

Report of Subcommittee to Study Secure Leave Policy



North Carolina State Bar
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NOTE: APPENDIX ITEMS ARE NOT INCLUDED IN THE PRINTED VERSION OF THE REPORT. ACCESS THE REPORT ONLINE AT [HTTPS://WWW.NCBAR.GOV/NEWS-PUBLICATIONS/REPORT-ON-SECURE-LEAVE-POLICY/](https://www.ncbar.gov/news-publications/report-on-secure-leave-policy/)

Report of Subcommittee To
Study Secure Leave Policy

October 4, 2021

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Establishment of Subcommittee. State Bar Vice-President and Issues Committee Chair Marcia Armstrong appointed a subcommittee on February 1, 2021 to study the operative secure leave policies available to North Carolina's practicing attorneys. The State Bar assigned Deputy Counsel Savannah Perry and Cameron Lee to assist the Subcommittee. The Subcommittee met seven times. (Minutes of its meetings are collected in Appendix, Item A).

Scope of Work. The Subcommittee established four¹ principal areas for assessment:

How well are the current secure leave rules working?

In what respects can the current secure leave rules be improved?

What adverse impacts do the current secure leave rules have on our state trial and appellate courts?

Can secure leave be designated through a central statewide clearing registry?

To make these assessments, the Subcommittee gathered input from a number of sources, including judges, judicial officials and AOC administrators. Deputy Counsel Lee surveyed secure

¹Originally, there was another area of assessment: "Is there a rationale for extending secure leave to practitioners' administrative agencies?" This area was removed from the list when member Walter Brock discovered 26 NCAC 03.0119 and form published by the Office of Administrative Hearings for submission to obtain secure leave designation.

leave policies from a sampling of other jurisdictions (Appendix, Item B)² as well as each of North Carolina's judicial districts. (Appendix, Item C).

Significant input was sought and obtained from the practicing bar through a survey designed to elicit data probative of issues and concerns about the current rules. Deputy Counsel Perry took the lead on the survey with the Subcommittee's review and input. Once concurrence was reached on the content, the survey was sent to the State Bar Councilors and the North Carolina Advocates for Justice, the North Carolina Association of Defense Attorneys, the NC Association of Black Lawyers, the North Carolina Association of Women Attorneys and the North Carolina Bar Association. The NCBA was asked to disseminate the survey to attorneys in its trial practice oriented sections (Administrative Law, Antitrust & Complex Business Disputes, Appellate Practice, Construction Law, Criminal Justice, Family Law, Litigation and Zoning, Planning and Land Use) and its Young Lawyers Division. (The request for participation letters are collected in Appendix, Item D). Each of these affinity bars cooperated. The fourteen question survey was a success. There were 958 responses. The resulting data report is 80 pages long (compiled in Appendix, Item E) and is a cornucopia of information pertinent to secure leave policy considerations.

Assessment Summaries.

A. How well are the current secure leave rules working?

Based on Deputy Counsel Lee's survey of other jurisdictions, North Carolina's secure leave rules offer benefits and protections unavailable to attorneys in most other states. Those states which adopted leave policies tended to emphasize their purpose was to facilitate vacations. In this respect, they are akin to the North Carolina rules.

All three North Carolina rules became effective in 2000 and thus have been available for almost 21 years.³ The question for the Subcommittee was: "Can the current rules can be optimized?" The Subcommittee answers this question "yes" based on multiple sources of input, not to least of which was the Deputy Counsel Perry's survey which identifies the following four areas for improvement:

- The cumbersomeness of the 90-day advance notice requirement (cited by 79% of the respondents).
- The Sunday to Saturday seven day minimum (cited by 57% of the respondents).
- The limitation of secure leave periods to a maximum of three day (cited by 54% of the respondents).

²Chosen for study were Virginia, South Carolina, Georgia, Florida, Texas, California, Oregon, Illinois and Massachusetts.

³Moreover, General Rule of Practice 26 and Appellate Rule 33.1 were extended to birth or adoption of children in 2019. The OAH counterpart rule has not been amended to conform to the 2019 amendments to Rules 26 and 33.1.

- The awkwardness of the submission procedure (cited by 45% of the respondents).
- B. In what respects can the current secure leave rules be improved?

