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IN THIS ISSUE

The Vanity Press

By L. Thomas Lunsford II

I was honored recently at a surprise party by the State Bar's officers and some of my colleagues in regard to the 30th anniversary of my employment with the agency. It was a very nice affair and I was highly gratified. In addition to an inordinate amount of praise in reference to my service, I received a gift of incalculable worth—a beautifully handcrafted, leather-bound book, evocatively entitled *Disbarment Enclosed*, which includes all of the essays I have written for publication in the State Bar *Journal* since 1997. Knowing that I would inevitably hock a gold watch or other commemorative object having actual market value, my friends wisely chose to give me something that only I could love, and for which there apparently exists no market at all. It was truly an inspired choice, commissioned by sympathetic people who well understand two essential things about me. I love rare books and I love the sight of my own voice. Quite happily, I now possess the world's rarest book, by one of my favorite authors.

It really is a great privilege, writing an essay each quarter that is read or ignored, or read and ignored, by 24,000 people who are legally literate and literally legal. It's also a great challenge trying to explicate the most mundane aspects of professional regulation in ways that are, it is hoped, surprising and attractive. I know I don't always succeed in explaining or amusing. But, my intentions are good. Frankly, it's difficult finding your authentic voice as an organ of governmental publicity. The role is fairly and appropriately restricted. I am in print mainly to interpret what the State Bar has done, is doing, or intends to do. It is not my place to criticize established policy or even to note my disagreement. I do have ample opportunity to influence official decisions as they are being formulated by providing information and advice, but I don't have a vote and I certainly don't have the right to discredit or second-guess. I keep faith with you, my imagined readers, by trying to tell the truth about what we do thoughtfully and credibly. In that connection, I am proud to say that, unlike Mark Twain, I am subject only to self-censorship.

Now, as it happens, most, if not all, state bars have a journal of some sort. I happen to have a complimentary subscription to most of them. They are, with a few notable exceptions, a rather sorry lot, in comparison to which our own magazine sparkles with imagination and panache. This comparative judgment bespeaks faint praise, I know, but I also think that our publication stands pretty tall in an absolute sense, particularly when you consider its fairly limited mission and its dependence upon amateur journalists like me for content. Although most bar journals have similar tables of contents and offer some of the same regular features, like the "President's Message," very few offer commentary from the executive director. Those that do tend to purvey information in a generic, no-nonsense kind of way. I can't think of anyone else in my position who routinely leavens the facts with buffoonery, deadpan, and absurdity. Maybe that's a good thing.

Of course, the most interesting question in regard to my articles, and everything else that appears in the *Journal*, is whether anyone is actually paying attention. We know the circulation of the publication because every active member is compelled to "subscribe," but we haven't a clue as to how many of you are in fact reading the magazine, in whole or in part. And we don't really know what you think of it. It would be good to have this information because we are rapidly approaching the day when there will be a readily available low-cost digital alternative to the palpable thing you are presently reading. In truth, the technology already exists, but we continue to suppose that the State Bar *Journal*, in its current form and with its recurrent content, has sufficient value to you and the agency to justify the amount we are spending to produce and distribute it each year—about $150,000 in 2011, exclusive of salaries and overhead.

Maybe we're wrong about that. Maybe the magazine, like so many other quaint descendants of the Gutenberg *Bible*, has outlived its usefulness and become cost ineffective and irrelevant. We have been told repeatedly by demographers and social scientists that young people, including young lawyers, tend to get the information they need on demand from digital devices, and simply don't read paperwritings much anymore. If that's so, maybe we ought to go green instead of black and white, forsaking the coffee table for the laptop, and substituting the "link" for the dog-eared page. It's worth noting in this regard that the State Bar has already converted the venerable *Lawyer's Handbook* to cybercopy. By offering that publication online instead of in print, we are saving about $50,000 a year. That's definitely a good thing.

But what about the magazine? Isn't it somehow different? It's one thing for a reference book, like the *Handbook*, to reside on the internet. Its content changes glacially and its primary virtue is being available when needed. Because it is meant to be consulted rather than consumed, a cybershelf is just as fine a resting place as a bookcase, and much more handy than a lobby or bathroom. But the magazine is a different thing entirely. It serves many other purposes. First and foremost, it dishes information and opinion—authoritatively and graphically, though somewhat belatedly. As the State Bar's journal of record, it is itself a recording.

It has residual archival value as a thing worth saving that can actually be saved. Unlike the millions of ephemeral electronic impulses that from moment to moment fleetingly represent thought and action in cyberspace, the *Journal* is extant and material. True, it can be thrown away by the recipient but, once delivered, it can't be deleted or overwritten by the publisher or anybody else. It has existential heft.

The *Journal* in its present form also has significance as a tangible representation of the State Bar and the idea of professional self-regulation. It is for most lawyers the "face" of the organized Bar. With its many distinctive and familiar elements, the magazine arrives predictably each quarter in the mail, bringing to mind the singular nature of our calling and our confederation in a way that dues notices, CLE forms, and email "blasts" just can't. It is something that represents us and unites us. That being the case, it has value that can't be measured merely in terms of timeliness, convenience, or utility. Like the new building that will soon rise in downtown Raleigh to house the State Bar's operations, and its soul, the *Journal* is an enduring symbol of our profession. It has a presence that cannot be entirely contained on or conveyed by the internet.

Perhaps more to the point is the fanciful notion to which many of us cling that people, and by that I mean to include lawyers, are more likely to read a magazine in hand than online. This theory, of course, runs counter to the wisdom referenced above concerning young lawyers, and I freely confess that I've got no evidence to support the alleged preference for paper. But it does make sense to me—and I used to be a "young lawyer." There's just something about flipping open a fresh copy of a fine professional journal that suggests the enchanting possibility of edification—and the delightful likelihood of surprise. Who knows upon what life-changing tidbit one's glance may randomly fall? Perhaps one of Bruno's Top Tips for Tip Top Trust Accounting, or an interesting IOLTA statistic, or one of those irreverent columns attributed to the executive director. This is the sort of arcana toward which no one would intentionally navigate on a website, and yet it is endlessly charming when encountered by chance while "leafing" through the *Journal*.

If I were still a mediocre trial lawyer, I would rest my case at this point, confident that you, the imagined readers of this essay, are convinced that we should print the *Journal* in perpetuity. But like the cross-examiner who foolishly asks the one fateful question to which he doesn't know the answer, I feel compelled to inquire further of you. Do you regularly read all or any part of the *Journal*? Do you occasionally read all or any part of the *Journal*? When you read the *Journal*, what regular features do you peruse? Is there any aspect of the *Journal* that you particularly enjoy or dislike? What do think of the *Journal's* overall quality? How could it be improved? What do you think about the featured articles? Would you like more information about who got stung by the Disciplinary Hearing Commission, or how to cope with depression, or what my childhood was really like? And, perhaps more to the point of this article, please let us know if you would you prefer to "receive" the *Journal* online.

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Metadata 101: Beware Geeks Bearing Gifts

By Erik Mazzone

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


Greg Hargreaves/images.com

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

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

Over the past few years, perhaps no such technological danger has been less understood yet more commonly present in law practice than that posed by metadata. Even the name itself is impenetrable, conjuring an unholy blend of metaphysics and data that probably makes you want to put down this article and turn on *Dancing with the Stars*. More frustrating still, a plea to our modern oracle—the internet—fails to provide any useful insight as to the nature of metadata. Merriam Webster helpfully defines it as "data that provides information about other data."

Well, that clears that up. Any questions?

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

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

Metadata: What Is It?

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

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

Metadata: Why Do You Need to Care?

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

Still there?

As an attorney, you need to care about metadata because it is a client confidentiality time bomb hidden in the middle of your practice. As attorneys, we are prohibited from revealing confidential client information without the informed consent of the client by RPC 1.6(a). You know this. I know you know this. I further know that you would never knowingly reveal client confidences purposefully. The very real possibility remains, though, that if in the course of your practice you have ever shared digital document with an opposing counsel, you may have unknowingly and inadvertently revealed confidential client information in the form of metadata.

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

We have an ethical duty to maintain client confidences.

Metadata may contain client confidences.

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

Metadata: What Do You Do About It?

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

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

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

Read it now? Great.

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

Duty When Sending Digital Information

Your duty when sending digital information is to "take reasonable precautions to prevent the disclosure of confidential information, including information in metadata, to unintended recipients." (2009 FEO 1) The opinion goes on to state, "a lawyer must take steps to minimize the risks that confidential information may be disclosed in a communication." (2009 FEO 1 quoting RPC 215) What steps and precautions would be considered reasonable will depend on the circumstances. So as not to leave you adrift wondering what you can do to satisfy this reasonable precaution standard, let me share with you the way I advise the members of the North Carolina Bar Association in the course of my work.

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

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

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

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

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Did Atticus Finch Commit Malpractice?

