-21.12 was to "avoid the adoption of a national or regional standard of care for health care providers" and that in this case, there was no testimony in the record that indicated that Dr. Curtis was familiar with the same or similar community requirement of the statute. "Simply put," observed the court, "Dr. Curtis never related the term 'standard of care' to the standards of practice that applied to family physicians in Randleman, North Carolina, or similar communities in February of 2000."

Does the Ramirez decision break any new ground? Probably not, but it does re-emphasize the importance of making sure that your retained expert understands that although they may offer testimony on a national standard of care, they *must* testify on the local community standard in order to get their opinions to the jury.

One additional case, actually decided in 2004, is also worth following on this issue: *Barham v. Hawk*, 165 N.C.App. 708, 600 S.E.2d 1 (2004).

*Barham* was a medical malpractice case filed in Polk County. At trial, the defendant called one of the decedent's treating physicians, Dr. Daniel Cerenko of Atlanta, to testify not only regarding his treatment of the patient in Georgia, but also on the North Carolina standard of care.

Plaintiffs objected to Dr. Cerenko's testifying on the standard of care, based on § 90-21.12. Both parties then conducted voir dire. Clearly, Dr. Cerenko was not familiar with Hendersonville. However, defense counsel posed hypothetical questions to Dr. Cerenko in which he asked the expert to assume facts relating to the defendant's care, and to also assume facts about Hendersonville itself. After assuming these facts, Dr. Cerenko said that he was familiar with the standard of care in the defendant's

community. *Barham v. Hawk*, 165 N.C. App. 708, 600 S.E.2d 1, 4-5.

The trial judge rejected this approach, holding that the defense expert had not satisfied the requirements of § 90-21.12. The expert could testify regarding his own care and treatment, held the court, but not on the standard of care in North Carolina.

The court of appeals agreed. The court noted that Dr. Cerenko admitted that he "knew nothing about Hendersonville, had no idea of the size of the community, knew nothing about the hospital in Hendersonville or its resources, and had no knowledge about the physicians practicing in that area." The only information he had was from the hypotheticals posed by defense counsel and this was not enough: "This testimony establishes that Dr. Cerenko neither had any knowledge about the standard of care in Hendersonville nor had any knowledge of the resources available in Hendersonville sufficient to be able to testify about the standard of care in similar communities." *Barham v. Hawk*, 165 N.C. App. 708, 600 S.E.2d 1, 5-6.

In 2005, the North Carolina Supreme Court granted review. So it is likely that the Court will tackle at least some of the problems posed by the § 90-21.12 in the near future. *Barham v. Hawk*, 165 NC App. 708, 600 SE2d 1 (2004), *review allowed* 59 N.C. 410, 612 S.E.2d 316 (NC April 16, 2005).

#### ***Cross-examination of experts***

Is it proper for a trial judge to preclude defense counsel from cross-examining Plaintiff's expert on that expert's opinions regarding the standard of care of a party who has been dismissed from the case? The answer to that question is probably no, but it happens. And when it does, there will be no reversal where other experts at trial testify to the very same thing.

In *Boykin v. Kim*, 2005 WL 2848443, the issue on appeal was whether the trial court had erred in blocking cross-examination of Plaintiff's expert on the subject of whether a former co-defendant (who had been dismissed) fell below the standard of care.

In *Boykin*, two physicians saw Plaintiff's decedent over a period of several months during which time she complained of symptoms including hearing loss, nasal problems, and a sore throat with hoarseness. According to the court's opinion, the physi-

cians had only sporadic contact with each other, although both were prescribing steroids for the patient's condition. After several months of treatment, the decedent collapsed suddenly and died from exsanguination related to pulmonary tuberculosis. The family alleged that the physicians had been negligent in failing to detect the tuberculosis.

One of the physicians settled the claim against him. The action then proceeded against the defendant, Dr. Kim. The jury returned a verdict in favor of the plaintiffs.

On appeal, the defendant contended, among other things, that defense counsel had been improperly precluded from cross-examining one of plaintiff's experts who had testified during discovery that the dismissed doctor had also failed to meet the standard of care.

The court of appeals affirmed, but it did so only after stating that the cross-examination of the expert was relevant (to causation) and probably should have been allowed. But the court found that any error was harmless, since the judge had allowed counsel to cross-examine other expert witnesses on the same subject. The bottom line from *Boykin* on this issue: At some point a trial judge may restrict cumulative testimony, and unless counsel can demonstrate prejudice it is not likely the judge's ruling will be reversed on appeal.

## II. Res Ipsa Loquitor

There were two cases involving the application of res ipsa loquitor in the context of a medical malpractice case decided by the court of appeals in 2005. Both cases were instructive in that they reiterated the view that in North Carolina res ipsa loquitor is to be applied sparingly in medical malpractice cases.

The first case was *Howie v. Walsh*, \_\_\_ N.C.App. \_\_\_, 609 S.E.2d 249 (2005), a case involving a patient who sustained a fractured jaw during the course of an extraction of a wisdom tooth in Mecklenburg County.

In March of 1999, plaintiff's jaw was fractured when the defendant, a licensed general dentist, was attempting to extract plaintiff's lower left wisdom tooth. Plaintiff's tooth was 80% to 90% impacted. Defendant testified that he had removed a portion of the plaintiff's tooth without incident, but when he attempted to remove the

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second section of the tooth, he heard a snap and "knew plaintiff's jaw had fractured." The patient sustained nerve damage and a compound fracture that required additional surgery to repair. She subsequently filed a malpractice action against the dentist.

At trial, plaintiff's experts testified that the plaintiff's jaw was not susceptible to fracture and that the use of force to cause a compound fracture had to be significant. Plaintiff's expert also testified, among other things, that it would have been almost impossible for the fracture to occur *unless* there was excessive force. Defendant, on the other hand, testified that he was not using excessive force and that he was surprised when the jaw fractured during the course of the extraction.

The trial judge allowed the jury to consider the application of res ipsa loquitor to the case, over the defendant's objection. The jury subsequently found that, based on the doctrine of res ipsa loquitor, there was negligence, and awarded \$300,000. The court of appeals reversed.