The difficulties with the current rules identified by the survey as well as input from other sources and their own experiences guided the Subcommittee's rewrite of the rules. The reforms recommended by the Subcommittee include:

- Within a calendar year, an attorney may enjoy 20 days of secure leave for any purpose.⁴
- Secure leave may be taken in minimum blocks of two consecutive days provided the total designated and taken does not exceed 20 days in a single calendar year.
- Saturdays, Sundays and holidays observed by the courts of North Carolina are disregarded for counting purposes (creating the possibility of the four or five day weekends).
- A secure leave period that crosses from one calendar year to another will be counted only against the calendar year in which the day actually occurs.
- Where secure leave is for birth or adoption, it is specifically in addition to the secure leave allowance for any purpose, and secure leave for birth or adoption is taken in blocks of time consisting of complete calendar weeks.
- The designation submission period is reduced from 90 to 45 days before the secure leave period begins and before a proceeding in any of the attorney's cases is scheduled that otherwise conflicts.
- In the event an attorney's plans for secure leave change in whole or in part for any reason, the attorney may move the secure leave to a different period by serving written notice of a modified secure leave period at least 45 days before the modified secure leave period begins and before a proceeding in any of the attorney's cases is scheduled for a time that conflicts with the modified secure leave period.

⁴The Subcommittee discussed other potential purposes for secure leave such as health, child or parental care, bereavement leave and the like. However, the strong consensus of the members is the principal goal of the secure leave is vacation, well being and improved mental health. 83% of the survey respondents indicate secure leave improved this mental health/quality of life. There will be those who use secure leave for other things – elective surgery, reserve duty, childrens' weddings and the like, but all of this qualifies as "any purpose," and a preponderant portion will be a positive adjunct to mental health. For this reason, the Subcommittee left secure leave unrestricted as to purpose while recognizing any secure leave not otherwise qualifying under Rule 26 can be sought under paragraph (h): "Nothing in this rule limits the inherent power of the courts to allow an attorney to enjoy leave that has not been designated according to this rule."

- If the attorney serves written notice of cancellation or withdrawal, the number of days originally designated but not taken will not be counted against the attorney's annual allowance.
- Other grammatical and syntactical changes have been made to simplify the rules.

Attached are Rule 26, Appellate Rule 33.1 and 26 NCAC 03.0119 in both redlined and untracked formats. For purposes of these drafts, certain comments are footnoted. It is not the intent of the Subcommittee these comments survive these drafts. They are retained for this report only for purposes of edification.

C. What adverse impacts do the current secure leave rules have on our state trial in appellate courts?

Based upon feedback from judges and other judicial officials, including the Administrative Office of the Courts, the secure leave rules have not had an adverse impact. If anything, the effect has been administrative in nature with clerks trial court coordinators, trial court administrators, judicial secretaries and others tasked with receiving and compiling secure leave submissions. Deputy Counsel Lee's report on local rules affecting the implementation of Rule 26 of the Rules of General Practice (Appendix, Item C) chronicles variations from district to district. On a local level, courts appear to embrace secure leave rather than push it away. For example, in District 10 (Wake), the court is empowered to waive the 90-day notice period under extraordinary circumstances (Local Rule 16.0). The same is true for District 16B (Robeson), (Local Rule 32) and District 22A (Alexander, Iredell) (Local Rule 20). Some local districts have expanded Rule 26. District 20A (Montgomery, Stanley) allows its attorneys to designate time away from court for continuing legal education. (Local Rule 20). District 26 (Mecklenburg) has a provision designed to accommodate attorneys in their observance of religious holidays. (Local Rule 23). District 29B (Henderson, Polk, Transylvania) uniquely extends Rule 26 to *pro se* litigants. (Local Rule 1.4). District 29B also deals with the local administrative practice of assigning a tentative trial date as much as a year in advance (which otherwise makes it impossible to give a 90-day notice). District 29B's attorneys are advised to notify the trial court coordinator if a trial date conflicts with a *potential* leave period "so reasonable accommodations can be made." (Local Rule 1.4).