By Jason A. McGrath

On November 21, 1935, Tom Robinson raped 19-year-old Mayella Violet Ewell. So said the Maycomb County, Alabama jury, as written by Harper Lee in the classic novel *To Kill a Mockingbird*. Despite an admirable defense by court-appointed attorney Atticus Finch, Tom Robinson was convicted and sentenced to death by a jury which was most definitely not made up of his peers.

Getty Images

The book strongly implies that Mr. Robinson was innocent, that the primary prosecution witnesses lied throughout the trial, and that it was only Mr. Finch's valiant efforts and relationship with the community which caused the jury to hesitate at all before the unfair conviction. What if, however, Atticus in fact made a terrible mistake during trial which eliminated any small chance his client had of acquittal, any chance of avoiding death?

Although I'm a fairly voracious reader for pleasure, I'd never gotten around to reading *To Kill a Mockingbird*. However, one recent weekend, desperately in need of a break from contract review and liability analysis, I grabbed it from the coffee table where my wife had deposited it a few days earlier. I'd never read a review or summary of the book (nor have I yet), but was still vaguely aware that it featured a lawyer named Atticus, a rape or murder, and a racial controversy. This makes it even more unlikely that I ended up reading the book, as I tend to avoid stories about lawyers, who in books and movies are almost always far too perfectly successful, far too naive, or far too evil to be realistic.

I grew up in an environment very dissimilar to Maycomb; nobody would confuse south Florida with south Alabama. Now that I've moved to North Carolina, however, explorations of southern culture seem more appropriate. Plus at least half of those running for judgeships and other positions within the justice system here seem to claim *To Kill a Mockingbird* as their favorite book. Thus I came to read it, in three different sittings within 36 hours. I enjoyed it, but I was at first puzzled, and then dismayed at the way the trial went, and not just due to the unjust outcome. I've tried many cases, including sex crimes, violent felonies, and wrongful death cases, and I just couldn't fathom what happened—or rather didn't happen. What went wrong, Atticus?

Toward the end of the trial, the father of

the alleged victim, a disreputable white man named Bob Ewell, takes the stand after being called by the prosecution. He described what he witnessed the night of November 21, 1935 as he returned home from the woods. "[J]ust as I got to the fence I heard Mayella screamin' like a stuck hog inside the house—." Mr. Ewell went on to point to the defendant, Tom Robinson, who was seated next to his attorney, Atticus Finch, and to exclaim, "I run up to th' window and I seen...I seen that black nigger yonder ruttin' on my Mayella!" The language used and the events described caused a disturbance in the packed courtroom.

Minutes later, Mr. Ewell's testimony continued with a question by the prosecutor. "Mr. Ewell, did you see the defendant having sexual intercourse with your daughter?" The witness answered with certainty, "Yes I did," and then stated that he had a clear view of the room as his daughter was being raped by the defendant. Finally, the angry father confirmed, "I sawed who he was, all right."

Upon cross-examination, Atticus Finch established several points, the key being that Mr. Ewell was left-handed. This was potentially relevant, as other evidence showed or implied that Mr. Ewell was a mean and perhaps abusive drunk, and that his daughter's injuries were largely on her right side—and thus arguably inflicted by a left-handed attacker.

The next witness to be called was the alleged victim herself, Mayella Violet Ewell. Other than being a member of the unpopular Ewell family, there was no indication in the book that Mayella herself was particularly disliked. Rather, she was presented as a young woman born into an unfortunate situation; into a family with no means, no motivation, and no role models.

Mayella agreed that she'd peripherally known the defendant for years, as they were neighbors. She testified that on November 21, Tom Robinson had been walking by her home when she asked him to assist her in chopping an old piece of furniture up to be used as firewood. Instead of helping her as asked, however, he attacked and raped her. "[A]n 'fore I knew it he was on me....He got me round the neck, cussin' me an' sayin' dirt—I fought'n'hollered, but he had me round the neck. He hit me agin an' agin—."

"Then what happened?" the young Ms. Ewell was asked. She replied, "I don't remember too good, but the next thing I know Papa was in the room a'standin' over me hollerin' who done it, who done it? Then I sorta fainted an' the next thing I knew Mr. Tate was pullin' me up offa the floor and leadin' me to the water bucket." (Mr. Tate was the sheriff.)

Tom Robinson later testified, denied that he had committed any type of crime or improper action, and reluctantly explained that it was he who had fended off Mayella's sudden advances. Atticus Finch demonstrated to the jury that Mr. Robinson had a particular physical impairment of his left arm and hand, which made it less likely that he could have carried out the attack as described. During closing arguments, Mr. Finch emphasized to the jury that the evidence of guilt was unreliable, and implored the jurors not to assume guilt merely because of the color of the defendant's skin. He also commented, "Her father saw it, and the defendant has testified as to his remarks. What did her father do? We don't know, but there is circumstantial evidence to indicate that Mayella Ewell was beaten savagely by someone who led almost exclusively with his left." Despite Mr. Finch's efforts, Tom Robinson was found guilty after perhaps six hours of jury deliberations.

At first, I expected Atticus to pounce on it during cross-examination of Mayella, for that would be what most lawyers would do. However, some lawyers (this writer being one of them) prefer not to emphasize such "gotcha!" testimony during cross, but rather save it for closing argument. (Why bring it up during cross, which only gives the opposition the opportunity to try to completely correct the problem or at least minimize the damage with additional evidence?) Thus, I thought "Ahhh, the wise Atticus Finch will keep this nugget in his pocket, polishing and savoring it until the moment is absolutely right, until the jury is hanging on his every word, his every motion. Of course!" Although it was one o'clock a.m. when I read this part of the book, I folded page 206 in order to mark it, the way I'd have asked a court reporter to mark a piece of testimony during a real trial. I then read through closing arguments before going to sleep, a sleep literally troubled by what turned out to be missing from Atticus' closing argument.

The next morning, I explained my thinking to my wife. She looked at me, trying to determine if I was actually being clever (for a change) or if I mistakenly thought I was being clever. Eventually she nodded in agreement, and her face took an expression of slightly puzzled thoughtfulness as she subconsciously continued to nod her head ever so slightly up and down.

Perhaps some of you reading this knew where I was going before you read more than a sentence of two of this commentary. Others may have picked up on it a few hundred words ago, while some of you, appreciated readers, are still waiting to hear what, to me, seems a blatant and damning error by the esteemed Atticus Finch. Well, let's get to it.

Bob Ewell testified very clearly that he saw Tom Robinson attacking and raping his daughter. Further, he then watched as Mr. Robinson, his long-time neighbor, exited the Ewell house and ran off. We have Mr. Ewell's own words that he "sawed who it was" and we know that he pointed to the defendant when he exclaimed, from the witness stand, "I seen that black nigger yonder ruttin' on my Mayella!" That's a perfectly straight forward and positive, first person, eyewitness identification, offensive language notwithstanding.

However, what did Mayella Ewell testify regarding her father and his words and actions at the time of the alleged crime? She made a general statement that she didn't "remember too good" what happened immediately after the rape, but then testified with specificity as to what she did remember. "[B]ut the next thing I know Papa was in the room a'standin' over me hollerin' *who done it, who done it*?" (emphasis added)

That question mark means everything here. The father, who testified so emphatically that he was an eyewitness to the defendant's rape of his daughter, was reportedly yelling and *asking that very daughter who had raped her*. This could have been, should have been, *the moment*, or at least should have led to the moment of the trial. The "gotcha" moment, the "now we all know you're a liar" moment, the "not even you, ever-suspect jurors, can now mess this up" moment. Yet somehow, it was not. Atticus Finch missed the key bit of testimony and its significance. The otherwise competent, even inspiring, country lawyer let his client

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Questions after a Decade on the Bench

By Martin B. (Marty) McGee

I have just completed a decade on the district court bench. During that time, the yearly caseload in my district has steadily grown from 35,000 to over 50,000 cases for our four judges. The variety, volume, and pace of these matters have taught me much about our judicial system and human nature. The time has allowed me to consider our legal system from a different perspective from my previous views as a law student and as an attorney in private practice. Now seems an appropriate time to reflect on this experience, and I hope to do so in a manner that may be helpful in improving our justice system.

In this article, I move beyond my narrow judicial responsibilities of finding facts and applying the law to discuss some practical concerns I now see with private warrant cases and with the procedure for setting bonds in domestic matters. I then explore creating a forum to identify and address other issues. In offering these opinions, I am mindful that it is the General Assembly's responsibility to make law. I hope, however, that this writing may offer a useful perspective of a judge in the trenches.

Should Private Warrants Be Eliminated?

Our state has a curious procedure that allows any citizen to charge another with a misdemeanor criminal offense. N.C.G.S. Sections 15A-303 and 15A-304. There is no need to call the police, because all one has to do is swear to the magistrate that the future defendant violated the law and that person will be charged with what is commonly called a "private warrant." This procedure needs to be reconsidered because innocent people are often charged and guilty people are unlikely to be convicted.