The court noted that the application of res ipsa loquitor in medical malpractice actions has resulted in "what our Supreme Court has characterized as a somewhat restrictive application of the doctrine." In order for the doctrine to apply in a malpractice case, Plaintiff must not only show that the injury resulted from Defendant's negligent act, but also, without the assistance of expert testimony, that the injury was of a type not typically occurring in absence of some negligence by the defendant.

The court observed that although a layperson might be able to infer that the fracture resulted from the application of

force by the defendant, the jury would lack a basis upon which they could determine that the force was excessive or improper, without the assistance of expert testimony. As such, the application of res ipsa loquitor under these circumstances was improper. The court noted that trial courts should remain vigilant and cautious about providing res ipsa loquitor as an option for liability in malpractice cases, other than in those cases where it has been expressly approved.

The court of appeals took up res ipsa loquitor in another malpractice case several months later, in the unpublished opinion of *Moore v. Gaston Memorial Hospital*, 616 S.E.2d 692 (Table)(2005).

In *Moore*, Plaintiff was admitted to Gaston Memorial Hospital in 2000 for an endoscopic examination related to treatment of a gastroenterological condition. Plaintiff subsequently filed a complaint against the hospital and the surgeon who performed the procedure, alleging that Defendants negligently perforated Plaintiff's esophagus and also administered a toxic dose of the antibiotic gentamycin.

To support her claims, Plaintiff alleged negligence under the doctrine of res ipsa loquitor in her complaint. Defendant filed a motion to dismiss, claiming that Plaintiff failed to allege in her complaint, pursuant to Rule 9(j), that she had an expert qualified to testify on that aspect of her claim. The trial court granted Defendant's motion to dismiss.

On appeal, Plaintiff argued that res ipsa loquitor supported her claim that the perforation was the result of Defendants' negligence. As such, she claimed, it was not necessary for her to include in her complaint the usual allegations that she had an expert

who was prepared to testify as to such negligence.

The appellate court, however, rejected her claim. Citing *Howie*, the court repeated the general rule that *res ipsa loquitor* should be applied “restrictively” in malpractice cases. In this case, continued the court, the “average juror would not, based on that juror’s common knowledge or experience, be able to infer whether the perforation of plaintiff’s esophagus was the result of a negligent act.” Therefore, held the court, Plaintiff should have included the allegations required by Rule 9(j) with respect to expert testimony.

A related issue discussed by the court in *Moore* is also worth discussing here. In addition to her allegations based on *res ipsa loquitor*, Plaintiff also had a general negligence claim that was supported by a pharmaceutical expert who was included to satisfy the pleading requirements of Rule 9(j). However, the defendant was a gastroenterologist, said the court. As such, Plaintiff’s claim was insufficient to satisfy Rule 9(j).

### III. Nursing Malpractice

Does a nurse in North Carolina have a legal duty to challenge physician’s orders? If so, under what circumstances should such a challenge be brought? And if the nurse fails to challenge the doctor, and the patient is subsequently harmed, will the nurse become a defendant in a malpractice action?

These questions and others were answered by the court in *Daniels v. Durham Cty. Hosp.*, \_\_\_ N.C.App. \_\_\_, 615 S.E.2d 60 (2005).

*Daniels* arose out of a labor and delivery at Durham County Hospital. According to the court’s opinion, the infant’s mother was admitted to the hospital for induction of labor due to an elevated blood pressure. An experienced labor and delivery nurse at the hospital was assigned to assist her physician in monitoring the patient during labor.

After several hours of labor, a decision was made by the physician to perform a mid-forceps delivery in which the doctor rotated the baby 180° to the proper position, after which the child was delivered. However, upon delivery, the child was noted to be unresponsive, blue in color, and not breathing. The child was subsequently diagnosed with a cervical spine injury and died.

The parents of the child filed suit alleg-

ing, among other things, that the hospital was liable for negligence because the labor and delivery nurse had failed to oppose the doctor’s decision to perform a mid-forceps delivery. Specifically, the family contended that it was below the standard of care for the physician to have attempted such a delivery and that the nurses “should have challenged the doctor’s decision, and, if unsuccessful in changing that decision, should have refused to participate as part of the [patient’s] labor and delivery team.”

The trial court disagreed. The judge found that even if the doctor had been negligent, there was simply no evidence that his negligence was “so obvious” as to require that the nurses refuse to obey the doctor’s orders, or challenge his treatment.

On appeal, the judge’s decision was affirmed. The appellate justices observed that in North Carolina there is a long-standing rule that provides that a nurse may not be held liable for obeying a physician’s order “unless such order was so obviously negligent as to lead any reasonable person to anticipate that substantial injury would result to the patient” if the order were carried out. The court went on to say that even in the world of modern medicine, certain legal concepts related to the relationship between nurses and doctors remain the same. Physicians are solely responsible for the diagnosis and treatment of patients. Nurses, on the other hand, are not expected to be experts in the technique or diagnosis or the mechanics of treatment. “While a nurse may disobey the instructions of a physician where those instructions are obviously wrong and will result in harm to the patient,” observed the court, “the duty to disobey does not extend to situations where there is a difference of medical opinion.” In so holding, the court properly refused to open the door to a plethora of suits that would be brought against nursing staff whenever a physician was named as a defendant in a malpractice case.

### IV. Peer Review

Are there limits to the peer review protection granted to physicians by the legislature in N.C.G.S. § 90-21.22? The answer to that question is yes, at least according to *Armstrong v. Barnes*, \_\_\_N.C.App. \_\_\_, 614 S.E.2d 371 (2005), a case that arose out of Catawba County.

N.C.G.S. § 90-21.22, which is entitled

“Peer Review Agreements,” specifically provides a measure of confidentiality protection for medical personnel who attend peer review meetings, and for doctors who participate in impaired physicians programs. The statute protects those who are involved in these meetings from being forced to disclose the contents of such meetings. The rationale behind the rule is simple. By affording the protection of confidentiality to those who conduct peer review or oversee impaired physician health programs, the legislature encouraged participants to do their work without fear of lawsuits or questioning by malpractice attorneys.