An initial and recurring concern for the Subcommittee is the potential for abuse of secure leave. That concern was original to the drafters of Rule 26 in that paragraph (d) requires the submitting attorney to include "a statement that the secure-leave period is not being designated for the purpose of interfering with the timely disposition of any proceeding...". Prospective abuse was thoroughly considered, particularly should the number of eligible days be enlarged from 15 to 20 and the number of potential secure leave periods be enlarged from 3 to 10. Survey question 13 asked "Have you ever observed or reasonably suspected an attorney of abusing the secure leave rules?" 905 respondents answered that question. 89% responded "no." Of the 98 individual comments which followed and dealt with the potential incidents of "abuse" observed by the respondents, most would be resolved by making then reforms recommended by the Subcommittee. For example: reports of attorneys who make "Designation of less than a week at a time" (comment #8) or "The attorney would frequently say he was on 'secured leave' for just a day or two (kind of

like a long weekend).” (Comment #29). Based on research of the Office of Counsel, there is, as of this date, only one public Consent Order of Discipline involving abuse of secure leave. *The North Carolina State Bar v. Hoyl*, 18 DHC 6 (2019) (attorney’s designation of secure leave in action or proceeding in which he had entered an appearance conflicted with a known hearing, trial or other proceeding scheduled during the designated secure leave period). (Appendix, Item F). Other grievance matters may also have arisen involving non-public discipline, but those obviously are not available to the Subcommittee for purposes of its work. Suffice it to say there is no empirical evidence abuse is widespread or of such concern to the judiciary or other practitioners that its contingency should forestall the reforms recommended by the Subcommittee.

D. Can Secure Leave Be Designated Through a Central Statewide Clearing Registry?

45% of survey respondents were dissatisfied with the submission procedure, particularly those who litigate in multiple districts. As Deputy Counsel Lee’s district by district survey and the Appendix thereto demonstrate, for those who practice in multiple districts there are multiple forms to be used depending on whether the case is in district or superior, civil or criminal, juvenile, special or estate. The simple answer to the question is yes, “it is possible for secure leave to be designated through a central statewide clearing agency.” In fact, it has been happening for a long time pursuant to Appellate Rule 33.1. Subparagraph (c) of that rule provides:

How to submit designation. An attorney must submit his or her designation of a secure leave period using the electronic filing site of the appellate courts at <https://www.ncappellatecourts.org>.

Obviously, the design, construction and maintenance of a secure leave designation portal serving courts and administrative agencies statewide is a much different undertaking from what is presently in use for the appellate courts. Nonetheless, Mel Wright and Walter Brock were deputized to pursue inquiries to the AOC and others concerning the feasibility of a statewide submission and clearing registry. Both reported the current system (Odyssey) being implemented by the AOC for statewide filing of cases and pleadings will also accommodate submissions of secure leave designations. A module within Odyssey would be developed to track “attorney availability on a statewide basis”. This linkage would be unprecedented and of immense value for planning and scheduling for the courts as well as to attorneys seeking time away from their toils. Walter Brock reported the rollout of the statewide filing system will take time and secure leave designation capability would not attain viability until the statewide system is operative. In short, there is time to design, construct and implement the module. From a second source, Mel Wright reported an inquiry floated to the district court judges came back favorably concerning a statewide filing capability. However, a significant number of the judges want the current system of district-by-district filing to be retained until full implementation of Odyssey is substantially completed. (See selected communications collected in Appendix, Item G).

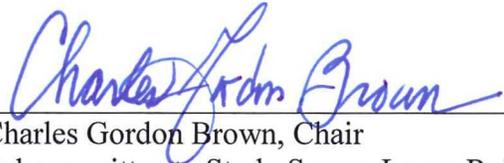
Recommendations.

The Subcommittee recommends to the Issues Committee that:

1. Rule 26 of the General Rules of Practice, Appellate Rule 33.1 and 26 NCAC 03.0119 be rewritten with the reforms as indicated on the attached redlined and untracked versions.

2. A new subcommittee be appointed to advocate for the design, construction and implementation of a unified, statewide filing system for secure leave designations, modifications and withdrawals. The Chief Business Officer of the AOC has indicated the process can be initiated by presentation of a formal request to the AOC from an appropriate agency. Given that agency may be the Supreme Court with respect to lawyers seeking secure leave in the State's trial and appellate courts and the Office of the Administrative Hearings for lawyers seeking secure leave in the State's administrative agencies, it is prudent to approach this topic over the course of the Issue Committee's 2021-2022 program year.

This 4th day of October, 2021.



