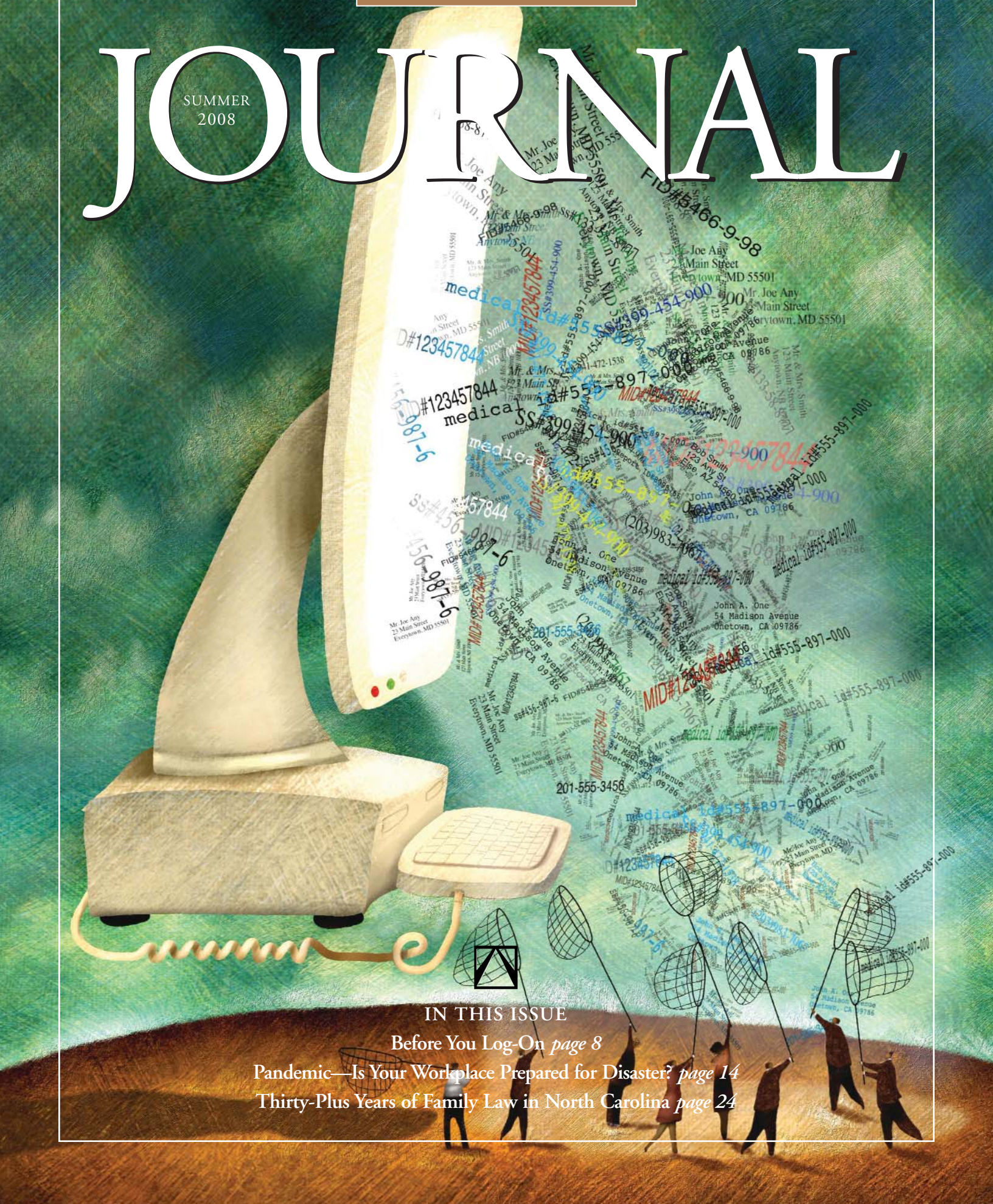
THE NORTH CAROLINA STATE BAR

JOURNAL

SUMMER
2008

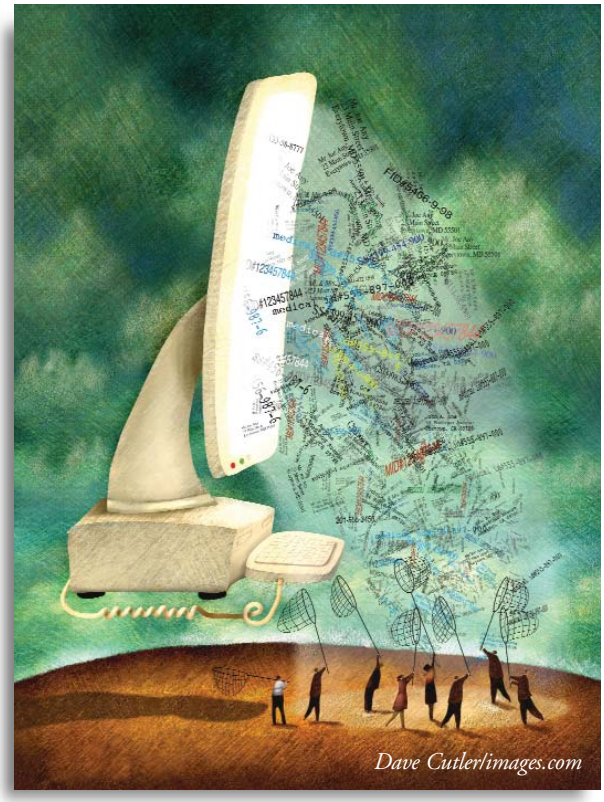


IN THIS ISSUE

Before You Log-On: Incorporating the Free Web in Your Legal Research Strategy

By Lauren M. Collins

In 2006, the American Bar Association published its Legal Technology Survey Report, which included a volume on Online Research. In the report, attorneys responded that 91% are conducting at least some of their research online. Though 39% report that they start their research using a fee-based service like Westlaw or Lexis, the report shows that even those who start their research with a fee-based resource eventually get it right—87% of attorneys report using some free online resources at some point over the course of a research project.