In *Armstrong*, Plaintiff sued several defendants for alleged negligence in connection with the delivery of Plaintiff’s child in 2000. The baby was delivered via caesarean section and was diagnosed with brain damage.

One of the defendants was the OB/GYN who had managed the labor and delivery. According to the court’s opinion, this physician had a history of drug abuse that dated back to the 1980s. However, the doctor has subsequently enrolled in, and successfully completed, a drug treatment program through the North Carolina Medical Board.

During the course of the malpractice case, Plaintiff’s attorney sought to obtain information related to Defendant’s participation in the North Carolina Physician’s Health Program. At Defendant’s deposition, his attorney objected to any questioning on the subject of the physician’s prior drug use, and instructed his client not to answer on the grounds that it was privileged. When the trial court failed to enter an order protecting the doctor from disclosing these details, his attorney went to the court of appeals for help.

The court of appeals affirmed the trial judge’s decision. The court said that, although the doctor could not be compelled to reveal the details of his participation in the program, he must answer questions related to the underlying drug use. The court would not allow a physician “to use the program as a shield to escape liability for his negligence by foreclosing any meaningful discovery by an injured party.” In other words, if Plaintiff’s attorney asks the physician about his alleged drug use, the doctor must answer this question. The decision does not, therefore, cut into the traditional protections afforded by peer review. But it

does serve as a marker of sorts for the limits of that protection.

The court also addressed peer review later in the year in its second opinion (rehearing) of *Miller v. Forsythe Mem'l Hosp.*, \_\_\_ N.C.App. \_\_\_, \_\_\_ S.E.2d \_\_\_, (2005), published on November 15, 2005. This decision is significant in that it provides guidance to counsel attempting to obtain privileged materials during the course of discovery. The case also warns that failure to adhere to these guidelines will result in a loss of an appealable issue after trial.

In *Miller*, Defendants provided Plaintiffs with a “privilege log” describing documents they contended were protected by the peer review privilege. Plaintiffs sought access to the documents, claiming that they were discoverable. The trial court denied Plaintiff’s motion to compel, and granted Defendant’s protective order.

On appeal, the trial judge’s rulings were affirmed. The court of appeals found that there was simply nothing in the record before it that would enable the court to make an informed ruling that the sought-after records were, or were not, discoverable. The court observed that not only had counsel failed to raise the issue at trial, but also Plaintiffs should have—or could have—asked the trial court for an in-camera inspection of the records and then preserved those records, under seal, for any subsequent appeal. Without access to the disputed documents, said the court, any opinion on their admissibility or alleged prejudice to Plaintiffs would be purely speculation.

On a related issue, the court in *Miller* held that under the then-existing state of the law, Plaintiffs were obligated to raise the issue of peer review at trial, even where the trial judge had granted Defendant’s motion in limine to prohibit such evidence. However, the court also observed that effective October 1, 2003, “once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal.” Since the case before it involved a ruling before that date, the old rule applied.

## VI. Directed Verdict/Causation

There were at least two appellate court

opinions in 2005 involving directed verdicts in the medical malpractice setting. In one case, the directed verdict granted by the trial court was reversed. In the other case, the verdict was upheld. Both cases reiterate the importance of understanding Plaintiff’s minimal, but not insignificant, burden of proof.

*Pope v. Cumberland Cty. Hosp.*, \_\_\_ N.C. \_\_\_, \_\_\_ S.E.2d \_\_\_ (2005) arose out of a labor and delivery at the county hospital in 1999. The infant child was born with brain damage following an emergency cesarean-section. Plaintiffs subsequently filed their action against the hospital and the delivering physician.

At trial, the evidence indicated that the newborn needed a blood transfusion immediately after birth. However, the transfusion was delayed even though a team of neonatal nurse practitioners was called to assist. Counsel for the defendant hospital subsequently presented expert testimony that the alleged failure of the team of nurse practitioners to properly treat the infant with an immediate transfusion was an intervening cause of injury, insulating the labor and delivery nurses from any liability for their own alleged negligence.

Plaintiffs countered this argument with expert testimony at trial that not only had the labor and delivery nurses been a cause of the initial bleeding (through repeated attempts to insert a fetal scalp electrode), but they had also failed to report the excessive blood loss to the neonatal team when they arrived. The judge granted a directed verdict in favor of the physician and what appeared to be a partial directed verdict, on the issue of causation, on some of the claims against the hospital. The jury could not reach a verdict on the remaining claims, and a mistrial was declared.

On appeal, Plaintiff claimed that the trial court erred in granting the directed verdict on causation. The court of appeals agreed: While acknowledging that Defendant had presented credible expert testimony to support their causation defense, the appellate court reminded the parties that on a directed verdict motion, the trial court “must review the evidence in the light most favorable to plaintiffs and deny the motion for directed verdict if there is more than a *scintilla* of evidence” to support the plaintiff’s claim. Here, continued the court, Plaintiffs had presented evidence

that any alleged delay by the neonatal team to order blood was a foreseeable result of the failure of the labor and delivery nurses to report the excessive bleeding. As such, the issue should have gone to the jury.

Of course, in the right setting a directed verdict on causation is appropriate in a medical malpractice case.

*Norman v. Branner*, 2005 WL 1669128 (2005) was an unpublished case from Mecklenburg County. In *Norman*, Plaintiff claimed that the defendants were negligent in their failure to remove a foreign object that had become lodged in Plaintiff’s right eye. Plaintiff subsequently lost the eye.

At trial, Plaintiff presented the expert testimony of Dr. Katz. Although critical of the care and treatment rendered by the defendants, Dr. Katz acknowledged on cross-examination that even had the appropriate treatment been rendered, the plaintiff might still have lost the eye. Defendant moved for a directed verdict on the issue of causation, which was granted by the trial judge.

On appeal, the directed verdict was upheld. Among other things, the appellate court noted “Plaintiff cannot prevail by merely showing that following Dr. Katz’s recommended courses of action would have *improved* Plaintiff’s chances of keeping his eye...[P]laintiff has not shown that the alleged negligence had a *probable* connection to the loss of his eye, only that it had a *possible* connection.” As such the directed verdict on causation was appropriate.