While some private warrants allege minor offenses, others are of a more serious nature—domestic violence, threats involving firearms, and assaults. With no investigation, it is often impossible for a judge to determine beyond a reasonable doubt what—if any-

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

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

Should Magistrates Set Bonds in Domestic Violence Cases?

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

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

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

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

Should North Carolina Establish a Legal Retreat?

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

As most readers know, the UNC School of Government does an outstanding job providing formal training to governmental employees and informally answering their questions on an as needed basis. The school could plan an excellent continuing legal education retreat that would benefit all North Carolinians. I would welcome the opportunity to volunteer to help in any capacity. ■

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

Metadata 101 (cont.)

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

Duty When Receiving Digital Information

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

Conclusion

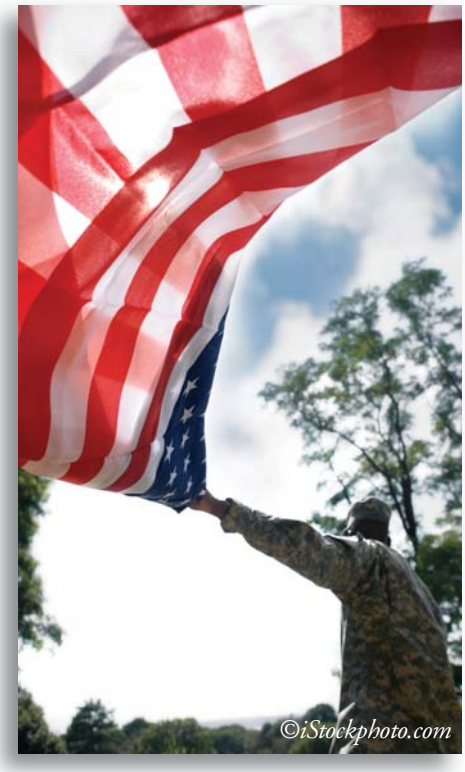
Not nearly as thorny and difficult to grasp and deal with as its name would imply, metadata is a fact of life in the modern law office. You now know what it is, why you need to care about it, and what to do about it. Purchase a metadata scrubber or otherwise put into place a procedure to deal with metadata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

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

New Veterans' Benefits Act Provides Private Right of Action

Michael S. Archer

On October 13, 2010, President Obama signed into law the Veterans' Benefit Act of 2010 (HR 3219), providing important tools for the enforcement and vindication of service member rights and a potentially lucrative opportunity for members of the bar. The Act extended, increased, and generally strengthened certain benefits provided to veterans, particularly, but not exclusively, to disabled veterans.



The VBA also amended the Servicemember Civil Relief Act (50 US Code Appendix, section 501 *et. seq.*), the principal statute protecting active duty service members and their families and also the focus of this article. The most important of these latest SCRA amendments established a private right of action against those who violate the SCRA. Other changes authorized the US Attorney General to commence civil actions to vindicate SCRA rights, and clarified service member rights to terminate cell phone contracts as well as residential and motor vehicle leases.

Those with only a passing familiarity with the SCRA may be aware that it precludes certain default judgments against service members, allows service members to reopen some default judgments, and prescribes circumstances under which a service member may delay civil proceedings. However, the SCRA also provides other rights and protections. For example: it limits interest rates on most pre-service obligations to six percent (section 527); prohibits landlords from evicting service members except through court order (section 531); except by court order, prohibits businesses from repossessing personal or real property secured by a contract executed prior to military service (section 532); prohibits non-judicial foreclosure on realty secured by a pre-service mortgage (section 533); authorizes service members to terminate residential or motor vehicle leases in certain circumstances (section 535); authorizes service members to terminate cell phone contracts without penalty in certain circumstances (section 535a); and provides that neither the service member nor the member's spouse either lose nor acquire a domicile for personal or income tax purposes solely due to compliance with military orders to move to a military duty station (section 571).

Needless to say, parties with adverse interests have not always been especially scrupulous in safeguarding such service member rights. Creditors repossess vehicles and banks pursue non-judicial foreclosures in violation of the SCRA. Lenders are hardly eager to reduce interest rates to six percent, and landlords withhold security deposits and send adverse information to credit reporting agencies when a service member validly terminates a residential lease. So, how is the service member to protect himself and/or pursue after-the-fact relief?

The service member may visit a military legal assistance attorney, who can educate the adverse party and may even provide a copy of the relevant portion of the law. If that doesn't work—and often it does not—the military legal assistance attorney can get the US Department of Justice (DoJ) involved. Generally, a call from the DoJ, which has full-time attorneys dedicated to SCRA enforcement, will stop the wrongful action, particularly since a knowing violation of many portions of the SCRA may constitute not only a civil wrong, but also a criminal offense.

But what if the service member is unaware of the obnoxious, unlawful action until it is too late? What if the repo man steals a sailor's car while the sailor is at sea? What happens if the creditor plaintiff pursues an illegal foreclosure before the soldier ever gets to any military legal assistance officer, or the marine has any idea that he may have protection under the SCRA? That's where the new law comes in.

This latest SCRA amendment makes it clear that the DoJ can pursue a civil case on behalf of the aggrieved service member. Even prior to the amendment, the DoJ pursued such cases, but defendants argued, occasionally with some success, that because such action was not explicitly authorized, the DoJ was powerless to pursue any civil remedy. According to this view, that lance corporal patrolling Helmund Province in Afghanistan had to fend for himself. No more.

Section 597of the SCRA now specifically provides that the DoJ can pursue a civil action against any person who engages in a pattern or practice of SCRA violations or engages in a violation that "raises an issue of significant public importance." The court may grant equitable or declaratory relief, and all other appropriate relief, including monetary damages. In addition, the court may assess a fine of up to $55,000 for the first offense and $110,000 for subsequent offenses.

But what can the service member do on his own? After all, the DoJ cannot be expected to intervene in every case. Further, the service member may want to control the litigation himself.

On this point, section 597a, concerning a private right of action, is short, sweet, and to the point. It now authorizes "any person" aggrieved by a violation of the SCRA to pursue a civil action to obtain equitable or declaratory relief, and to "recover all other appropriate relief, including money damages." The statute provides that the court "may" award costs and attorneys' fees to the aggrieved person if that party prevails in the litigation.

Prior to this amendment, lawsuits against SCRA violators had gone forward, sometimes resulting in large damage awards. However, the statute now specifically authorizes a wide array of relief, including attorney fees to the prevailing plaintiff. Furthermore, prior to the amendment, defendants would argue that because the statute failed to specify a private right of action, none existed. According to this view, once the bad actor violated the statute, there was nothing the service member could do about it. The majority position had always been that an implied private right of action existed, particularly in light of the purposes of the statute as well as the oft-cited US Supreme Court admonishment that, "The Act should be read with an eye friendly to those who dropped their affairs to answer their country's call." *Le Maistre v. Leffers* 333 U.S. 1,6 (1948).

In large measure, section 597a grew out of *Hurley v. Deutsche Bank,* a case arising in the Federal District Court for the Western District of Michigan. In this case, contrary to the old adage, bad facts have made for good law. Sergeant James Hurley, an army reservist with an existing mortgage, was mobilized for active duty. He fell behind on the mortgage when he quit his second job. The lender foreclosed on the soldier's house pursuant to non-judicial foreclosure, evicted his family while Sgt. Hurley was deployed to Iraq, and sold the house to a bona fide purchaser. The plaintiff also provided an affidavit to the court inaccurately averring that Hurley was not in the armed forces, without making any inquiry whatsoever as to the truth of the statement. Despite the fact that the plaintiff's actions violated at least two provisions of the SCRA, the plaintiff was granted summary judgment, the court agreeing that the SCRA did not authorize a private right of action (W.D. Mich. Sept. 30, 2008). Unless Sgt. Hurley could find some state remedy, he was simply out of luck. On reconsideration, the judge determined that the SCRA implied a right of action, reversing his earlier ruling (W.D. Mich. Mar. 13, 2009). Enshrining this right into the text of the SCRA should go a long way toward persuading attorneys to take such meritorious cases. The new law should also diminish the likelihood that future service members will return from combat only to find their families illegally evicted, their houses illegally taken out from under them, and the courts unwilling to do anything about it. ■

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To view the full text of the Veterans' Benefits Act of 2010, go to govtrack.us/congress/bill.xpd?bill=h111-3219.

Atticus Finch (cont.)

down and, we may even feel, let us down.

The Finch's neighbor, Miss Maudie, reflected that it was impressive that Atticus had at least given the all-white, biased jury reason to pause on its way to unfairly convicting the defendant. "And I thought to myself, well, we're making a step - it's just a baby step, but it's a step." Well said, but under further consideration, we may be left to wonder if that baby step could have or should have been a leap.