Hopefully, those attorneys who said they used free web resources did not count databases within Lexis and Westlaw that were within their flat-fee agreement. When using items within these agreements, many tend to discount the volume of use. Though it is more economical for most large firms to negotiate flat rate contracts with the titans of legal information these days, a "flat rate" should not be perceived as "all-inclusive" or, horror of horrors, "free." The usage levels of these resources are now more frequently scrutinized by astute clients (who sometimes refuse payment for unwarranted fees charged back to them) and are always considered by the vendor in future negotiations. Thus, the volume of use for Lexis and Westlaw is relevant no matter what the current billing arrangement might be, which makes the integration of truly free resources in the online research strategy a must for any legal practitioner who cares about the bottom line.

Another hope is that attorneys, trained in critical thinking, are giving serious consideration to the web resources we use. Because of the ease in locating information on the Internet, users have to be critical of the resources they find. Questions about the accuracy, authority, currency, objectivity, and the scope of coverage of web resources should always be asked before a practitioner is comfortable relying on web information. As professionals who are familiar with legal authori-

ty, however, these checks on the information we rely upon are not new to us.

The challenge in conducting good legal research is using print, fee-based and free web resources as a part of a well-planned research strategy best suited for your research needs. There are certainly times when turning to Lexis or Westlaw as a place of first resort is warranted, but it should not be done simply out of habit. Judges are now citing free web resources,[1] so why wouldn't practitioners be using them?

What exactly should you do before you log onto a fee-based legal resource? Several years ago, this was a question best and simply answered by providing a list of links to reliable free web resources. An attempt to list all of the resources that might be relevant to a North Carolina attorney which are available on the web would be long and require constant updating. Now that free web resources have become so prevalent, rather than provide an exhaustive list, suggested strategies to help the practitioner determine when to make use of the free web as a part of his or her legal research plan are more appropriate. When should you go straight to Lexis or Westlaw without passing "GO"? When do you use the resources of the Government Printing Office, a federal agency or a state, county, or local government webpage? When is the best idea just to "Google" it?

State Primary Law

Primary sources of law are pervasive on the free web. It is easier and less expensive for legislatures, courts, and administrative agencies to provide web access to their own material than to pay print publishing and distribution costs that have gotten official versions of the primary law to practitioners in the past. The good news is that many government agencies, which have been notoriously slow getting their publications to us by traditional means, are now much timelier. The bad news is twofold. First, though access to current information is much improved, it is not always the current statute or the most recent case that the legal practitioner is looking for, and older information can be more difficult to find on the free web. In addition, though provided directly by the governmental entities promulgating the laws, most online resources have not been stamped "official" or "authentic" by those agencies. A lack of authentication means that no person or machine has verified the text of the statutes online and compared the language to that found in the official, approved print version of the statutes. A lack of official status means that errors in the text will be resolved in favor of print versions of the publication.

As an example, the current North Carolina General Statutes are available at no charge on the North Carolina General Assembly website. The statutes have neither been deemed official nor authentic. The website carries a clear caution on the opening page that they are not to be considered official versions and that the General Assembly "will not be responsible for any errors or omissions" in the files. To provide some context, only seven states and the District of Columbia have deemed their online statutes as official and none have authenticated any of their primary legal resources. However, in the case of North Carolina, though not given official status, the online text comes from the same system used to generate the print text of the statutes and materials prepared for the legislature's internal use.[2] Additionally, there are no documented cases where courts have adjudicated the question of the official status or authenticity of online primary resources.[3] The primary goal of the legislature in making statutes available is access, and for that purpose, the General Statutes online represent a step forward. The drawbacks of using such resources are most daunting for *pro se* litigants who are not, as attorneys, trained to think critically and are more likely to fail to consider the pitfalls of using non-traditional legal resources before deciding on what they should rely.

One reason that statutes generally are resources whose web versions we have been quick to adopt is the idea that current versions of statutes are frequently sufficient to meet our research needs. Problems with historical versions of statutes and session laws are often presented with regard to access in addition to questions of trustworthiness. Historical versions of the compiled North Carolina General Statutes are available on Lexis (1991 -) and Westlaw (1986 -). The General Assembly website does not make full compiled codes available as they existed at any time other than the present. North Carolina's scope of session laws available on the free web, however, are impressive with Local Laws beginning with the 1961 session and Public

Laws beginning with the 1983-1984 session. If you are looking for a law as it was passed prior to its codification or need to trace the history of a specific statute, the free resource will provide you with what you need, with the caveats, again, of authenticity and official status applied to the General Statutes.

The rules for access to administrative law are generally similar to those for statutory law. Current versions of administrative codes are normally all that are available on the free web from official sources. This is true in North Carolina; the Office of Administrative Hearings makes the NC Administrative Code available at no charge. Again, just as with the state's statutes, this version has not been declared official and there are no historical versions of the Code available. For historic versions of the Administrative Code, rely on Westlaw, which provides them as early as 2002, or your local law library.

Generally, case law research is a less likely candidate for free research resources than statutory or administrative law. Though most courts, like legislatures, now provide their case law on the web, few, when adding case law to the web, included older cases. In North Carolina, the Supreme Court opinions are available beginning in 1997 and the court of appeals beginning in 1996, with both courts' cases extending to the present. In addition to the limited scope of case law on the free web, advanced features that enable updating using fee-based services are unavailable for free case law. Recognizing this fact, both Westlaw and Lexis provide pay-as-you-go Shepard's and KeyCite options, each of which are presently less than ten dollars per search. Again, where there are any discrepancies between the opinions accessible online and the print versions, the print remains authoritative.

Federal Primary Law

Federal primary law is also readily available on the web. The Government Printing Office (GPO), which still publishes official versions of the United States Code, the Federal Register, and the Code of Federal Regulations, also makes these available online on their website GPO Access. The Federal Register and the USC are both available as early as 1994 and the CFR is available beginning with the 1996 edition. Many characteristics of these various publications such as shelf size, frequency, and publishing delay make electronic access easier for GPO and more convenient for the user. The "official" status of these resources varies based upon their governing bodies. Thus, the Administrative Committee of the Federal Register, according to a GPO White Paper on Authentication, has declared the online versions of CFR and the Federal Register are official. This, however, is not the case with the Code as is specifically stated on the GPO Access website.