## VII. Venue

There was at least one reported case involving the issue of venue in a malpractice case last year. The holding was a narrow one.

*Morris v. Rockingham Cty.*, \_\_\_ N.C.App. \_\_\_, 612 S.E.2d 660 (2005) was a negligence and malpractice claim that arose out of an ambulance transport between two hospitals in different counties.

Plaintiff Charles Morris was a patient at Eden Memorial in Rockingham County. He was to be moved from that facility to North Carolina Baptist Hospital in Forsythe County. The transport was to be accomplished by paramedics employed by Rockingham County. After arriving at Baptist Hospital, and while removing the stretcher carrying the plaintiff from the ambulance, the paramedics allegedly

allowed the head of the stretcher to “bounce” off of a step and subsequently drop to the ground. As a result, Plaintiff claimed he sustained cervical injuries requiring surgery.

Plaintiff filed his claim in Forsythe County. Defendants moved for a change of venue, to Rockingham County. As a basis for their motion, Defendants claimed that since the action was being brought against a county and its public officers for the performance of an official duty, venue was proper only in Rockingham. The trial judge denied Defendant’s motion.

The court of appeals affirmed. The court rejected Defendant’s claim that public officers can only be sued in their own county. The “official duties” of the paramedics brought them to Forsythe County, where the accident occurred. As such, the cause of action, for venue purposes, arose in Forsythe, not Rockingham County, held the court.

#### VIII. Recovery of Costs

The law regarding the recovery of costs in a medical malpractice action, as in many civil actions, has been in conflict in North Carolina for years. The primary confusion seems to be the court’s interpretation of two competing statutes, N.C.G.S. § 6-20 and N.C.G.S. § 7A-305. The cases decided in 2005 by the court of appeals only added to the disarray.

There were at least four published opinions by the court in 2005 that dealt with the award of costs. Two of the cases were medical malpractice actions. However, all four will be reviewed briefly since any one of them might have some influence on the recovery of costs in malpractice cases.

The first case, *Handex of Carolinas v. County of Haywood*, \_\_\_ N.C.App. \_\_\_, 607 S.E.2d 25 was a breach of contract and negligence action. The pertinent issue in *Handex* was whether the trial judge erred in awarding as costs deposition fees in the amount of \$1,980.61. The court of appeals, citing the decision of *Department of Transp. v. Charlotte Area Mfd. Housing, Inc.*, 160 N.C.App. 461, 586 S.E.2d 780 (2003), held that deposition fees were not recoverable because they are not specifically listed in N.C.G.S. § 7A-305. The court rejected any notion that a trial judge has discretion, under § 6-20, to award such costs. The *Handex* decision was published on January

18, 2005.

The court looked at costs again eight months later, in *Miller v. Forsythe Mem’l Hosp.*, \_\_\_ N.C. \_\_\_, 618 S.E.2d 838 (2005). *Miller* was a medical malpractice action in which Plaintiffs alleged that Cynthia Miller had been injured as a result of the negligent administration of an antibiotic injection. The jury returned a defense verdict.

Following the verdict, defense counsel moved to recover costs, including deposition costs, mediation costs, expert witness fees, and exhibit fees. The trial judge denied all of these costs. On appeal, the court found that the judge had erred with regard to the denial of mediation fees, since such costs are specifically listed under § 7A-305. The court also held that although expert fees were recoverable pursuant to § 7A-305, such fees could be awarded only where it is shown that the expert was under subpoena. There was no such showing in *Miller*. As such, the denial of expert fees was also appropriate.

However, on the issue of deposition fees, the court made no reference to *Handex*. Instead, the court stated that the decision to award deposition fees was within the discretion of the trial judge. Since there was no showing of an abuse of that discretion, the trial court’s order would stand. The court reached essentially the same conclusion with regards to the exhibit costs.

The next published opinion on the recovery of costs came on October 4, 2005, in *Oakes v. Wooten*, \_\_\_ N.C.App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (2005). In *Oakes*, the court of appeals *rejected* the notion that costs not listed in § 7A-305 were recoverable.

*Oakes* was a negligence action arising out of an automobile accident in Guilford County. The jury found for the plaintiff and the judge awarded costs that included fees for medical reports, depositions, travel costs, and trial exhibits. The trial judge apparently felt that § 6-20 allowed him the discretion to award costs not listed in § 7A-305. On appeal, the trial judge’s decision awarding these costs was *reversed*. Since these costs were not specifically listed in § 7A-305, it was improper for the court to award them, held the appellate court.

In reaching its conclusion, the court in *Oakes* cited several prior opinions, including *Handex*. But there was no mention of *Miller*.

Incredibly, on the very same day the *Oakes* case was published, another appellate court decision reached a very different conclusion as to whether costs not listed under § 7A-305 were recoverable, or not.

*Morgan v. Steiner*, 2005 WL 2428755 (October 4, 2005) was a medical malpractice action from Richmond County. The jury returned a defense verdict and the trial judge subsequently awarded defense costs in the amount of \$31,082.87. These costs included deposition costs, costs for medical records, mediation costs, exhibit fees, expert witness-related costs, and other fees. On appeal, Plaintiff challenged the trial court’s award of costs, other than those fees *specifically* listed in § 7A-305.

The court of appeals in *Morgan* took a more expansive view of a trial judge’s ability to award costs. Citing *Department of Transp. v. Charlotte Area Mfd. Housing, Inc.*, 160 N.C.App. 461, 586 S.E.2d 780, and the 2004 decision of *Lord v. Customized Consulting Specialty, Inc.*, 164 N.C.App. 730, 596 S.E.2d 891, the *Morgan* court declared that deposition costs *were* recoverable in North Carolina, despite the fact that they are not listed in § 7A-305.

How did the *Morgan* court get there?