I still can't decide if I like Atticus Finch more now than I would had he been better, had he pulled off the miracle. At least he wasn't perfect, as we surely are not. I dare say we are no better than Mr. Finch was, and we should remain thankful for him, stunning error and all. ■

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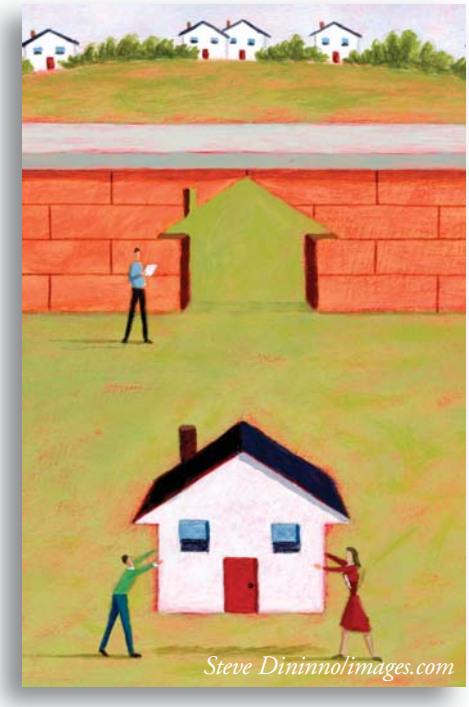
The Exhaustion Requirement as a Barrier to Fair Housing Claims

By Mark Dorosin and Peter Gilbert

The Federal Fair Housing Act (FFHA)[1] allows victims of housing discrimination to choose between filing an administrative complaint with the US Department of Housing and Urban Development (HUD), filing a lawsuit with no administrative complaint, or to simultaneously proceed in the administrative forum until "the beginning of the trial of a civil action"[2] and to proceed in court until an "administrative law judge has commenced a hearing on the record" in the administrative proceeding.[3]



Incongruously, even though HUD has designated the North Carolina Fair Housing Act (NCFHA) as "substantially equivalent" to the federal act, there is an assumption that the state act requires a plaintiff to exhaust administrative remedies before pursuing an action in court under the NC statute. Congress did not require administrative exhaustion for the FFHA, as it did in some other administrative contexts, because it imposes a substantial burden on victims of discrimination and thereby hampers the goal of both acts: to end residential segregation.

The burden is exacerbated in North Carolina because the North Carolina Human Relations Commission (NCHRC) lacks the resources to investigate and resolve claims in a timely manner as required by statute. Delayed adjudication denies prompt relief for meritorious complaints and keeps even innocent defendants in limbo. Delay increases costs to plaintiffs and defendants and may discourage complaints. Low-income plaintiffs are especially affected by the time and expense involved in delayed administrative proceedings. In addition, exhaustion limits plaintiffs' choice of forums, which undermines their ability to obtain effective redress for discrimination. Exhaustion also contributes to low settlement amounts because of plaintiffs' inability to sustain lengthy proceedings. The large number of administrative complaints, when compared to paltry settlement amounts, suggests that administrative remedies are inadequate to address pervasive discrimination.[4]

Imposing an exhaustion requirement in the NCFHA not only denies justice to victims of discrimination, but is legally untenable because such a requirement: 1) diverges substantially from the federal requirement of substantial equivalence, 2) lacks a foundation in case law or the NCFHA's own statutory terms, and 3) is inconsistent with the persuasive interpretation of parallel statutes in similar jurisdictions.

Current NC Law

The NCFHA is largely modeled after the FFHA. As the NC Court of Appeals noted in *North Carolina Human Relations Council ex rel. Leach v. Weaver Realty Co.*, the "[l]egisla-

ture modeled the key provisions of the State Fair Housing Act after provisions of the Federal Fair Housing Act."[5] The court of appeals acknowledged that "the body of federal cases interpreting the Federal Fair Housing Act is useful," but then rejected the federal case law recognizing disparate impact discrimination in fair housing claims.[6] The court found that disparate impact analysis was "contrary to the ordinary meaning of the terms in the North Carolina State Fair Housing Act," even though those terms matched the language of the federal law.[7] Following the ruling and subsequent inquiries by HUD, the legislature amended the state act to allow claims based upon disparate impact.[8] After these amendments, "the Acts are now virtually identical."[9]

While largely mirroring the FFHA, the NCFHA omits language in the Federal Act that a party has an express right to directly "commence a civil action in an appropriate United States district court or state court."[10] However, nowhere does the state law prohibit a party from immediately filing such a civil action: "[a]ny person who claims to have been injured by an unlawful discriminatory housing practice or who reasonably believes that he will be irrevocably injured by an unlawful discriminatory housing practice *may* file a complaint with the North Carolina Human Relations Commission."[11] This permissive language implies that an administrative complaint is not the exclusive remedy. The NCFHA refers to various situations where a civil action may be pursued, but all within the context of the administrative enforcement scheme.[12] The NCFHA does not address a plaintiff proceeding directly in court and bypassing the administrative option entirely; the enforcement provisions neither forbid nor regulate such judicial proceedings to remedy housing discrimination under NCFHA.

"It is a familiar canon of statutory construction that when a legislature borrows from the statutes of another legislative body, the provisions of that legislation should be construed as they were in the other jurisdiction at the time of their adoption."[13] Although federal decisions interpreting a statute even with verbatim terms are not binding on state courts, where, as in fair housing, "North Carolina decisions are few by comparison and the state and federal systems are closely interrelated," increased regard for federal decisions is appropriate.[14] Deference to federal interpretation is particularly suitable when the state statute and its judicial interpretations must be "substantially equivalent" to the federal scheme. The FFHA and cases interpreting it do not require exhaustion; "Congress intended to provide all victims of Title VIII violations two alternative mechanisms by which to seek redress: immediate suit in federal court, or a simple, inexpensive, informal conciliation procedure, to be followed by litigation should conciliation efforts fail."[15] The NC statute was modeled after the federal law; therefore, the NCFHA should be construed to not require administrative exhaustion.

There are very few cases interpreting the NCFHA, and none address the question of administrative exhaustion, even when that issue was argued to the court. In *Bergman Real Estate Rentals v. North Carolina Fair Housing Center*, a fair housing organization filed an administrative complaint.[16] The defendants sought an injunction in superior court based on lack of standing.[17] The organization argued the court lacked jurisdiction because the administrative process had not been exhausted: "The Durham Fair Housing Ordinance, state Fair Housing Act, and the Administrative Procedures Act (APA) mandate that such complaints be resolved in an administrative setting before any court intervention is permitted."[18] Although the issue of exhaustion *under the NCFHA* was expressly raised, the NC Court of Appeals did not consider the issue, finding only that exhaustion was not required *under the APA* in that particular situation.[19] The lack of any North Carolina ruling requiring exhaustion, even when squarely before the court, suggests looking to other jurisdictions, and especially at the FFHA upon which the NCFHA is modeled, which does not require exhaustion.

Milsap v. Cornerstone Residential Management, Inc.

In *Milsap*, a class of prospective tenants and the Housing Opportunities Project for Excellence, Inc., (HOPE), sued a housing developer, alleging that its policy limiting the number of occupants per bedroom discriminated on the basis of familial status.[20] Plaintiffs' action was brought under both the FFHA and the analogous Florida FHA.[21] Relying upon Florida precedent in *Belletete v. Halford*,[22] the federal district court held, "the only law published on the issue holds that

Florida's Fair Housing Act claims are barred unless administrative remedies are exhausted," and dismissed the complaint.[23]

Following the dismissal, the Florida Attorney General intervened in the case "for the limited purpose of arguing that the [Florida FHA] does not require exhaustion of administrative remedies."[24] The attorney general's argument focused on three points: 1) the Florida act was modeled after the federal statute and ought to be interpreted with guidance from federal law; 2) the *Belletete* opinion improperly relied upon federal employment law, which requires exhaustion, and, 3) that the Florida Supreme Court was likely to overrule the exhaustion requirement.[25] Additionally, the attorney general warned that an exhaustion requirement "would clearly diminish, if not entirely eliminate, the 'substantial equivalency' of the Florida law to its federal counterpart," and undermine the purpose of both acts by barring "victims of housing discrimination from raising their claims."[26]

Persuaded by the attorney general's brief, the *Milsap* court reversed itself, finding that the Florida Supreme Court would likely overrule *Belletete*, and holding that the Florida FHA contained no requirement for administrative exhaustion.[27] The opinion focused on the fact that *Belletete* improperly relied on state and federal employment law, which requires exhaustion, rather than federal case law and legislative intent for the FFHA, both of which specifically reject an exhaustion requirement.[28] The court also quoted the language of the Florida FHA that an aggrieved party "*may* file a complaint with the commission," "language [which] is permissive and not mandatory."[29] "The clear import of the above-referenced statutory language indicates a complainant may file a complaint and exhaust administrative remedies or, alternatively, commence a civil action."[30]

North Carolina ought to pay special attention to *Milsap* not merely because of its cogent reasoning and the lack of any controlling North Carolina cases, but primarily because of the great similarity between the fair housing statutory frameworks in Florida and North Carolina. Both are expressly modeled after the FFHA, and both contain almost exactly the same language that persuaded the *Milsap* court that there was no exhaustion requirement in Florida.[31] Even where the state acts differ from the federal statute, they differ in the same respects: both statutes specify that even after the administrative proceedings have begun, a party may proceed in court if no resolution is reached within a given time period,[32] and both also lack any analogous language to the federal provision which specifically allows a civil action without exhaustion.[33]

Although the *Milsap* court did not address the attorney general's warning about substantial equivalency certification, it nonetheless found no exhaustion requirement in a statutory scheme virtually identical to North Carolina's. The case is even more compelling because in Florida, unlike North Carolina, an appellate court had previously ruled that exhaustion was required. Nevertheless, the court recognized the error of that ruling and found that an exhaustion requirement was a substantial deviation from the statutory language and persuasive federal law.