Another limitation of the resources housed on GPO Access is limited search capability. Unlike Google and other search engines that we use every day, functional searching is not the main goal of the GPO. Therefore, GPO Access resources are better for retrieval of information by citation than subject searching. Documents in GPO databases are, however, accessible by Google searching. Therefore, searches using precise language or the advanced searching features of Google such as the ability to search within a specified site or domain can help you circumvent imprecise GPO Access searching.

Federal case law on the web is not as limited by scope as state case law. Supreme Court cases, for example, are accessible from 1790 from LexisOne, a free service that provides some Lexis products to registered users. Other sites like FindLaw, GPO Access, and the Supreme Court's own site, provide access to cases with various date ranges as early as the 1800s. Again, the printed United States Reports are the only "official" resource for Supreme Court opinions, but the Court makes PDF versions of its bound volumes available as early as 1991 and early access to bench opinions on the Court website is available as soon as final decisions are released.

Administrative law and presidential documents are also readily available through GPO Access. Many agencies now link the statutes governing their activities, the regulations they create, their procedures, and policies together on their own websites. Links to federal agency websites are available through USA.gov, an interagency website administered by the US General Services Administration's Office of Citizen Services and Communications.

State Bar Association Websites

Thirty-four percent of respondents to the Law Technology Resource Center Survey Report who start their legal research on the free web start with their state bar association website. In North Carolina, this is an excellent idea: the NC Bar Association subscribes to Casemaker, an online resource provided through some state bar associations that gives access to those organizations' members without additional charge. The NC database provides access to the current versions of the state General Statues and Administrative Code, as well as NC Supreme Court cases beginning in 1939, and court of appeals cases beginning in 1968. In addition, there are court rules, municipal codes, and a wide array of federal materials relevant to the NC practitioner. Casemaker also provides access to law school journals that, except for current versions, are not generally available free of charge on the web.

Other Jurisdictions

When you are faced with researching the law of another jurisdiction, both Lexis and Westlaw provide help on the free web. FindLaw, which started out as an independent resource but was purchased by the Westlaw parent, Thomson, provides links to government sites that contain primary information for federal, state, and some international jurisdictions. In addition, there are links to other helpful resources like state boards of bar examiners, law schools across the nation, and firm webpages, which can be helpful to the legal practitioner if scrutinized for issues like bias and the trustworthiness of the firm's attorneys.

Similarly, Lexis provides LexisOne, billed as a resource for small firms, which provides some free information including forms, a full run of US Supreme Court cases, and other case law for the past five years. Users may also opt to pay as they go and use other Lexis databases through LexisOne.

Other lower-cost alternatives to Lexis and Westlaw include Fastcase, VersusLaw, and LoisLaw. Each provides various primary resources of varying scope, often broader than the free databases, but normally not as complete as Lexis and Westlaw coverage. These services are often associated with print publishers, which allows access to treatises, and have updating systems similar to Shepard's and KeyCite. Another very useful feature is their free trials, which allow practitioners to test each of these resources before making a full investment. Note, however, that a full investment is very inexpensive. The most costly Professional Plan for VersusLaw, for example, is about $40 per month.

Secondary Resources

In comments made by attorneys respond-

ing to the 2006 ABA Legal Technology Survey, sites created by other practitioners were cited as free, web-based resources often used by practitioners. This fact brings to light one of the important limitations of free web research—provenance. The sources of primary law discussed in the previous sections all have one thing in common, whether the documents provided are declared "official" or not, the sources clearly are. The source for the NC General Statutes is the NC General Assembly. The sources for North Carolina case law are the North Carolina courts themselves. Rarely are the time-tested secondary resources written by respected scholars and practitioners available freely online due, in large part, to copyright restrictions. Many such publications are, however, available in Lexis or Westlaw if published by LexisNexis or Thomson-West. Even those treatises on Lexis and Westlaw may be out of date, so remember to check your information button before deciding on an electronic resource over the print.

If a practitioner's guide is what you seek, you'll do best to rely on the resources you always have. Survey responses indicate practitioners are well aware that traditional secondary resources are not normally freely accessible on the web. Forty percent of respondents continue to use print resources when they need to consult treatises or other secondary materials. That number is decreased by half or better when attorneys are looking for forms, legal news, or law reviews and legal periodicals. These resources, as with the primary law, are frequently more easily accessed online where current versions are sought.

If you think of secondary sources more broadly, the web can be much more helpful. For example, if you need a research aid, you will find many research guides developed by legal information experts—librarians—on the web. These guides can be especially helpful when you are researching law in an unfamiliar jurisdiction or practice area. Research guides developed by law librarians tend to be unbiased, are frequently updated, and are created by someone who conducts frequent research and may even teach legal research in the jurisdiction in question. In addition to the law library's own website, a common repository for research guides is the Law Library Resource Xchange.

The Legal Information Institute, sponsored by the Cornell Law School and user donations, is a unique secondary legal resource that is from a trusted, unbiased source. Though much of the background information provided on the website is so introductory that it is of limited use for a practicing attorney, even in an unfamiliar area of practice, the site is an extremely effective research tool. Its "Law About" section, which covers topics from ADR to Workplace Safety, brings together primary law on the topics addressed with links to the full text of those resources. In areas where there is governing federal law, this is particularly helpful as all statutes, regulations, and some federal case law on the topic of interest will be linked together on a single page. In addition, some state law (frequently limited to New York and California), links to international resources, and links to federal agencies are also compiled. When you are struggling to recall the citation to the governing federal statute or

For those who still want website recommendations, here are several that are mentioned in this article:

North Carolina Websites

NC General Assembly: www.ncga.state.nc.us
NC General Statutes: www.ncga.state.nc.us/gascripts/statutes/Statutes.asp
NC Court Opinions Online: www.aoc.state.nc.us/www/public/html/opinions.htm
NC Administrative Code: http://reports.oah.state.nc.us/ncac.asp
NC Casemaker (through the NC Bar Association): www.ncbar.org/casemaker/index.aspx

Federal Websites

GPO Access: www.gpoaccess.gov/cfr/index.html
US Supreme Court Official Website: www.supremecourtus.gov/
Supreme Court Decisions on FindLaw: www.findlaw.com/casecode/supreme.html
USA.gov Agency A-Z List: www.usa.gov/Agencies/Federal/All_Agencies/index.shtml
Legal Information Institute: www.law.cornell.edu/