In both *Charlotte Area* and *Lord*, observed the court in *Morgan*, a trial judge’s authority to award costs included not only those costs specifically listed in § 7A-305, but also any costs that were established by case law prior to the enactment of § 7A-305 in 1983. The source of the trial judge’s power, continued the court, was § 6-20. Since deposition costs had been recoverable prior to 1983, they were recoverable in *Morgan*, said the court. There was absolutely no mention in *Morgan* of the *Oakes* decision, where deposition costs *were* forbidden, published on the same day.

But what about costs for medical records and trial exhibits? Here, the court in *Morgan* drew a line. Since neither of these costs had been recognized in the case law prior to 1983, and since neither was listed in § 7A-305, they were not recoverable.

So now we have at least two, if not three, rules on costs: Pursuant to *Handex* and *Oakes*, the only costs you may recover are those specifically listed in § 7A-305. But using the *Morgan* and *Miller* cases, counsel can make the argument that their clients may recover not only costs listed in § 7A-305, but also any costs that were

awarded, or recognized by case law, prior to 1983.

What do all of these cases mean to the average practitioner? At the very least, the door remains open to the possibility of the recovery of some costs that are not listed in § 7A-305—especially deposition costs. Since there is authority going in several different directions, counsel can—and probably should—ask the trial judge for these costs. Until the Legislature or the Supreme Court weigh in, this area of North Carolina civil practice will undoubtedly be the subject of additional opinions in the future.

### IX. Rule 9(j)

Does the granting of a Rule 9(j) motion to extend the statute of limitations apply to all the potential defendants in a malpractice case, named or not? The answer to that question, according to the unpublished decision of *Stenger v. Spagnoli*, 617 S.E.2d 723 (2005), is yes.

*Stenger* was a malpractice action filed in Mecklenburg County. On September 22, 1998, Plaintiff's decedent had been admitted to the hospital for surgery on her temporomandibular joint. The surgery was successful but two days later, on September 24, the patient was found unresponsive while still in the hospital, and died.

On September 21, 2000, the court granted Plaintiffs an extension of time to file their malpractice claim, pursuant to Rule 9(j). Plaintiffs named several defendants in their 9(j) motion, and were given 120 days, to file their claims. Plaintiffs subsequently filed their action on January 19, but included additional defendants not named in their 9(j) motion. These "new" defendants filed a motion to dismiss, claiming that the statute of limitations had expired because they were not named as party-defendants by Plaintiffs when they obtained their Rule 9(j) extension in September 2000.

The trial court agreed, granting these defendants their motion to dismiss. On appeal, however, the judge was reversed.

The court of appeals, citing prior authority, held that "where there are multiple defendants, a single motion filed in the county where the cause of action first arose will be effective to extend the statute of limitations against all defendants ultimately named in the action." By the order of September 21, 2000, continued the court,

the statute of limitations was extended to *all prospective* defendants and the ruling on that portion of the motion to dismiss was in error. In reaching its opinion, the court noted that it was not making any new law. Rather, the holding continued a line of cases with similar outcomes going back to at least 1999.

*Rupe v. Huck-Follis*, \_\_\_ N.C.App. \_\_\_, 611 S.E.2d 867 (2005) was another Rule 9(j) case decided last year. In *Rupe*, however, the court was dealing with the expert certification requirements imposed by the Rule.

Rule 9(j)(2) requires that a complaint alleging medical malpractice contain an allegation that the medical care at issue has been reviewed by an expert qualified to testify under rule 702(e) of the Rules of Evidence. Failure to include such an allegation in the complaint will result in dismissal. In October of 2001, the court of appeals held that this provision of Rule 9(j) was unconstitutional. See *Anderson v. Assimos*, 146 N.C.App. 339, 553 S.E.2d 63 (2001), vacated in part and appeal dismissed, 356 N.C. 415, 572 S.E.2d 101 (2002). One year later, the North Carolina Supreme Court vacated the *Anderson* decision, leaving Rule 9(j) intact.

The *Rupe* case was filed after the appellate court's decision in *Anderson*. As such, the complaint in *Rupe* did *not* contain the expert certification, which was briefly unconstitutional. After the Supreme Court subsequently reinstated the Rule, Defendants in *Rupe* moved to dismiss Plaintiff's complaint for failure to comply. The trial judge rejected the motion, but a second judge, on a motion for rehearing, granted the dismissal.

The court of appeals reversed, reinstating the complaint. When the plaintiff filed his complaint, said the court, the original appellate court decision in *Anderson* was still good law. As such, continued the court, "Plaintiff's action proceeded as if the Rules of Civil Procedure existed without Rule 9(j) and Plaintiff could not subsequently be faulted for failing to comply with its certification requirement." This was a common sense decision limited to the state of the law for a brief period of time, and probably will not result in any significant additional case law or changes.

Yet another Rule 9(j) case was decided by the court late in the year in *Estate of Vicky*

*Barksdale v. Duke University Medical Center*, \_\_\_ N.C.App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (2005).

In *Barksdale*, the plaintiff's decedent died of cancer on March 18, 2000. The estate subsequently filed suit against several health care providers alleging, among other things, that the defendants had failed to timely diagnose the decedent's illness.

Plaintiff's first complaint alleging malpractice was filed in March 2002. The complaint did not contain a Rule 9(j) certification. In December 2002, Plaintiffs took a voluntary dismissal of their complaint pursuant to Rule 41(a). Since Rule 41(a) provides for a one-year extension of the statute of limitations, and since the three year statute applicable to medical malpractice actions would not expire until March 2003, Plaintiffs believed that the voluntary dismissal would extend the statute to at least December of 2003. As a result, they refiled their action on November 19, 2003. The last complaint finally contained the requisite expert certification pursuant to Rule 9(j).

Held, Plaintiff's complaint was properly dismissed by the trial court for failure to comply with the statute of limitations. The court of appeals reviewed several recent Supreme Court decisions involving Rule 9(j) and rule 41(a) and concluded, in essence, that a Rule 41(a) voluntary dismissal *does not* extend the time in which Plaintiffs must file a complaint that complies with Rule 9(j). The court noted that the original limitations period would have expired in March 2003. If Plaintiffs had properly moved for a 120-day extension of time (also per Rule 9(j)), said the court, they would have had until July 2003 to file their complaint with the proper certification. But they failed to do so.