Administrative Remedies are Insufficient to Meet the Goals of the Fair Housing Act

Reading an exhaustion requirement into the statute, although legally questionable, would not be as objectionable if the administrative process adequately deterred discrimination. In the recent draft, *Analysis of Impediments to Fair Housing Choice*, all four of the primary impediments identified by the State of North Carolina relate directly to the exhaustion requirement: 1) insufficient system capacity, 2) discrimination in the rental markets, 3) constraints in the lending markets, and 4) "[p]ossible barriers in land-use policies."[34] Insufficient system capacity creates long delays in the administrative process, increasing costs and delaying resolution, and therefore deters complaints but not discrimination. Rental and loan discrimination are specifically targeted by the NCFHA, but administrative exhaustion limits the impact of the law by increasing complainant costs and decreasing settlement amounts. As to the fourth impediment, the NCFHA could be used to challenge discriminatory zoning and land use practices, but complainants in North Carolina have avoided it due to the exhaustion requirement.[35] Greater opportunity to bring cases in state court without an exhaustion requirement would not completely remove these impediments, but the increased potential for litigation would help deter and remedy discrimination.

State fair housing claims are regularly brought through the NCHRC, but the putative exhaustion requirement limits strategic options, reduces settlement amounts, and increases the cost of proceedings. While complainants may pursue claims under the FFHA, federal litigation generally consumes more time and resources than state litigation because courts are fewer and more sparsely located, with crowded dockets and a smaller bar. State judges are also more likely to be familiar with the context of segregation and fair housing in their communities, as recognized in the federal statute by its preference for local resolution where protections are substantially equivalent.[36]

Unfortunately, after the time and cost of an administrative proceeding, complainants are unlikely to bring a suit in state court. Out of hundreds of complaints to the NCHRC in recent years, only two plaintiffs have proceeded in court following the administrative proceedings.[37] An increased choice of forums would broaden the options available to advocates and help resolve legitimate claims of discrimination.

The persistence of housing discrimination in North Carolina also suggests that recovery amounts awarded in conciliation and administrative hearings have been inadequate to deter discrimination. An analysis of data from the NCHRC shows that of 55 cases with reported non-zero settlement amounts, the average recovery was $3,232.26; the average of those cases conciliated through the administrative process, 48 of the 55, was only $2,546.85.[38] These low amounts, even in cases where the agency found cause to believe discrimination had occurred, are an inadequate deterrent to housing discrimination.

Cases that proceed to an administrative hearing fare slightly better. A review of fair housing cases litigated through the NC Office of Administrative Hearings from 2001 to 2009 reveals only four published cases.[36] Discrimination was found in two of those cases, both default judgments related to race discrimination.[40] One resulted in damages of $30,910, the other $9,400, both substantially larger than the average results achieved through conciliation. Although the awards in these administrative hearings are higher, the fact that only a tiny fraction of cases proceed to this stage highlights the inadequacy of this exclusive forum.

Unfettered access to state courts would provide greater deterrence through increased damages for discrimination. In administrative resolutions, the potential for an immedi-

ate court proceeding, with the associated attorney costs and uncertainty, would encourage respondents to settle for higher amounts.[41] In civil court, the amount of damages and penalties awarded for housing discrimination usually exceeds that of administrative proceedings.[42]

One final advantage of greater access to state courts would be the development of a body of case law interpreting the NCFHA. The North Carolina Court of Appeals has only heard three cases since 1986 interpreting the act; none have been heard by the NC Supreme Court.[43] Of the three cases, one was dismissed for lack of standing and another was subsequently overruled by amendment to the act.[44] This dearth of judicial analysis increases uncertainty in the act's interpretation, which in turn discourages complaints and further hampers the purpose of the act.

Substantial Equivalency

HUD must certify that state agencies and statutes are "substantially equivalent" to the FFHA and its enforcement structure in order for the state to receive funding and be referred claims. Substantial equivalency depends both on the adequacy of the law, which focuses on the text of the statute, and on the adequacy of performance, which examines how the statute is enforced. The adequacy of the law prong mandates *inter alia* that the state law "not place excessive burdens on the aggrieved person that might discourage the filing of complaints," including increased costs,[45] and that the law affords both administrative and judicial enforcement.[46]

Adequacy of performance depends largely on the timeliness of the state agency's processing of charges, requiring commencement of processing within 30 days of receipt, determination of reasonable cause within 100 days, and administrative resolution within one year.[47] Performance reviews also consider the standards used, attempts at settlement, the number of complaints filed, and the adequacy of the relief granted to prevent continued discrimination.[48]

Understaffing, combined with the need for travel and detailed investigation, prevents the NCHRC from determining cause in the majority of complaints within the 90 days required by the NCFHA, which increases the delay and cost to plaintiffs and frustrates the purpose of the act.[49] Of the 70 cases with an ascertainable cause determination date, 99% took more than the NCFHA's 90 days, and 96% took more than the 100 days allowed by the FFHA.[50] On average it took 341 days for the NCHRC to investigate and determine whether cause existed. The longest case took over two years.[51] While both state and federal law allow the agency to exceed the time limits in exceptional cases if they provide a written explanation of the delay to the parties, it is inconceivable that legislators contemplated that 96-99% of cases would exceed this timeframe.[52] Even if these delays could be justified, they highlight the inadequacy of the administrative remedy as the exclusive option to address housing discrimination. Administrative exhaustion ought not to be required if for no other reason than to relieve the burden on the overwhelmed NCHRC.

Administrative resolution also frequently takes longer than the statutorily permitted year. Of 124 cases analyzed, 38 (31%) took more than a year to resolve.[53] On average the cases took almost a year to resolve, but the longest took almost seven years.[54] Although no evidence suggests that the NCHRC fails to provide written notice explaining the delays, the fact that a large percentage of the complaints are not handled within the period set by statute violates the intent of the FFHA, discourages victims of discrimination from seeking administrative redress, and constitutes an "excessive burden" on complainants. Permitting aggrieved parties to file directly in state court would provide individuals a more expeditious vehicle for their claims, as well as relieve pressure on NCHRC.

An exhaustion requirement contradicts the substantial equivalency provisions regarding the adequacy of the law and the adequacy of performance. If the state law requires exhaustion, it fails the adequacy of the law prong because it discourages complaints and does not afford equivalent judicial enforcement. The consistent failure of the NCHRC to comport to the federal time frames constitutes inadequate performance. An exhaustion requirement undermines the intent and efficacy of the NCFHA, compounds delays in resolving complaints, discourages claim filings, and exacerbates the resource and personnel pressure on NCHRC. Administrative exhaustion therefore jeopardizes NC's substantial equivalency certification.

Conclusion

The upcoming state report on impediments to fair housing highlights the persistence of residential segregation and discrimination. While the NCHRC labors diligently against the tide of complaints, its capacity is insufficient. Removing the perceived administrative exhaustion requirement is not a panacea, but would expedite resolution of fair housing claims, increase the damages awarded in fair housing cases, and further the deterrent effect of the act. Fair housing advocates would gain a key tool in their work—access to state courts. Most importantly, federal funding through HUD for fair housing would be safeguarded by bringing North Carolina into compliance with federal regulations. ■

Mark Dorosin is the senior managing attorney at the UNC Center for Civil Rights, where Peter Gilbert is the community development attorney fellow. Special thanks are also due to

Charles E. Daye, Henry Brandis professor of law and deputy director of the Center for Civil Rights at the UNC School of Law, former community development attorney fellow Sarah Krishnaraj, and Nam Douglass.