Other Helpful Sites

American Association of Law Libraries State by State Report on Authentication of Online Legal Resources: www.aallnet.org/aallwash/authenreport.html
Law Library Resource XChange: www.llrx.com
Lower-Cost Alternatives to traditional Lexis & Westlaw
- **LoisLaw:** http://loislaw.com/
- **VersusLaw:** http://versuslaw.com/
- **FastCase:** https://www.fastcase.com/Corporate/Home.aspx
- **LexisOne:** http://www.lexisone.com/
- **Shepard's Pay as you go:** http://web.lexis.com/xchange/forms/uas/casepullcheck.asp?_svc=SH&loc=LEX1
- **Westlaw by Credit Card (including KeyCite):** http://creditcard.westlaw.com/welcome/frameless/default.wl

MoreLaw Verdicts: www.morelaw.com/verdicts/
Jury Verdict Research: www.juryverdictresearch.com/index.html
NC Lawyers Weekly: www.nclawyersweekly.com/
Campbell Law Library: http://law.campbell.edu/information-resources/
Charlotte School of Law Library: www.charlottelaw.org/lawlibrary/
- **Research Guides:** www.charlottelaw.org/lawlibrary/default.asp?PageID=170

Duke Law Library: www.law.duke.edu/lib/
- **Research Guides:** www.law.duke.edu/lib/research_guide

Elon School of Law Library: www.charlottelaw.org/lawlibrary/default.asp?PageID=170
NC Central Law Library: http://ariel.acc.nccu.edu/law/ilibrary/index.html
UNC Law Library: http://library.law.unc.edu/
Wake Forest Professional Center Library: http://pcl.wfu.edu/
- **Research Guides:** http://pcl.wfu.edu/PCL-Resources/Guides/index.html

related regulations on a topic, this is an excellent place to find your reminder.

Practice Tools

Rarely do attorneys reinvent the wheel when it comes to developing legal documents; from pleadings to contracts, we frequently recycle. Locating sample pleadings on the web can be tricky and what you find is likely to require some work before it will be useful to you. Though you may find free briefs, motions, complaints, or other pleadings on the web, you may not be able to find materials specific to your jurisdiction or area of law or those that come from reliable sources.

As a starting point, you may find legal pleadings and briefs to use as samples on the websites of organizations that routinely represent the legal interests of their constituencies such as the American Civil Liberties Union, as well as associations that represent members of specific professions like the American Bar Association's advocacy webpage, sites of corporate litigants related to their own legal matters, and governmental agencies that prosecute legal claims, such as the Department of Justice. The pleading banks of these organizations and parties may provide access to briefs in older cases and may also include the complete pleadings in a lawsuit, as well as complaints and motions.

With the increasing number of briefs available, this may be an instance when you would be justified in beginning your research with a fee-based resource. Westlaw and Lexis are increasing the number of cases for which they provide briefs, though the guidelines about which briefs are selected for inclusion are only that the widest variety of available topics is intended. Additional compensation may also be required for briefs in Lexis and Westlaw. For federal causes of action, the relatively low cost of the Federal Courts' Public Access to Court Electronic Records (PACER) is also a justifiable expense as finding sample briefs on the free web will cost you much more in time.

Many legal forms can be easily found on the web; again, a user must be careful about the source of this information. With forms, official versions are frequently available as it is easier and less expensive for the issuing agency to make them available via the web than it is to provide printed versions. Therefore, the forms of courts and administrative agencies on the federal, state, and local level are increasingly easy to find electronically on the free web.

One example of an area of law where forms are readily available is bankruptcy. Bankruptcy practice is heavily form-driven and the US Bankruptcy Courts make their official forms available with an instruction guide in PDF form on the US Courts site. Availability of forms in PDF format means the forms you download from the website are the exact forms you would receive from the court, many of which have been developed in interactive formats that allow you to type directly onto the form using your computer. You may also find forms for other federal courts through the US Courts website.

Many federal agencies, particularly those involved with highly regulated industries such as tax, securities, and intellectual property, provide forms for filings right on their websites, some of which can actually be manipulated on your computer, and filings made directly on the site. For these, go directly to the individual website and scan it for links to forms or publications. You will find many forms are accompanied by instruction booklets, which are provided to aid in their completion. To find federal websites and locate official forms, visit GPO Access, or USA.gov and follow the links to the courts or agencies of interest. To find state websites in order to locate official state forms, you may wish to visit a site that compiles links such as FindLaw.

You may wish to search for jury verdicts or settlements to help you determine appropriate damage amounts, and the web can be a valuable resource. Generally, this information is provided by private vendors and reliant upon the accuracy of the information provided by attorneys litigating cases. Some caution should be exercised in determining its reliability, but this is generally the case with settlement information from any source, as it is not systematically collected in most states. Lexis and Westlaw also include some settlement information; however, the same limitations apply and much of this information falls within more expensive billing rates than traditional legal information.

One free resource where jury verdicts can be found is MoreLaw.com. This website includes settlements that can be searched topically, by amount, by attorney, and on a state-by-state basis. Again, the database is dependent upon the submission of verdict information by attorneys so it is not a complete picture of all verdicts made before any particular court or comprehensive settlement information.

Jury Verdict Research is likely familiar to most practitioners in its print format, but its publisher, LRP Publications, also maintains a website. This site provides access to the services of Jury Verdict Research, which includes the performance of case evaluations and accessing a large database of jury verdicts and settlements. These services are not free, but this database is more inclusive of settlements and verdicts from various jurisdictions than many other resources.

Jury verdict and settlement information can also be found in legal newspapers. Many of these have searchable databases on the web. In some cases, access to those databases is a part of a subscription to the newspaper, but it sometimes requires an additional subscription fee. *North Carolina Lawyers Weekly* maintains a website. In its archives, you can search for verdicts and settlements reported in the newspaper back through 1989. This service is included as a part of the newspaper subscription and requires only registration for activation.

Google It?

"Google" is listed in the Merriam-Webster Online Dictionary as a transitive verb meaning "to use the Google search engine to obtain information about (as a person) on the world wide web." Just because we accept the word as a part of our vocabulary, does that mean we should include it as a part of our legal research strategy? The answer is a definite yes. To everything there is a season. What that is, is heavily dependent on knowing what Google can and *cannot* accomplish.