The court of appeals also rejected Plaintiff's argument that Rule 9(j) did not apply because of the rulings in the *Anderson* case, discussed above.

### X. Damages/Emotional Distress

*Iadanza v. Harper*, \_\_\_ N.C.App. \_\_\_, 611 S.E.2d 217 (2005) was a somewhat complicated case that involved allegations of professional negligence, and other civil claims, arising out of care and treatment, and an alleged relationship, between a doctor and his patient. With regard to damages, Defendant brought a motion for partial summary judgment on the grounds that

Plaintiff did not allege “special damages” or provide proof of “severe emotional distress.” As such, claimed the defendant, Plaintiff was not entitled to actual or compensatory damages. The trial court granted Defendant’s motion.

The court of appeals reversed. The court rejected Defendant’s contention that Plaintiff was not entitled to general damages because she did not offer proof of “physical pain and suffering.” Physical pain and suffering is only one aspect of such damages, observed the court, and an award of such damages does not require proof of physical pain. Likewise, continued the court, it was not necessary for the plaintiff to prove that any alleged emotional distress was “severe.” The requirement that emotional distress be severe is an element of a cause of action for negligent infliction of emotional distress, said the court. But it is not a requirement for the recovery of general damages. As such, it was improper for the trial court to grant Defendant’s motion.

The decision does not make any new law, but it stands as the most recent reminder to counsel that general damages for pain and suffering are recoverable without proof of physical pain or suffering.

## XI. Judicial Estoppel

*Harvey v. McLaughlin*, \_\_\_ N.C.App. \_\_\_, 616 S.E.2d 660 (2005) was a malpractice action that started out life in the workers’ compensation system.

In *Harvey*, Plaintiff sustained a compensable workers’ compensation injury to his back that was settled for nearly \$500,000. After that action was settled, Plaintiff focused his litigation attention on the chiropractor that treated him for his work-related injury. Specifically, Plaintiff claimed that the chiropractor committed malpractice by performing a “violent” manipulation that allegedly resulted in a ruptured cervical disc and multiple surgeries.

Defendant subsequently moved to dismiss the complaint on the grounds of judicial estoppel, claiming that the plaintiff had taken inconsistent legal positions in the workers’ compensation case and the malpractice case. In review of the record, the trial judge found, among other things, that Plaintiff “had intentionally asserted contrary legal position” between the two actions and had, in essence, misrepresented the nature of his condition and injuries. On

the one hand, observed the trial judge, Plaintiff told the workers’ compensation system that he had seriously injured his back at work. On the other hand, said the judge, when Plaintiff filed his malpractice claim, he alleged that he was in good health prior to treatment with his chiropractor. As such, the court dismissed Plaintiff’s complaint.

The court of appeals reversed. Upon careful scrutiny of the complaint filed in the civil action, and the materials related to the compensation claim, the appellate court determined that Plaintiff had not taken clearly inconsistent positions in the two cases. The court noted that although the doctrine of judicial estoppel prohibits parties from deliberately changing positions on factual assertions according to the “exigencies of the moment,” a single internal inconsistency is not enough to justify imposition of a dismissal.

## XII. Interlocutory Review

Are sanctions likely to be imposed on a party that improperly appeals an interlocutory order to amend a complaint? Apparently so.

*Estate of Spell v. Ghanem*, \_\_\_ N.C.App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (2005) was a medical malpractice action that arose out of the death of an unborn child who died in utero. Plaintiff’s initial complaint was filed in October 2003. In July of 2004 Plaintiffs filed a motion to amend their complaint to add additional allegations against the nursing staff at the hospital. The motion was granted, and the defendants were given 25 days to answer. Instead, the defendants filed an appeal, claiming that a “substantial right” would be lost if the case proceeded without an immediate review of the judge’s ruling on the motion to amend.

To support their “substantial right” claim, defendants argued that without an immediate appeal they would (1) lose their right to raise the statute of limitations or laches as affirmative defenses, and (2) lose their ability to have Plaintiff’s complaint dismissed for failure to comply with Rule 9(j).

The appellate court disagreed: The court found that not only had the defendants failed to properly raise and preserve these issues with the trial court, but also that the interlocutory appeal itself was subject to sanctions pursuant to Rule 34. The court

rejected the defendant’s contention that pretrial review is necessary because they would lose forever the “right” to avoid the expense and inconvenience of a trial. Avoidance of trial is not a “substantial right” that would make the order appealable, said the court, instructing the trial judge to determine the reasonable amount of attorneys’ fees incurred by Plaintiffs in opposing the appeal.

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## Federal Court

There were at least two published cases involving malpractice claims in the federal courts in North Carolina in 2005. Both cases were filed by prisoners and were premised on alleged civil rights violations for the denial of adequate medical care while incarcerated. Both cases were “deliberate indifference” actions in which the prisoners failed to establish that the medical care in question was “so grossly incompetent, inadequate, or excessive as to shock the conscience or to be intolerable to fundamental fairness.” As such, summary judgment was granted in both actions for the defendants. See *Wynn v. Mundo*, 367 F.Supp.2d 832 M.D.N.C. (2005) (“deliberate indifference is a very high standard—a showing of mere negligence will not meet it.”); *Nyuwa v. Bissonnette*, 2005 WL 2136949 (M.D.N.C. 2005) (an error of judgment on the part of medical staff will not constitute a constitutional deprivation). Although neither case set any new precedent, both *Wynn* and *Nyuwa* reaffirmed the rule that ordinary allegations of mere negligence or malpractice are not sufficient to constitute “deliberate indifference” in the civil right/prisoner setting.

## Conclusion

As 2006 begins, the important cases discussed here from 2005 will undoubtedly impact attorneys on both sides of the bar who practice in the medical malpractice field. ■

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# My Katrina Experience

BY STEVE SCHLOSSER

Y

ou saw them on television, being plucked off rooftops, pulled through windows and into boats, wading through waist-high water, clinging to their children. What happened to these Hurricane Katrina victims after that? Thousands went to the Superdome and to the Astrodome in Houston—the media covered all that. But thousands of others left the New Orleans area on

their own initiative by any means available. These evacuees did not loot, shoot, rape, or riot. With only the clothes on their backs, they drove, hitchhiked, or walked north along Interstate 55 into Mississippi.