Endnotes

1. Fair Housing Act, 42 U.S.C. § 3601 (2006).
2. *Id.* at §3612(f).
3. *Id.* at §3613(a)(3).
4. *See* infra text accompanying notes 38-43.
5. 79 N.C. App. 710, 714, 340 S.E.2d 766, 768 (1986).
6. *Id.* at 714-15, 340 S.E.2d at 768-69.
7. *Id.*
8. B. Bailey Liipfert III, Comment, *The Broadened Dimensions and More Powerful Bite of the State Fair Housing Act*, 12 CAMPBELL L. REV. 268, 281-82 (1989-90).
9. *Id.* at 268.
10. Fair Housing Act, 42 U.S.C. § 3613(a)(1)(A) (2006).
11. State Fair Housing Act, N.C. GEN. STAT. § 41A-7(a) (2007) (emphasis added).
12. *Id.*
13. *Hyde v. Abbott Lab., Inc.*, 123 N.C. App. 572, 578, 473 S.E.2d 680, 684 (1996) (considering federal cases as persuasive authority where the state anti-trust statute was modeled after federal law). *See also Edmisten v. J. C. Penney Co.*, 292 N.C. 311, 314-16, 233 S.E.2d 895, 898 (1977) (citing federal cases to interpret NC statutes modeled after the Federal Trade Commission Act).
14. *Stone v. Lynch*, 68 NC App. 441, 443-44, 315 S.E.2d 350, 352-53 (1984) (declining to apply federal income tax law where a North Carolina decision applied directly).
15. *Gladstone v. Village of Bellwood*, 441 US 91, 104 (1979); *see e.g., Mitchell v. Cellone*, 389 F.3d 86, 90 (3rd Cir. 2004).
16. 153 N.C. App. 176, 177, 568 S.E.2d 883, 884 (2002).
17. *Id.*
18. Br. Def.-Appellant at 8, 17, Bergman, 153 NC App. 176, 568 S.E.2d 883 (2002) (emphasis added).
19. *Bergman*, 153 N.C. App. at 179, 568 S.E.2d at 887.
20. Compl., *Milsap v. Cornerstone Residential Mgmt.*, No. 05-60033-CIV, 2005 WL 452058 (S.D. Fla. Feb. 1, 2010). *See also* Keenya J. Robertson, President, Housing Opportunities Project for Excellence, Inc., Testimony before the National Commission on Fair Housing & Equal Opportunity (Oct. 17, 2008), available at: www.prrac.org/projects/fair_housing_commission/atlanta/robertson.pdf.
21. Complaint at 10, *Milsap*, No. 05-60033-CIV, 2005, WL 452058.
22. 886 So.2d 308 (Fla. Dist. Ct. App. 2004).
23. Order at 5, *Milsap*, No. 05-60033-CIV, 2008 WL 1994840 (May 5, 2008) (citing *Belletete* and citing *Ross v. Jim Adams Ford, Inc.*, 871 So.2d 312 (Fla. Dist. Ct. App. 2004)).
24. Intervener's Mot. Recons. at1-2, *Milsap*, 2009 WL 5548496 (Nov. 30, 2009).
25. *Id.* at 3-7.
26. *Id.* at 8-10.
27. Order and Op. at *4, *Milsap*, 2010 WL 427436 (Feb. 1, 2010).
28. *Id.* at *1-2.
29. *Id.* at *3.
30. *Id.*
31. Compare State Fair Housing Act, N.C. Gen. Stat. § 41A-7(a) (2007) ("Any person who claims to have been injured by an unlawful discriminatory housing practice or who reasonably believes that he will be irrevocably injured by an unlawful discriminatory housing practice may file a complaint with the North Carolina Human Relations Commission." (emphasis added)), with Fair Housing Act, Fla. Stat. § 760.34(1) ("Any person who claims to have been injured by a discriminatory housing practice or who believes that he or she will be injured by a discriminatory housing practice that is about to occur may file a complaint with the commission." (emphasis added)).
32. N.C. Gen. Stat. § 41A-7(h) (130 days after filing, the NCHRC, "shall issue to the complainant a right-to-sue letter which will enable him to bring a civil action in superior court"); Fla. Stat. § 760.34(4) (180 days after the complaint is filed, "the person aggrieved may commence a civil action in any appropriate court").
33. *See* Fair Housing Act, 42 U.S.C. § 3612 (2006). *See generally* N.C. Gen. Stat. § 41A; Fla. Stat. §§ 760.20-37. *But see* Fla. Stat. §§ 760.35(d) (section contemplating civil actions initiated by the commission specifies, "This subsection does not prevent any other legal or administrative action provided by law.").
34. 2010 North Carolina Analysis of Impediments to Fair Housing Choice Draft Report for Internal Review at 3 (September 17, 2010), www.nchfa.com/forms/Forms/2011-2015AI.pdf.
35. *See, e.g.*, Complaint, *Habitat for Humanity of the NC Sandhills, Inc. v. Unsworth*, 2009-CVS-00858 (Moore County Super. Ct. May 1, 2009) (A fair housing case brought by the UNC Center for Civil Rights challenging, *inter alia*, exclusionary zoning by the town of Pinebluff, NC. The case was brought under the FFHA in state court, removed to federal court, remanded to state court, and ultimately settled.).
36. 42 U.S.C. § 3610(f).
37. Telephone Interview by Nam Douglass with Richard Boulden, chief counsel for NCHRC (June 23, 2009). One plaintiff proceeded in federal court; the other in state court after an administrative finding of "no cause." The property in question purchased for about $250,000. *Id.*
38. Data is based upon a review of 363 cases filed between January 22, 2002, and April 17, 2009. The Center for Civil Rights requested data from the NCHRC on fair housing complaints in June 2009, and again in September and October 2010. The Center was provided with four overlapping data sets, a "Summary of Fair Housing Intake Data for Human Relations Commission November 2004–October 3, 2008," "FHAP Voucher Detail Reports" covering cases closed between June 16, 2008, and June 16, 2009, a "Case Closed Inventory" filed with HUD by the NCHRC covering January 1, 2007, through September 30, 2010, and a "Complaint Log" covering complaints filed between December 5, 2007, and October 25, 2010. This data was amalgamated, and 362 cases had enough information about their disposition to analyze. A small number of cases had inconsistent information between the various reports and were excluded.

    These cases do not represent all complaints filed in this time period but were all of the information received from NCHRC. According to the draft report on impediments to fair housing, "more than 800 complaints were filed in North Carolina from 2004 through 2009." 2010 North Carolina Analysis of Impediments to Fair Housing Choice Draft Report at 3. Complaints filed in North Carolina would not necessarily be included in NCHRC's data if they were filed with municipal agencies or resolved by HUD.
39. Decisions, North Carolina Office of Administrative Hearings, www.oah.state.nc.us/hearings/decisions/ (listing OAH cases related to the HRC between 2001 and 2009). Of seven cases listed as having had administrative hearings, four had published decisions. Two of these, one brought by the NCHRC and the other by the Orange County Human Relations Commission, resulted in findings of no discrimination. *Id. NC Human Relations Comm'n ex rel. Teele v. Wedco Enter.*, 00 HRC 1449 (NC Office Admin. Hearings Dec. 20, 2001); *Orange County Human Relations Comm'n ex rel. Wolpin v. Cornerstone Realty Income Trust*, 03 HRC 1116 (N.C. Office Admin. Hearings Mar. 24, 2004).
40. *Guffey v. Heavener*, 99 HRC 1383 (NC Office Admin. Hearings Aug. 6, 2001); *NC Human Relations Comm'n ex rel. Johnson v. Gore*, 08 HRC 1166 (NC Office Admin. Hearings Mar. 16, 2009).
41. *Liipfert* at 288 ("results [in an administrative proceeding] may be more predictable" than in civil trial, and "[f]or respondents, the risk of facing a jury can be a costly risk").
42. *Id.* (citing J. Kushner, Fair Housing Discrimination in Real Estate, Community Development, and Revitalization, app.9-1 (1983 and Supp. 1988)).
43. A Westlaw search for "Fair Housing Act" in the "ncc s" or "All North Carolina State Cases" database reveals three cases, *Lee Ray Bergman Real Estate Rentals v. North Carolina Fair Housing Center*, *supra* n. 17, *NC Human Relations Council ex rel. Leach v. Weaver Realty Co.*, *supra* n. 6, and *Town of Newton Grove v. Sutton*, 111 NC App. 376, 432 S.E.2d 441 (1993).
44. *Supra* n. 9, n. 12.
45. 24 C.F.R. § 115.204(a)(3).
46. 24 C.F.R. § 115.204(b). 42 U.S.C. § 3612(a).
47. 24 C.F.R. § 115.206(e).
48. *Id.*
49. N.C. Gen. Stat. § 41A-7(e) (While the federal regulations allow 100 days, the NCFHA requires the shorter 90-day time period.).
50. Of the case data provided by the NCHRC, *see supra* n. 39, eight cases gave a date of cause determination, one of which was excluded because the data was inconsistent with other information provided. Sixty-six additional cases resulted in a finding of "no-cause" so the cause determination date would be the same as the case-closed date. Of these 66, three cases were excluded due to discrepancies in the case-closed date.
51. *Id.*
52. 24 C.F.R. § 115.206(e). N.C. Gen. Stat. § 41A-7(e).
53. Of the data provided by the NCHRC, 135 cases had dates for both the filing of the complaint and the administrative resolution. Of these, five cases had significant discrepancies between data sets provided, and so were excluded from the sample. Six additional cases were excluded from the study because they were apparently filed and closed on the same day. 124 cases remained and were analyzed. *See supra* n. 39.
54. *Id.*

The Stone Bull

By Miriam Delaney Heard

Roy Parker had loved his wife for as long as he could remember. Even now, after more than 20 years of marriage, he still felt a stirring in his chest as he watched her sleep. Cora made a neat, slender mound in their four-poster bed, a ripple beneath the snowy white bedspread. Roy matched his breaths to the hypnotic rhythm of the bedcovers rising and falling as he sat in a straight chair propped against the bedroom wall—a sentinel on his nightly watch.