Briefly, search engines are dependent "spiders" that "crawl" the web retrieving information, which is then cataloged and accessible to the user via mathematical algorithms that determine what the engine finds in response to the information you feed it. Some databases, though freely accessible, are not crawled and, thus, their information is not indexed and retrievable by the average search engine. Other databases that are crawled may have information included that is buried and can only be accessed if you know a direct web address or by several clicks through a website's many pages. Though this barrier to indexing has been diminished over time, there are still, report-

edly, a large number of pages that remain inaccessible to spiders.

Information may also be hiding if it is stored in tables and tailored information is arranged according to your search request. An example of this is the Census Bureau's American Factfinder, which compiles census data tables according to the parameters you set. Most state statute databases are also set up this way. Another good example of this is a library's online public access catalog (OPAC). Though libraries make access to these openly available to anyone who wishes to use them, because they draw from databases, their information is only accessible if you directly call upon the database to retrieve it. Also inaccessible are paid and password protected databases; even those to which you have access, as a member of a public library for example. Thus, though you may have free access to a database, a search engine cannot surmount the obstacle that your user name and password can. Though Google is getting past some of these challenges—for example, linking Google Books to local library catalogs—you are missing great deals of information on the web if you rely solely on Google or another search engine.

So when is it a good idea to use Google or some other general search engine? Clearly, once you have accessed an item using other means and assessed that none of these barriers exist, Google may be an easy way to return to what you have already found but forgotten to record. Google is also a great device when you have inaccurate information, such as a bad citation, and detective work is necessary to correct it. Perhaps someone else has a properly cited resource you are hoping to find on the web. You may have a correct title of a resource, but due to poor formatting of the citation you are unable to discern whether you are looking for a section in a book or an article. Again, Google can aid in the detective work necessary for you to determine whether you need a periodical index or a library catalog to find what you need. This general use of Google works equally well when you need to correct a misspelled name or improperly recorded address or phone number.

The key to using Google, or any other online resource, is learning when to use it and how to use it well. From Google to Lexis and Westlaw, understanding the language that the resource understands is necessary to avoid wading through items only tangentially related to what you hope to find. All electronic searching is wholly dependent upon what you give the system to work with, so you must learn to use the features in advanced searching on the free web as well as tools in Lexis and Westlaw that help you search more precisely. Though the costs of fee-based legal resources are unquestionably high, poor use of those resources is probably as much to blame for much of the exorbitant costs legal practitioners pay as high prices.

Conclusion

So much has changed about access to information generally in the past 20 years and legal information has been no exception. As was likely the case when Lexis first presented its terminals with software that allowed access to word processed legal opinions in the 1970s, recent changes in means of access to legal information have outstripped the popular wisdom about the legal authority of the information. Though caution is clearly warranted until these issues are resolved, there is a place in your legal research for the use of free resources. Experienced legal researchers, particularly those who have practiced for a substantial time, have experienced changes before and are used to the introduction of new methods of accessing legal information. Handling the change as we have before, the free web presents opportunities to add to our research strategy arsenal that should not be ignored simply because they are unfamiliar. ■

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Endnotes

1. Coleen M. Barger, *On the Internet, Nobody Knows You're a Judge: Appellate Courts' Use of Internet Materials*, 4 J. App. Prac. & Process 417 (2002).
2. Richard J. Matthews and Mary Alice Baish, *State-by-State Report on Authentication of Online Legal Resources*, Chicago: American Association of Law Libraries (2007). The implications of this lack of official status are significant and warrant consideration in greater detail, but that is for a later article.
3. *Id.* at p. 23.

Pandemic—Is Your Workplace Prepared for Disaster?

By Donald W. Benson and Julie K. Adams

How should North Carolina employers prepare their workplaces for possible pandemics of avian influenza, Severe Acute Respiratory Syndrome (SARS), or illness spread by bioterrorism? Is the risk of a pandemic illness significant enough to merit the devotion of time and resources necessary to secure the continuity of business operations?[1] What is the employer's role in promoting quarantine effectiveness, social distancing, or preventative hygiene?

Or, is the near hysteria over the possibility of a pandemic caused by avian influenza or another similarly contagious illness merely the latest version of a dooms-day forecast, similar to the prediction that Y2K would shut down global business operations? That prediction spawned an entire industry devoted to business preparations for the millennium, and almost every company of significant size devoted considerable amounts of management and IT time and capital to achieving readiness for Y2K.

Of course, many attorneys, accountants, consultants, and vendors profited handsomely from these efforts, but it should be noted that business productivity gains in the early years of this century may be due, in no small part, to the updating and planning that occurred in advance of Y2K. Accordingly, it is possible that the current alarmist news coverage focused on the possibility of a pandemic may encourage similarly creative business and legal planning that will not only help to minimize the

effects of any such pandemic, but also foster the type of productivity gains that resulted from the attention devoted to the threat of Y2K.

This article will first examine the nature and threat of the pandemic occurrence of a disease such as avian influenza and its possible effects on North Carolina business operations. Notably, the commercial poultry industry in North Carolina alone generated more than 2.86 billion dollars in 2006.[2] It will then discuss pertinent federal and North Carolina state regulations and guidelines including the "North Carolina State & Local Planning & Response Activities." Finally, the remainder of the article will highlight some of the major legal and logistical issues on which counsel should advise business clients in an effort to ensure that they are properly prepared for a possible pandemic.

Pandemic: A Global Outbreak of Disease

The United States Centers for Disease Control and Prevention (CDC) has set forth three conditions that must exist in order for a global outbreak of a disease to occur: (1) the emergence of a new type of virus for which humans have little or no immunity; (2) the capability of this new virus to infect and cause illness in humans; and (3) the capability of the virus to spread easily and without interruption among humans.[3] A pandemic results when these three factors converge with regard to a disease.