Charles Gordon Brown, Chair
Subcommittee to Study Secure Leave Rules

Rule 26. Secure-Leave Periods for Attorneys

- (a) **Definition; Entitlement.** A “secure-leave period” is a block of time ~~one complete calendar week that is~~ designated by an attorney during which the ~~superior courts¹ and the district courts~~ may not hold a proceeding in any case in which that attorney is an attorney of record. An attorney is entitled to enjoy a secure-leave period that has been designated according to this rule.
- (b) **Allowance.**
- (1) Secure-Leave for any Purpose. Within a calendar year, an attorney may enjoy twenty days of ~~three different~~ secure-leave periods for any purpose. Secure-leave designated under this subsection may be taken in minimum blocks of two consecutive days provided the total number of days designated and taken do not exceed twenty days in a single calendar year. Saturdays, Sundays and holidays observed by the courts of North Carolina shall be disregarded for counting purposes.² A secure-leave period that crosses from one ~~spans across~~ calendar years into another counts against the attorney’s allowance for the first calendar year in which the day occurs.
- (2) Secure-Leave for Birth or Adoption. Within the twenty-four weeks after the birth or adoption of an attorney’s child, that attorney may enjoy twelve additional weeks of secure-leave periods for the purpose of caring for the child. Secure-leave periods designated under this subsection shall be taken in blocks of time consisting of complete calendar weeks. The secure-leave allowance in (b)(2) is in addition to the secure-leave allowance in (b)(1).
- (c) **Form of Designation.** An ~~A~~attorneys must designate his or her secure-leave periods in writing.
- (d) **Content of Designation.** An attorney’s designation of a secure-leave period must contain the following information:
- (1) the attorney’s name, address, e-mail, telephone number, and state bar number;
- (2) the date of the Sunday on which the secure-leave period is to begin and the date of the Saturday on which it is to end;

¹Comment 1. “Courts” include the superior and district courts of North Carolina and their constituent operations: civil, criminal, juvenile, estates, special proceedings, domestic, etc.

²Comment 2. A designated day followed by a court holiday followed by a designated day shall be counted as two consecutive days. A designated Friday followed by a Saturday, Sunday and a designated Monday shall be counted as two consecutive days.

- (3) the allowance that the secure-leave period will count against, with reference to either subsection (b)(1) or (b)(2) of this rule;
- (4) the dates of any previously designated secure-leave periods that count against that allowance;
- (5) a statement that the secure-leave period is not being designated for the purpose of interfering with the timely disposition of any proceeding;
- (6) a statement that the attorney has taken adequate measures to protect the interests of the attorney's clients during the secure-leave period; and
- (7) the attorney's signature and the date on which the attorney submits the designation.

(e) **Where to Submit Designation.³**

- (1) **In Criminal Actions.** ~~The a~~Attorneys must submit ~~his or her~~ designations of ~~a~~ secure-leave periods to the office of the district attorney for each prosecutorial district in which ~~the attorney's~~ criminal actions are pending.
- (2) **In Civil Actions.** ~~The A~~attorneys must submit ~~his or her~~ designations of a secure-leave periods to the office of the senior resident superior court judge for each superior court district and to the office of the chief district court judge for each district court district in which ~~the attorney's~~ civil actions are pending.
- (3) **In Special Proceedings and Estate Proceedings.** ~~The a~~Attorneys must submit ~~his or her~~ designations of a secure-leave periods to the office of the clerk of the superior court of ~~each the~~ county in which ~~the attorney's~~ special proceedings or estate proceedings are pending.
- (4) **In Juvenile Proceedings.** ~~The A~~attorneys must submit ~~his or her~~ designations of a secure-leave periods to the juvenile case calendaring clerk in the office of the clerk of the superior court of ~~each the~~ county in which ~~the attorney's~~ juvenile proceedings are pending.

(f) **When to Submit, Modify or Withdraw Designation.** An attorney must submit ~~a~~ ~~his or her~~ designation of a secure-leave period:

- (1) at least ~~forty-five ninety~~ days before the secure-leave period begins; and

³Comment 3. The Subcommittee is exploring the feasibility of a statewide electronic registry for secure-leave designation. If adopted, it would link with and serve the databases set forth below, among others.

- (2) before a proceeding in any of the attorney's cases is scheduled for a time that conflicts with the secure-leave period.