*One enterprising gentleman, who later needed a little free legal counseling, “borrowed” a City of New Orleans dump truck to get himself and his family, as well as others he found stranded along the way, out of New Orleans and to the shelter at Easthaven Baptist Church in Brookhaven, Mississippi.*



The first town they found with shelters available was little Brookhaven, Mississippi, with a population of about 9,500. These were not Red Cross shelters, but faith-based (church run) ones. Five churches in Brookhaven opened their doors the day after Katrina passed and took in any and all who were in need. With church funds, individual donations, and with church members doing the work, they fed and sheltered the evacuees.

This was the situation when I arrived on August 30th as a Red Cross National Disaster Team member. My crew was assigned to Easthaven Baptist Church on the outskirts of town, the first shelter found by the evacuees as they traveled north. The shelter filled rapidly and the building, though large, was packed with 350 persons—young, old, in-between, all races, all walks of life. The church classrooms and meeting rooms were jammed with

this community of people who had all been torn from their homes.

Traditionally, the Red Cross sets up shelters after a disaster, manning the kitchens and caring for clients. Katrina and Brookhaven were different. This was a community effort, with the church shelters and church volunteers partnering with the Red Cross. We joined in the cooking, serving, and cleaning that had already begun. Pots and pans were



washed, kitchen and dining room swept and mopped after each meal, tables were sanitized, and halls and rooms cleaned daily. Outside areas were cleaned daily as well. Sixteen to 18-hour workdays were the norm.

A few evacuees had air mattresses, but most, including volunteers, slept on the floors. More mattresses arrived from the Red Cross, and some cots were obtained, and the elderly and special needs persons were able to get off the floors. Local citizens donated clothes. The Red Cross and other donors sent in bottled water by the truckload, a true blessing since the local water was contaminated. The Red Cross began sending food, at first military heater meals, but soon accounts were set up with large food distributors and the shelters could order freely.

Easthaven was fortunate in receiving enough donations of food, water, clothing, and baby needs that we were able to serve as a distribution center for evacuees unable to get into shelters, as well as those Brookhaven and county citizens affected by the hurricane.

The most gratifying part of our mission was the face-to-face work with the clients. There was not a person staying in the Easthaven shelter who had not been wiped out; many were missing children, parents, grandparents, and other relatives. Because mental health volunteers were scarce, an important part of our work was talking and listening, mostly listening, and then attempting to give some hope for the immediate future. A great morale booster was the access to the Red Cross website, which eventually began listing evacuees for various shelters. As loved ones were found, spirits lifted and residents began to move on to join the recently located relatives.

Local businesses were contacted for jobs and local families were asked to take in evacuated families. Local doctors and dentists were implored to come to the shelter, and did so without exception, helping those in need, making appointments, and sending the most ill to the hospital.

FEMA representatives began coming by and false hopes were raised. After a few such visits, if the FEMA workers did not have assistance in hand, they were not invited in.

The Red Cross, within a week of our arrival, was able to disburse checks to shelter residents. Amounts were based on family size. No one got rich, but it was enough for gas and motels as families began to travel to out-of-state relatives. The church bus was used to run



*The Red Cross team at Easthaven Shelter, Brookhaven, MI. Steve Schlosser is second from the right in the back.*

clients without vehicles to the bank to cash their Red Cross and Social Security checks. As people moved out of the shelter, those remaining had more living space, more privacy, and more access to the two showers. The atmosphere became more hopeful and happier.

When I left after two and a half weeks our client population was down to 110. Gung ho Red Cross replacements arrived and I was able to leave with the knowledge that our evacuee

friends still there were being well cared for by a truly loving church and a handful of Red Cross volunteers. ■

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# A Fifty Year Lawyer Speaks— *Remarks by Roy W. Davis Jr.*

FROM THE FIFTY-YEAR LAWYERS LUNCHEON, OCTOBER 2005

Officers and members of the council, members of the judiciary, guests of the State Bar, and especially to all of you, my fellow septuagenarians representing the State Bar Class of 1955:

When I consider the contributions you have made, individually and collectively, to our state, our profession, and your several communities, I'm overtaken by a sense of the great honor it is to appear before you today as we celebrate the five decades of our professional life together.

My message is essentially one of congratulations to each of you for having successfully reached what some wag has facetiously referred to as "the lawyer's metallic age." This is, of course, that advanced season in legal life, which we now enjoy, when you have silver in your hair, gold in your pocket, and lead in your ass!

Looking back, it cannot be said that we were a diverse group. We were in fact white, male, and mostly 25 years old. I recall only two women and no African-Americans in my class at Chapel Hill who took the bar in 1955. Of these two, only one, Ann Greene McKenzie, formerly of Concord, remains a member of the surviving State Bar Class of '55. The other, a distinguished scholar and jurist, now deceased, was known to us in law school by the familiar name of "Peanut." This "Peanut" regularly "broke the grading curve" of our class at Chapel Hill to the dismay of the male society, myself included, in which she lived. I'm speaking, of course, of the Honorable Naomi Morris, late chief judge of the North Carolina Court of Appeals. I can recall no African-American or additional women members of our group at Chapel Hill who are with us today. I've just learned, however, that there is in attendance with us today

a distinguished member of the Class of '55 who is both a woman and an African-American. I'm speaking of attorney Allie Latimer, who was introduced to you a few minutes ago. I believe it is fitting that we should give her special recognition at this time because of her unique pioneer status.

Of course most of us received our legal education at the Wake Forest, Duke, and UNC Law Schools. Our ranks do include, however, law graduates of the Universities of Richmond, Howard, Pennsylvania, and Syracuse. Two of us received our legal education at UVA. And I proudly note that two of our happy band brought the credentials of Harvard Law School, including a cum laude degree, to the Class of '55.