We have experienced three influenza pandemics in the previous century: "Spanish influenza" in 1918, "Asian influenza" in 1957, and "Hong Kong influenza" in 1968.[4] The 1918 pandemic killed an estimated 40-50 million people worldwide.[5] Although the 1918 Spanish influenza was exceptionally deadly, the two subsequent pandemics also caused significant human deaths, including an estimated two million deaths in 1957 and one million deaths in 1968.[6]

Currently, public health officials are alarmed over the pandemic potential of the current strain of avian influenza, H5N1. Although the vast majority of avian influenza viruses do not infect humans, on rare occasions these bird viruses can infect other species, including pigs and humans.[7] H5N1 has spread by bird migration and commerce into the domestic and wild bird populations of 50 countries in Asia, parts of Europe, the Middle East, and Africa.[8] Transmission from birds to humans has been relatively rare, but 373 confirmed cases have resulted in 236 deaths in a wide geographic area including Azerbaijan, Cambodia, China, Djibouti, Egypt, Indonesia, Iraq, Thailand, Turkey, and Vietnam.[9]

An influenza pandemic occurs when a new virus subtype emerges that has not previously circulated in humans and "starts spreading as easily as normal influenza—by coughing and sneezing."[10] Public health experts are particularly concerned that H5N1 might ultimately mutate into a strain that is contagious among humans because it is an influenza A subtype and has genetic similarities to influenza strains that have spread among humans.[11] With such a genetic adaptation, H5N1 would no longer be a bird virus, but a new human influenza virus to which the human immune system would have no preexisting immunity.[12] This lack of immune defense makes it likely that people who contract such a type of influenza will experience more serious disease than that caused by normal influenza to which humans have already been exposed.[13]

What Is the Threat of the Occurrence of a Pandemic and Potential Level of Disruption?

The emergence of a virus that meets the biological characteristics set forth by the CDC seems quite plausible given the rapidity with which viruses develop and change. Moreover, viruses that have these characteristics are assisted in their spread through populations and from one population to the next by the reality of a truly global economy in which people travel far more than they did 50 years ago. Many more American companies now have sales, logistics, operations, and financial employees who regularly travel to their companies' overseas plants, or to those of their vendors or buyers. Similarly, personnel from these vendors and buyers are making onsite calls to businesses in the United States. The prevalence of these international trips has led the World Health Organization (WHO) to estimate that a global pandemic for a highly contagious airborne disease like avian influenza could reach pandemic distribution in as little as three months.[14]

The WHO is currently working under three assumptions with regard to planning for a possible pandemic. The first assumption is that a pandemic would spread to all continents in less than three months.[15] The second assumption is that significant portions of the world's population would require medical care, and the third is that medical supplies will be inadequate in all countries due to limited supplies of vaccines and anti-viral drugs.[16] Based on the comparatively mild 1957 influenza pandemic, the WHO projects approximately 2 million to 7.4 million deaths worldwide.[17] The level of disruption to business that may be posed by a pandemic will depend in part on the stage of the pandemic. Past pandemics have generally occurred in two or three waves, so that not all countries experienced the same level of disruption at the same time.[18] Thus, employers may face various stages of disruption caused by a pandemic including: (1) overseas occurrence affecting travel and foreign suppliers and customers; (2) high absenteeism at home, but with the ability to maintain near-normal operations; and (3) near total absenteeism at home, making it difficult to keep operations open, along with possible disruption of utilities and quarantines of the facility area.

Business disruption levels also will be significantly affected by the level of interdependence between a business's operations in the United States and businesses in other areas of the world in which the pandemic is most likely to start. Many American businesses are now directly a part of, or directly affected by, the global economy. These companies sell to or buy from locations in other countries. If those countries experience a pandemic that significantly limits their ability to buy American products or to deliver the goods and services that United States companies have purchased, the ability of American plants and operations to stay open in the United States will be affected.

Overall, not only could the lead time for influenza pandemic planning be extremely short, but uncertainty regarding the level of disruption that a particular virus may pose makes the problem even more vexing for planners. SARS was ultimately contained far short of causing massive deaths and disruptions to worldwide commerce, and, to date, the spread of smallpox or anthrax through bioterrorism has been largely

avoided. Nevertheless, business planners may do well to heed the current alarms about the potential disruption that a virus such as avian influenza could cause, given the history of past influenza pandemics and the ever increasing level of global connectivity.

Pertinent Federal Government Regulations and Guidelines

Existing federal regulations and guidelines issued by the Occupational Safety and Health Administration (OSHA), the United States Department of Agriculture (USDA), and the CDC may play a key role in shaping how businesses in the United States respond to a pandemic. Governmental agencies may be expected to build upon this existing framework[19] in developing new regulations in response to an emerging disease threat.

In a pandemic scenario, OSHA's blood borne pathogens standard and respiratory protection standard[20] would come into play. In addition, the "general duty" clause of the Occupational Safety and Health Act[21] requires an employer to provide a safe and healthy work environment for employees, thus giving OSHA broad statutory authority for issuing new regulations. In November 2006, OSHA acted on this authority and issued new guidelines for various types of persons who may be affected by an avian influenza pandemic, such as those who clean areas affected by the virus, airline personnel, and citizens living abroad.[22]

Given the fact that the source of a virus is often birds or animals, the USDA also can be expected to play a major role in preventing the spread of any pandemic virus. For example, to stem the spread of avian influenza virus to the United States, the USDA helped to enforce a federal ban on the importation of all birds from the Asian countries that experienced an outbreak of the virus.

In February 2007, the CDC issued new community standards for mitigating an avian flu pandemic.[23] These mitigation guidelines include social distancing strategies to reduce contact between people during the outset of a pandemic when vaccines and medicines will not be readily available. These guidelines include closing schools and daycares for up to 12 weeks, canceling public gatherings, planning for liberal work-leave policies and telecommuting strategies, and the voluntary isolation of cases and quarantine of household contacts. These guidelines also include the new Pandemic Severity Index, which rates the severity of an influenza outbreak from levels 1 through 5, much like the Saffir-Simpson scale used by the National Hurricane Center to rate a hurricane's intensity. The use of social distancing measures will be based on the Pandemic Severity Index, matching the level of distancing methods to the magnitude of the pandemic.