In the event an attorney's plans for secure-leave change in whole or in part for any reason, the attorney may move the secure-leave to a different period by serving written notice of

(1) a modified secure-leave period at least forty-five days before the modified secure-leave period begins, and

(2) before a proceeding in any of the attorney's cases is scheduled for a time that conflicts with the modified secure-leave period.

If the attorney serves written notice of cancellation or withdrawal, the number of days originally designated but not taken will not be counted against the attorney's annual allowance.

Any modification, cancellation or withdrawal of a previous secure leave designation shall state such action is not being taken for purposes of interfering with the timely disposition of any proceeding.

Child Birth/Adoption Exceptions. But because of the uncertainty of a child's birth or adoption date, the ~~superior court or district~~ court scheduling authority must make reasonable exception to these requirements so that an attorney may enjoy leave with the child.

- (g) **Depositions.** A party may not notice a deposition for a time that conflicts with a secure-leave period that another party's attorney has designated according to this rule.
- (h) **Other Leave.** Nothing in this rule limits the inherent power of the ~~superior courts or the district~~ courts to allow an attorney to enjoy leave that has not been designated according to this rule.

Rule 33.1. Secure-Leave Periods for Attorneys

- (a) **Definition; Entitlement.** A “secure-leave period” is a block of time ~~one complete calendar week that is~~ designated by an attorney during which the ~~appellate~~ courts¹ will not hold oral argument in any case in which that attorney is an attorney of record. An attorney is entitled to enjoy a secure-leave period that has been designated according to this rule.
- (b) **Allowance.**
- (1) Secure-Leave for any Purpose. Within a calendar year, an attorney may enjoy twenty days of ~~three different~~ secure-leave periods for any purpose. Secure-leave designated under this subsection may be taken in minimum blocks of two consecutive days provided the total number of days designated and taken do not exceed twenty days in a single calendar year. Saturdays, Sundays and holidays observed by the courts of North Carolina shall be disregarded for counting purposes.² A secure-leave period that crosses from one calendar year into another counts against the attorney’s allowance for the calendar year in which the day occurs.
- (2) Secure-Leave for Birth or Adoption. Within the twenty-four weeks after the birth or adoption of an attorney’s child, that attorney may enjoy twelve additional weeks of secure-leave ~~periods~~ for the purpose of caring for the child. Secure-leave periods designated under this subsection shall be taken in blocks of time consisting of complete calendar weeks. The secure-leave allowance in (b)(2) is in addition to the secure leave allowance in (b)(1).
- (c) **How to Submit Designation.** An attorney must submit a ~~his or her~~ designation of a secure-leave period using the electronic filing site of the appellate courts at <https://www.ncappellatecourts.org>.
- (d) **When to Submit, Modify or Withdraw Designation.** An attorney must submit a ~~his or her~~ designation of a secure-leave period:

¹Comment 1. “Courts” include the superior and district courts of North Carolina and their constituent operations: civil, criminal, juvenile, estates, special proceedings, domestic, etc.

²Comment 2. A designated day followed by a court holiday followed by a designated day shall be counted as two consecutive days. A designated Friday followed by a Saturday, Sunday and a designated Monday shall be counted as two consecutive days.

- (1) at least ~~forty-five~~ ~~ninety~~ days before the secure-leave period begins; and
- (2) before oral argument in any of the attorney's cases is scheduled for a time that conflicts with the secure-leave period.

In the event an attorney's plans for secure-leave change in whole or in part for any reason, the attorney may move the secure-leave to a different period by serving written notice of

- (1) a modified secure-leave period at least forty-five days before the modified secure-leave period begins, and
- (2) before oral argument in any of the attorney's cases is scheduled for a time that conflicts with the modified secure-leave period.

If the attorney serves written notice of cancellation or withdrawal, the number of days originally designated but not taken will not be counted against the attorney's annual allowance.

Any modification, cancellation or withdrawal of a previous secure leave designation shall state such action is not being taken for purposes of interfering with the timely disposition of any proceeding.

Child Birth/Adoption Exceptions. But because of the uncertainty of a child's birth or adoption date, the Supreme Court and the Court of Appeals will make reasonable exception to these requirements so that an attorney may enjoy leave with the child.