Roy had loved Cora even when they were kids and she wouldn't give him the time of day. A silent, coffee-colored boy in patched clothes, Roy had hardly been able to carve out any time for school with all of the work that had to be done on the 40 acres that his daddy sharecropped. When he did get to attend Carter G. Woodson Elementary, he had been awed by the ginger-skinned Cora Avery who stood out in the schoolyard like a fairy princess with her two fat braids, her neatly pressed dresses, and her full lunch pail. During the Depression, when most every family in Pine Point had too many children and too little food, Cora, an only child, was an oddity. She never wore hand-me-downs like everyone else. She had a tall, strong daddy, a pretty momma, and a bedroom where she got to sleep all by herself. Most of all, Cora radiated such joy from her hazel eyes.

When her daddy went missing, and later when everyone accepted that white folks had killed Samson Avery, Cora changed. Just little changes at first. Her hair was no longer neatly combed. The part down the middle was crooked as if her momma had been too busy to tend to her and Cora had tried to fix her own plaits. Her legs grew too long for her skirts, but no one let out the hems. It was Cora's eyes, though, that nearly broke Roy's heart. They lost that saucy sparkle; they looked dull and dejected as if she'd opened a brightly wrapped Christmas present and found it full of sand.

Roy made it his mission to get Cora to smile. He snatched apples from the barrel at the general store to give her at lunchtime, paying no mind to the rumblings of his own belly that his momma's cold biscuits and a dollop of sorghum syrup never assuaged. He brought her satin ribbons, bouquets of pink bush roses, and once, a white lace handkerchief.

When they were no longer children, Roy knew he wasn't the sort of man that Cora would give her heart to easily. Cora belonged with somebody like Roosevelt Turner, somebody with good hair and easy laughter. Roosevelt was stylish, and he had all the same moves as the dancers in the colored minstrel shows that came to the fairgrounds once a year. He was like quicksilver with his compliments and jokes, and girls hung on Roosevelt's every word. Roy knew his Cora wouldn't marry the smooth talking roller, though. He knew it even when he came home one weekend and saw her dancing cheek to cheek with Roosevelt in Walter Lee's café. Roosevelt Turner was restless and unreliable. Cora wasn't going to marry a man who might leave her.

Meanwhile, Roy worked out a plan of his own. Being a funeral director was one of the few respectable jobs where a colored man could earn a good living, so he apprenticed himself to his uncle, an embalmer in LaGrange. Roy studied hard and passed the state board examination. He became as dependable and as sturdy as a Georgia pine—saving money and writing to Cora every week. After Roosevelt Turner rode off on a train headed for Detroit, leaving Cora with kisses and empty promises, Roy came home and married her. He opened his own funeral parlor in Pine Point, and Cora had worked right beside him until the babies started coming.

The Results Are In!

This year the Publications Committee of the State Bar sponsored its Seventh Annual Fiction Writing Competition. Eight submissions were received and judged by a panel of six committee members. The submission that earned third prize is published in this edition of the *Journal*.

Roy Jr. and Beverly were born not quite 14 months apart; then five years later, Anna. And just when they thought they were done, Henry. Cora called him her change of life baby.

Junior and Beverly, they were just like their momma—fearless and stubborn with a rod of steel for a backbone. And Henry was Roy's big brother Sammy all over again—good-natured and cheerful. Henry could coax the meanness out of Satan with a smile and a wink.

But Anna, sweet Anna—doe-soft brown eyes, timid, and tenderhearted.

Roy started as a car drove past the house. In an instant, he was up from his chair, reaching for the loaded shotgun beside him. He pressed his body against the bedroom wall while he watched the headlights on the car cast crazy shadows in the front yard. The car drove past and disappeared down Pope School Road. Roy let out the breath that he didn't realize he had been holding.

It had been the same every night since that brick had been thrown through the window. They had registered Anna in the white high school that morning, and all hell had broken loose by the afternoon: death threats over the phone; carloads of rednecks driving past the house, cursing and jeering. The Reverend Hairston and Lawyer Jessup from

the NAACP had told them that they could expect some retaliation. They had promised that the Parker family would be protected, told them that they could count on the support of the attorney general and the full resources of the Justice Department.

Only the attorney general and the Justice Department had not been on Pope School Road when that brick came through their living room window. There had been no protection when Roy and his oldest son found the dynamite under the front porch, the dynamite that had somehow slipped out of the duct tape that was still wrapped around the brick, the dynamite that had landed, by the grace of God, under their porch and not in their home. When Junior, young fool that he was, had picked up the makeshift bomb and hurled it into the empty field next to the house like he was a quarterback trying to get a third down conversion, there had been a mighty explosion. The blast had fallen a tree and burned the surrounding brush, but it had not maimed or incinerated Roy's family.

Tomorrow he was supposed to walk his baby girl into that high school and hand her over to those murdering bastards.

Roy had protested Anna's attending that school with everything he had. When representatives from the NAACP, the SCLC, and the SNCC all came to his house to tell him that it was imperative to force Pine Point to abide by that Supreme Court decision, Roy said his Anna was not going to that school. When Cora, still breathing fire and brimstone over her father's murder, insisted that it was high time to send a message to whites in Palmetto County that they couldn't kill a Negro with no more thought than they would give to shooting a dog just 'cause he wanted honest pay for honest work; when she vowed that nobody was going to tell Samson Avery's grandchildren where they could eat, piss, and sleep, Roy had held firm. His Anna was not going to that school.

It was Anna herself who had been his undoing, when she'd grasped his hand and said softly, "Somebody's got to be first, Daddy."

Somebody's got to be first.

Roy had read a section of an encyclopedia once that talked about folks who lived thousands of years ago on the other side of the world. Once a year, they held a ceremony and sacrificed one of the village's children to a god made of stone. He could still remember the picture. The stone god with a face like a bull and a lap made of fire. A man on his knees, his arms outstretched, about to toss a live baby into that fire—all so their warriors could defeat an enemy in battle, or so that a drought would end and the village could have a good harvest.

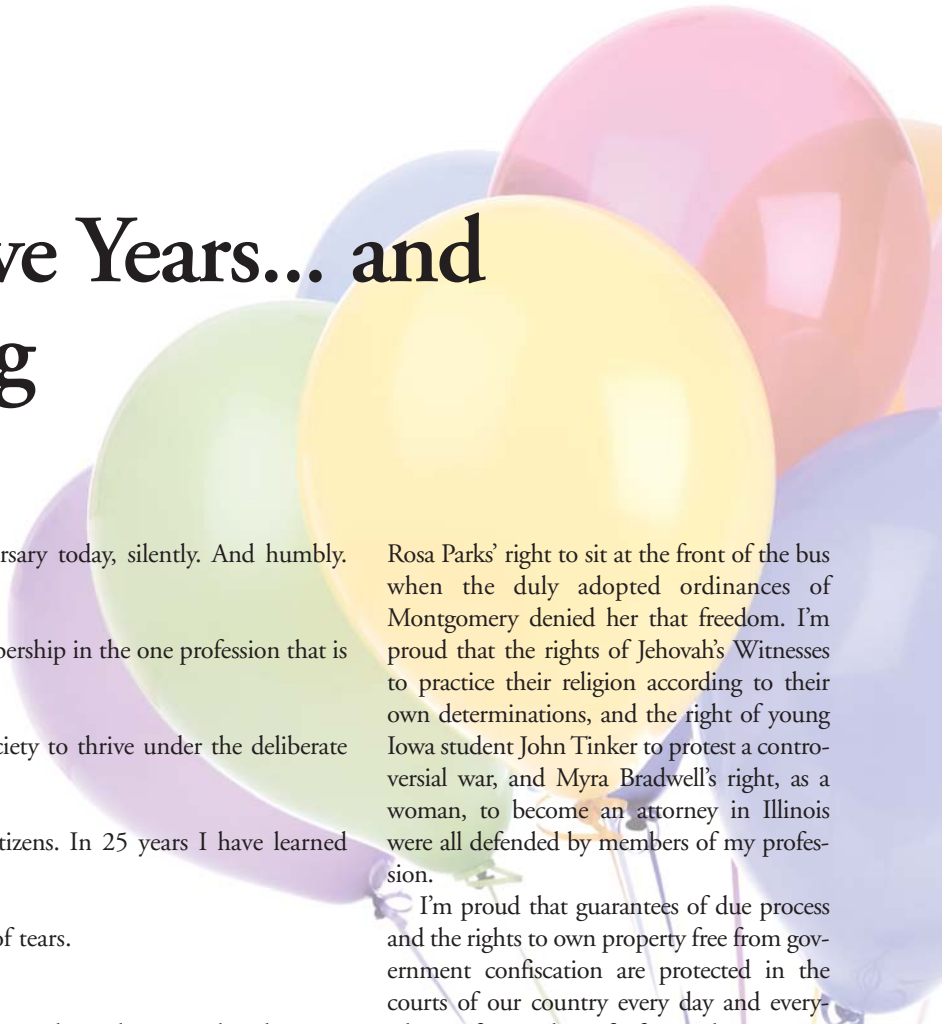
Roy wondered if the man held his own child or someone else's.