Pertinent North Carolina State Government Regulations and Guidelines

In addition to and in conjunction with federal regulations and guidelines, the state of North Carolina is working with the US Department of Health and Human Services (HHS) to maintain its own regulations and guidelines to manage pandemic conditions within the state. On March 21, 2006, the HHS and other federal agencies held a summit with North Carolina public health and emergency management and response leaders to discuss and create policies for dealing with an influenza pandemic. Governor Michael F. Easley and HHS Secretary Michael Leavitt signed a Planning Resolution detailing the HHS's and NC's shared and independent responsibilities for pandemic planning.[24]

Under the Planning Resolution, the HHS has accepted responsibility for providing guidance, technical assistance, and (subject to available funding) financial assistance for pandemic planning. The state of North Carolina has agreed to devote numerous resources to state and local planning and the development of an operational plan for responding to a pandemic influenza. In February 2007, North Carolina issued this operational plan which covers such areas as disease surveillance, infection control, and the allocation of scarce resources.[25] The operational plan also includes recommended social distancing strategies for schools and businesses which will be implemented under the authority of the state health director.[26]

North Carolina bases its plan on the 1918-1919 influenza pandemic.[27] The plan adopts for planning purposes the following assumptions: Such an influenza will have an incubation period of an average of two days.[28] During seasonal influenza, illness rates will be the highest among school-aged children (about 40%) and decline with age.[29] Among working adults, an average of 20% will become ill during a community outbreak. Sick patients may shed the virus up to one day before symptom onset and the peak infectious period is the first two days of illness.[30] Each ill person could cause an average of two secondary cases if no interventions are implemented. Planners anticipate multiple "waves" of local epidemics for most communities, although they may be more severe if they occur in fall and winter.[31] Each wave of pandemic disease in a community will last six to 12 weeks.[32 33]

Using these assumptions, the North Carolina Plan estimates that planners should anticipate a severe pandemic creating 1.6 million doctor visits, 290,000 hospitalizations, and 63,500 deaths.[34]

Based on guidance issued by governmental agencies thus far, employers may be faced with very detailed governmental workplace regulations in the face of a pandemic. Accordingly, preparation for a pandemic should include identifying the management team responsible for monitoring new governmental regulations and adopting procedures for communicating changes to affected supervisors and employees to ensure compliance with any new requirements.

Preparation in the Workplace

Employers who prepare for a possible pandemic will need to think of a broad range of issues associated with disaster planning. Preparation should take into account both federal and North Carolina directives. When drafting a pandemic preparation plan, employers should include procedures for handling employees who are sick in the workplace and the implementation of health and hygiene measures, such as remote work strategies and crisis management procedures, to promote social distancing and cut down on transmission risks. Employers also should consider implementing health and medical initiatives such as disease screening and vaccination programs. Given that large numbers of employees may be absent from the workplace in the event of a major avian influenza or other disease outbreak, employers should implement plans for new employee training, cross-

training of existing employees, and developing a pre-planned communications strategy for contacting large numbers of employees located outside of the work site. Each of these areas for planning and preparation raises its own set of legal issues and potentially far-reaching legal requirements.

Communicable Disease Policy

Employers should consider adopting a communicable disease policy and procedures as one of the first planning measures to implement in advance of any potential pandemic. Attorneys should advise business clients to consider adopting some version of the following employee policy, tailored, as appropriate, to meet individual business needs and the dangers confronted by the client's specific employees:

Communicable Illness

In order to help keep [Company} safe, we need your help. If you are (a) diagnosed with an illness that is communicable in our workplace such as active TB (tuberculosis) or SARS (Severe Acute Respiratory Syndrome), or avian flu, (b) if you believe you may have been exposed to a person so diagnosed to a person so diagnosed, or (c) of you have recently visited a location on which there has been an outbreak of such an illness and you do not feel well or are exhibiting any symptoms if the illness in question, YOU MUST REPORT THIS TO [insert title of appropriate company representative]. This information will be kept confidential to the extent reasonably possible but, obviously, full confidentiality cannot be guaranteed under these circumstances.

Travel and Quarantine Policies

Companies also should consider addressing their employee travel policies regarding foreign travel. Policies should state that travel should be curtailed in accordance with advisories issued by the CDC and the United States Department of State. Employees traveling to areas with current outbreaks of a communicable disease should be required to obtain and maintain all recommended vaccinations and to follow recommended health precautions.

The potential for the imposition of quarantine for travelers to certain areas also must be considered. If an employee travels for work reasons to a region for which quarantine upon return home is required or advisable, the employer should request the employee to inform his or her supervisor or human resources department immediately so that home work assignments or paid administrative leave can be arranged. If an employee travels on personal business to a region requiring quarantine upon his or her return home, the company should consider allowing the employee to use sick leave, accrued paid-time-off or vacation time, or be placed on unpaid administrative leave. If the employee is diagnosed with a communicable illness or quarantined in association with such an illness, the company should consider requiring a note from a medical provider stating that the employee may safely return to work before permitting the employee to return to the work site.

The North Carolina Plan recommends that businesses consider setting a protocol for the conditions triggering a business closure and establishing plans for how to cope with a period of closure.[35] The Plan provides for mandatory school and child care dismissal, alteration of workplace practices to allow social distance between workers, and cancellation of public gatherings and other activities that bring people together.[36]

Compliance with HIPAA

The Privacy Rule regulations issued by the Department of Health and Human Services under the Health Insurance Portability and Accountability Act of 1996 (HIPAA)[37] require that an employer protect the privacy of its employees' medical information. Businesses should consult with legal counsel to determine which diseases an employee or potential employee must disclose to the employer and who will have access to the information provided. When there is a need to inform other employees of a possible workplace exposure, every effort must be made to maintain the privacy of the infected employee.[38]

Workers' Compensation

Employers should ensure that their workers' compensation (WC) insurance premiums are paid in full. Without the WC exclusive remedy for workplace injuries, employers may be liable under all sorts of creative tort claims for negligence, wrongful death, etc. Under certain conditions, North Carolina does include communicable diseases that are contracted at the workplace within the list of work-related injuries that are covered by the WC statute.[39] Employers should consult with counsel about whether the WC bar is available in the states in which they employ workers, paying particular attention to states in which external sales representatives are based.