SECURE-LEAVE PERIODS FOR ATTORNEYS

- (a) Any attorney may designate one or more secure leave periods each calendar year as provided in this Rule.
- (b) Length, Number.
- (1) Secure-Leave for any Purpose. A secure leave period shall consist of a block of time of up to twenty days for any purpose. Secure-leave designated under this subsection may be taken in minimum blocks of two consecutive days provided the total number of days designated and taken do not exceed twenty days in a single calendar year. Saturdays, Sundays and holidays observed by the courts of North Carolina shall be disregarded for counting purposes.¹ A secure-leave period that crosses from one calendar year into another counts against the attorney's allowance for the calendar year in which the day occurs. ~~one or more complete calendar weeks. During any calendar year, an attorney's secure leave periods pursuant to this Rule shall not exceed, in the aggregate, three calendar weeks.~~
- (2) Secure-Leave for Birth or Adoption. Within the twenty-four weeks after the birth or adoption of an attorney's child, that attorney may enjoy twelve weeks of secure-leave for the purpose of caring for the child. Secure-leave periods designated under this subsection shall be taken in blocks of time consisting of complete calendar weeks. The secure-leave allowance in (b)(2) is in addition to the secure leave allowance in (b)(1).
- (c) Designation, Effect. To designate a secure leave period an attorney shall file a written designation containing the information required by Paragraph (d) with the Chief Hearings Clerk. The designation shall be filed:
- (1) ~~no later than at least [thirty][forty-five] 90~~ days before the ~~beginning of the secure--leave period begins~~; and
- (2) before ~~any argument or other~~ proceeding in any of the attorney's cases before an administrative law judge ~~ishas been~~ scheduled for a time that conflicts with during the ~~designated~~ secure leave period.

Upon such filing, the secure--leave period so designated shall be deemed allowed without further action by the presiding administrative law judge, and the attorney shall not be required to appear at any ~~argument or other administrative~~ proceeding during that secure--leave period.

¹Comment 1. A designated day followed by a court holiday followed by a designated day shall be counted as two consecutive days. A designated Friday followed by a Saturday, Sunday and a designated Monday shall be counted as two consecutive days.

In the event an attorney's plans for secure-leave change in whole or in part for any reason, the attorney may move the secure-leave to a different period by serving written notice of

- (1) a modified secure-leave period at least forty-five days before the modified secure-leave period begins, and
- (2) before a proceeding in any of the attorney's cases before an administrative law judge is scheduled for a time that conflicts with the modified secure-leave period.

If the attorney serves written notice of cancellation or withdrawal, the number of days originally designated but not taken will not be counted against the attorney's annual allowance.

Any modification, cancellation or withdrawal of a previous secure leave designation shall state such action is not being taken for purposes of interfering with the timely disposition of any proceeding.

(d) Content of Designation. The designation shall contain the following information:

- (1) the attorney's name, address, telephone number and state bar number;
- (2) the date ~~of the Monday~~ on which the secure leave period is to begin and ~~of~~ the date Friday on which it is to end;
- (3) the dates of all other secure leave periods during the current calendar year that have previously been designated by the attorney pursuant to this Rule;
- (4) a statement that the secure leave period is not being designated for the purpose of delaying, hindering or interfering with the timely disposition of any matter in any pending action or proceeding; and
- (5) a statement that no argument or other proceeding has been scheduled during the designated secure leave period in any matter pending before an administrative law judge in which the attorney has entered an appearance.

~~History Note: Authority G.S. 7A-750; 150B-40(e);~~

~~Eff. August 1, 2000;~~

~~Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. July 23, 2016.~~

Appendix .
to
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(Appendix items are available via links below)

Item

- A [Subcommittee Meeting Minutes for March 12, 2021, April 1, 2021, May 3, 2021, June 8, 2021, July 6, 2021, August 10, 2021 and August 31, 2021.](#)
- B [Results of Survey of Secure Leave Rules of Sample Jurisdictions.](#)
- C [Report on Local Rules Affecting Implementation of Rule 26 of the Rules of General Practice.](#)
- D [Request for Participation Letters to North Carolina Advocates for Justice, North Carolina Association of Defense Attorneys, NC Association of Black Lawyers, North Carolina Association of Women Attorneys and North Carolina Bar Association.](#)
- E [Survey Regarding Secure Leave Topics.](#)
- F [The North Carolina State Bar v. Larry G. Hoyle, 18 DHC 6 \(2019\).](#)
- G [Miscellaneous correspondence concerning capability of Odyssey system to support a statewide unified filing system for secure leave designation, modification and withdrawal.](#)