He peered through the window up and down the quiet street. Roy propped his gun against the wall and sat back in his chair to watch his wife sleep. ■

Miriam Delaney Heard was a member of the charter class of Elon University School of Law and since her admission to the bar, she has worked for the Greensboro office of the statewide nonprofit law firm, Legal Aid of North Carolina, Inc., where she focuses on Medicaid, Social Security, and other state and federal administrative law issues.

Twenty-Five Years... and Celebrating

By Tom Terrell



I celebrate my 25th anniversary today, silently. And humbly. Twenty-five years of membership in the one profession that is needed for an ordered society to thrive under the deliberate laws of its duly-elected citizens. In 25 years I have learned much, taught much, laughed much, and had moments of tears.

I've made mistakes of law and mistakes of judgment, each one, I hope, making me stronger and better as a person and as a lawyer.

I have gained deeper understandings and a richer appreciation of our adversarial process, where the opposing counsel is my colleague, not my enemy, where successes belong to the men and women who have entrusted to me their interests and their livelihoods, but where failure is personally felt.

Over 25 years I have advised governments in their deliberations of what is useful and what is good, and I have represented businesses as they have created jobs and expanded tax bases. I have represented men and women who, because of someone else's negligence, have lost a member of their family, a part of their body, or their ability to earn a living. And I have, on a few occasions, had the privilege of standing between a citizen accused of a crime and a powerful government that clumsily holds the levers of the fragile machinery of justice. Over 25 years I have learned that justice is more of an ideal than a result, and that, in spite of our continuous efforts to improve our laws and legal systems, they remain inherently unequal and imperfect because we, as humans, are imperfect.

As a profession, we are often maligned on Monday by the same person who needs us desperately on Tuesday, while the methodical and tedious and time-consuming efforts required to build and present our cases in courts of law are often portrayed in abbreviated simplicity and undeserved glory in movies and on TV.

But our role in a civil society is never so keenly underappreciated or misunderstood as when, in celebration of Memorial Day or the 4th of July, citizens of admirable intention forward mass emails that credit the totality of our freedoms to victories and sacrifices on foreign battlefields, messages that ignore the ongoing battles in our own cities and neighborhoods over the centuries either to protect American citizens from society's members who are sometimes fearful of others' freedoms while guarding their own, or to protect citizens from a government that has taken active steps to take their freedoms away.

I'm proud that it was lawyers with briefcases, not soldiers with guns, who fought for Rosa Parks' right to sit at the front of the bus when the duly adopted ordinances of Montgomery denied her that freedom. I'm proud that the rights of Jehovah's Witnesses to practice their religion according to their own determinations, and the right of young Iowa student John Tinker to protest a controversial war, and Myra Bradwell's right, as a woman, to become an attorney in Illinois were all defended by members of my profession.

I'm proud that guarantees of due process and the rights to own property free from government confiscation are protected in the courts of our country every day and everywhere, often without fanfare and sometimes without compensation, by lawyers. For we prove to ourselves again and again that when it comes to the basic rights and freedoms guaranteed by one of the greatest documents ever written, we—not foreign governments—can be our own worst enemy.

On September 19, 1985, I stood in a courtroom before the Honorable Edwin S. Preston and took an oath to "be faithful and bear true allegiance" to our state and federal laws and constitutional powers and to "truly and honestly demean myself" as an attorney. And as I sit here today, reflecting on my first 25 years as a member of the Bar of the great state of North Carolina, I hope my record reflects that I have lived up to my oath. And I hope that my next quarter century gives me every opportunity to do the same. ■

Tom Terrell, an attorney with Smith Moore Leatherwood, practices land use in NC. He has become an active commentator on land use matters through his blog, where this article was originally posted on September 19, 2010. To read this and other posts, visit https://nclegallandscapes.wordpress.com.

OCOB Opines that Lawyers May Not Secure Legal Fees with Deeds of Trust on Clients' Residential Property

By Suzanne Lever

In July 2009, North Carolina enacted the North Carolina Secure and Fair Enforcement Mortgage Licensing Act (NC S.A.F.E.), N.C. Gen. Stat. § 53-244.010 *et seq.* NC S.A.F.E. provides, with limited exceptions, that

> no person may engage in the mortgage business or act as a mortgage loan originator with respect to any dwelling located in this state without first obtaining and maintaining a license under this Article. It shall be unlawful for any person, other than an exempt person, to act as a mortgage loan originator without a mortgage loan originator license, which authorizes an individual who is employed by a licensee holding a license as provided in subsection (b) of this section to conduct the business of a mortgage loan originator.

N.C. Gen. Stat. § 53-244.040(a).

The North Carolina Office of the Commissioner of Banks (OCOB), among other responsibilities, regulates non-exempt persons and entities engaged in the mortgage business in the State. According to OCOB, they have very little leeway under NC S.A.F.E. to allow individuals to make loans secured by deeds of trust on residential real property. While there is an exemption for lawyers under NC S.A.F.E., the exemption only applies to "[a]n attorney licensed pursuant to Chapter 84 of the General Statutes who negotiates the terms of a residential mortgage loan *on behalf of a client* in the course of and incident to the attorney's representation of the client, so long as the attorney does not hold himself out as engaged in the mortgage business and is not compensated by a mortgage lender, a mortgage broker, or other mortgage loan originator when negotiating the terms of a residential mortgage loan." N.C. Gen. Stat. § 53-244.040(d)(4)(emphasis added).

This raises the inquiry of *"What happens when an attorney takes a promissory note for unpaid legal fees and secures it with a deed of trust from the client?"* In 1995, the ethics committee issued RPC 186, which rules that "a lawyer who represents a client in a pending domestic action may take a promissory note secured by a deed of trust as payment for the lawyer's fee even though the deed of trust is on real property that is or may be the subject of the domestic action." RPC 186 does not distinguish between residential or non-residential real estate nor does it address any OCOB licensure issues.

According to the OCOB, to the extent a lawyer intends to secure the fee payments by a note and deed on "residential real estate," as that term is defined in § 53-244.030(31), the lawyer would need to be licensed under NC S.A.F.E. OCOB opines that if the lawyer is not negotiating the terms of a residential mortgage loan on behalf of a client, but instead on his own behalf, he would not be exempt under § 53-244.040(d)(4), and would be "engaging in the mortgage business" as that term is defined in § 53-244.030(11)(a)–(c). On the other hand, and to the limited extent that the payments are secured by commercial or non-residential real estate, licensure is not required. According to OCOB, any lawyer who took a mortgage on a client's home after the effective date of NC S.A.F.E. is in violation of the act and could be subject to prosecution by the Attorney General's office. While the practice of securing fees with security interests may primarily be associated with family law practitioners, presumably, any prohibition under NC S.A.F.E. would apply regardless of practice area.

Compliance with the law is implicit in the Rules of Professional Conduct. To the extent that RPC 186 conflicts with NC S.A.F.E., the ethics opinion is trumped by the law. A footnote to that effect has been added to the online version of the ethics opinion. In addition, given the concern that there is a conflict between RPC 186 and NC S.A.F.E., the Ethics Committee will consider the fate of the ethics opinion at the next quarterly meeting in April.

OCOB is considering other inquiries pertaining to this prohibition, including how it may relate to lawyers securing obligations on behalf of clients in equitable distribution actions. Stay tuned. ■

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

Outlook (cont.)

We could, probably should, and perhaps will, ultimately seek the answers to these interesting questions by means of a proper scientific survey, no doubt conducted online. In the meantime though, it would be nice to get some informal and unscientific feedback from you, the putative readers of this column. Not only will your answers be carefully considered, but it would be very encouraging to the author and the publisher to know that someone out there is paying attention. What have you got to lose? Take a moment and respond. Don't bother with snail mail or try to be ironic. Just send me an email at tlunsford@ncbar.gov and tell me what you think. Who knows, if your opinions are insightful and respectful, you may qualify for an autographed copy of *Disbarment Enclosed.* ■

L. Thomas Lunsford II is the executive director of the North Carolina State Bar.