When we took our bar exam, it was a three day ordeal of essay questions not diluted by the simplicity of multiple choice questions to which there are actually correct answers. But the big difference in our exam from its contemporary example is that ours was administered under the demonic hand of one Ed Cannon, then executive director of the Law Examiners. Who among us cannot remember calling, when the results of our bar exam were available, to determine whether we had passed or failed, only to hear Mr. Cannon's voice of doom tell us, with elaborate pauses for effect, that he could not find our name among the elect—and yet: "What was your name? Davis? Oh, I thought you said McGillicuddy. Let me look again. I've been over this list a couple of times. But...oh yes, oh yes, there it is. I've overlooked your name by mistake. Yes, Mr. Davis, it appears you have passed the bar."

Like most Americans of most generations, we have known war and rumors of war. I expect a few of us may even have seen military service in the big one: the Second World War. I am sure that many of us were involved in the

Korean War, and that most of us have served in our nation's armed forces at one time or another—if only, as in my case, as a mild mannered legal officer. Not as soldiers but as citizens we have observed a Vietnam War lost, a Cold War won, and a War on Terrorism begun.

Once most of us opened our practices in the "Old North State" following graduation and military service, we covered the state from Hayesville to New Hanover. Only to find, to our surprise, that the law we had so carefully tried to understand in law school was rapidly being changed on us by the General Assembly, assisted by the leading lights of our profession, including some of our own number. One of the first waves of this assault was the Universal Commercial Code, which trumped what we had learned at Chapel Hill as "Bills and Notes" under the redoubtable Professor Breckenridge. These waves of enlightenment have never ceased to flow over us: the new Intestate Succession Act; the new Probate Code; the new Business Corporation Act; the new Rules of Civil Procedure; the new Rules of Evidence; the new Appellate Rules; and so on and on. Even the organization of our courts has been changed and lo, the old local "recorders courts" we knew so well have disappeared, "leaving not a rack behind," giving way to district courts and the court of appeals. And, most regrettable of all to the true student of history, such as myself, the ancient and honorable title of "solicitor" has been taken, with scarcely an apology, from the mantle of that public officer we must now refer to by the bland title of "district attorney."

And what have you gal and guys who are represented here today been up to in these five decades since you were sworn in? Quite a bit, as best I can determine. Many of you have

been general practitioners, yet have maintained eminent standing as criminal or civil trial attorneys. Several have identified themselves as probate, trust, estate, and real property specialists, and one of you has specialized in public utility law. At least two of you have been in-house counsel to industry. One of you has served as general counsel to what may be the state's largest and most prominent life insurance company. Another organized one of the state's first firms specializing in patent, copyright, and trademark law—and this was long before the practice of “intellectual property law”

became a hot topic or synonymous with guaranteed financial success. Many of you have practiced municipal law in your several communities. And one of you, thought by me to be a mere lobbyist, allegedly claims the specialty of “legislative law,” which he practices, according to all I hear, with notable integrity and success.

A significant number of you, as well as several of our deceased members, have served as judges of our appellate and trial courts. At least four of you have served in the North Carolina General Assembly. At least five of you have been members of the State Bar Council. Perhaps the majority of you have served as presidents of your local district or county bars. Three presidents of the North Carolina Bar Association have come from our class, and many of you have served in positions of leadership on behalf of the Bar Association, the Academy of Trial Lawyers, and our other voluntary bars. Your ranks include two of the smartest people I've ever known, one of whom alleges himself to be fluent in French, German, Italian, Russian, and Spanish. These two eminently qualified lawyers, one from Charlotte and one from Raleigh, ably represented the interests of North Carolina in and to the American Bar Association from 1968 for almost the 30 ensuing years.

Speaking of changes, when we were sworn in to take our place in the North Carolina State Bar, it was composed of about 3,000 lawyers. Things have changed somewhat in



*The 2005 class of Fifty-Year Lawyers*

that regard because the State Bar today is seven times that large. That's right, folks, North Carolina now has about 21,000 lawyers. In 1955 there were only four law schools in the state. Now there are five law schools in operation in North Carolina, and two more will soon be added. We have happily participated in a half century of economic prosperity that has brought us the mega-firm, sophisticated specialties and sub-specialties of law practice, freedom of speech in the form of advertising (“you don't pay unless we win”), and a comfortable living for most of us. There is little doubt that lawyers practice today at a higher level of knowledge and skill than they did in the ancient days of 1955, and we have witnessed the birth and unprecedented growth of information technology as a definitive factor in our lives and in our law practices. Symbolically, we have moved all the way from manual typewriters and black coffee to laptops and bottled water. And, in a more serious vein, we have seen commendable improvements in the judicial system of our state, the continuing education of lawyers, and in the field of civil rights. In 1955, almost all of our lawyers were white and male. Some of the voluntary bars did not always welcome African-American members. Today, many North Carolina lawyers are women, African-Americans, or representatives of other minorities. And the voluntary bars have long been enriched by the gifts and leadership of women and minority members.

Do we of the Class of '55 claim credit for

all the good things that have happened in the legal system since we came to the bar? Well, not exactly. We do recognize, however, that it is the duty of all lawyers to justify our near monopoly over the practice of law by serving as problem solvers for the public. As officers of the court, we understand it is our responsibility to ensure that our courts are available to all our people, rich or poor, and that the courts of our state should operate as fairly and efficiently as possible. Our Rules of Professional Conduct tell us it is the basic duty of each lawyer to provide community service, community leadership, and public interest legal services in such areas as poverty law, civil rights, charitable organizations, and the administration of justice. I do here and now boldly claim for the Class of '55 that we have used our legal skills to fulfill these professional duties in our communities from Hayesville to New Hanover, and even beyond the borders of North Carolina, not for just a year or a decade, but on thousands of occasions over the course of the last 50 years. And many of us are still playing that role.

So, speaking in a spirit of good will for all to hear: I don't care what anybody says. I think we've done a great job. I hereby congratulate the State Bar Class of 1955, and suggest that every member of our class now stand to receive the well deserved applause of all those assembled here today. ■

*Roy W. Davis Jr. is a former North Carolina State Bar President from Asheville.*