Clarify Leave Policies

Employers have a tendency to think of leave policies as a benefit subject to employee abuse and may initially be concerned with ensuring that employees remain at work as absenteeism grows in response to an outbreak of disease. In the various stages of a pandemic, however, the problem may be quite different. First, there may be employees who have traveled for business who find themselves subject to quarantine but can work from home. Second, there may be sick employees, or employees caring for sick family members, whom the employer wants to remain at home in order to reduce the risk of infection to others.[40] Third, there may be sick employees who will come to work and will need to be sent home to keep them from spreading the infection. Fourth, under the new policies issued by the CDC, schools and daycares may be shut down for an extended period of time and employees may be without any means of available child care. Finally, there may be some

employees who are too afraid to venture out in public from fear of contracting illness.

In some or all of these situations, both the CDC's and North Carolina's response plans stress that employers should consider how to use leave policies to (1) maintain compliance with pandemic social distancing directives; (2) maintain operations; and (3) sustain a functional and available workforce. Employers must recognize that a pandemic presents a double edged sword to the average American worker—go to work and risk becoming ill, or stay home from work and risk losing your job and ability to support your family. According to a recent poll conducted by the Harvard School of Public Health, a large proportion of working adults with children thought that, if faced with pandemic conditions, they could arrange childcare so that at least one employed adult in their household could go to work if schools and daycares were closed for an extended period of time.[41] However, when asked about possible financial difficulties due to missed work, a greater number of adults reported they would face financial problems, especially if they were forced to miss work for 7-10 days.[42]

Therefore, an employer's pandemic response plan should ensure that leave policies address the needs of the employer as well as the employee. Leave should be employed in such a way as to limit unnecessary social interaction but minimize the more troubling effects of employee absenteeism on business operations and an employee's financial situation. Paid leave, or unpaid leave with health benefits, can mean the difference in maintaining the work force in the area or experiencing significant employee turnover. Avoiding such turnover can be particularly significant as a business seeks to resume normal operating levels. Similarly, fighting every claim for unemployment benefits may not be in the employer's interest if the denial of benefits encourages the pool of available workers to shift to areas unaffected by the disease. Ensuring that there is a leave plan in place and that the plan has been communicated to employees will help to minimize the impact of workplace absenteeism on both employers and employees, whether the emergency is a pandemic or a natural disaster such as Hurricane Katrina.

In considering leave issues, business clients should be counseled on the requirements of applicable federal and local leave laws that govern paid or unpaid leave for sick employees; employees caring for immediate family members; first-responder health care providers; and employees called to active military service to enforce a quarantine. Leave policies should clearly spell out the following items: (1) how the employee requests leave; (2) any requirements for regularly reporting his or her medical condition; (3) whether the leave is paid leave; (4) whether any benefits (such as health insurance, matching 401k contributions, vacation pay, etc.) are provided or continue to accrue during the leave period; and (5) when the leave is exhausted, whether the employee will be returned to work.

Statutes and Regulations that May Affect Leave Policies

The Family and Medical Leave Act

The federal Family and Medical Leave Act of 1993 (FMLA) and implementing regulations[43] may have a significant impact on leave policies. If the employer has more than 50 employees at a location, and an employee who has requested leave has worked at least 1,250 hours within the last 12 months for that employer, the FMLA provides that the employee can elect to take up to 12 weeks of unpaid leave due to a "serious health condition."[44] Influenza that requires continuing treatment by a physician over a three-day period will likely be considered a protected "serious health condition" that triggers the FMLA right to return to a substantially equivalent job when the leave ends.[45] If the employee is absent from the workplace for several months but was never told that this absence exhausted the FMLA leave period, the employer's obligation to reinstate the employee may extend far into the future.[46]

The Americans with Disabilities Act

Similarly, those employees who suffer permanent health problems affecting a major life activity like breathing may be entitled to protection under the Americans with Disabilities Act of 1990 (ADA).[47] Once the ADA-protected employee returns to work, the employer will likely need to engage in the mandated process to determine whether any reasonable accommodation must be provided to help the employee perform the essential functions of his or her prior position.[48]

ERISA and Accrued Leave and Benefit Policies

In preparing for a possible pandemic, employers should examine any contractual promises contained in handbooks and leave policies. These policies may allow employees to accrue, from year to year, large amounts of paid leave. Employers may need to consider the inclusion of exception clauses for disasters, emergencies, and epidemics that limit the lump-sum use of such paid leave. Employers who fail to plan for such contingencies could experience tremendous financial liability for such leave at the time when they can least afford it.

In examining leave and benefit policies, the Employee Retirement Income Security Act of 1974 (ERISA), the federal statute that governs certain types of employee benefit plans, must be considered.[49] Prudent employers will at once confirm that the proper, updated Summary Plan Descriptions (SPD) of its benefit plan (Plan) are distributed to Plan participants and their covered dependents. Otherwise, provisions allowing the Plan to be changed may not be enforceable.[50] Worse still, if the employer cannot prove that the participant or beneficiary received a revised SPD, then the employer may be required to provide higher benefits according to some previous, and more generous, version of the Plan.[51] Further, in the event of a pandemic, a self-administered Plan will have an immediate need to increase the size of its administrative staff to handle the anticipated increase in benefit requests and appeals. Unfortunately, under ERISA, the question of whether or not the participant is entitled to benefits will most often be determined based solely on the record before the Plan administrator (whether an in-house benefits administrator or a third-party entity hired to provide and record benefits), not at some future time when lawyers can flesh out the file through discovery. Accordingly, it is crucial that the Plan allocate sufficient resources to develop fully the administrative file, or benefits may be later awarded by the courts to otherwise unqualified applicants.

Examine Pay and Telecommuting Rules

A pandemic may lead to many employees working from home. Those telecommuting employees who are non-exempt employees under the Fair Labor Standards Act of 1938 (FLSA)[52] can create off-the-

clock and overtime issues for employers. The employee who is performing the normal work activities of the job over a computer from home may be working substantial additional time without management's knowledge or supervision. Additionally, these employees may be checking email and voice mail outside of regular work hours. These off-the-clock activities may push the total hours worked in a week beyond 40, entitling the employee to overtime pay at one and a half times the regular rate of pay.[53] In order to avoid problems under the FLSA, employers can require employees to check emails or to perform work only during specified hours of each day, to carefully record and submit documentation of their time worked, and to ask and receive permission prior to working in excess of 40 hours in a week.

Communicating a Pandemic Response Plan to Employees

Before employers present a pandemic response plan to their employees, they should ensure that its contents are compliant with state and federal laws and are as up-to-date with both local, state, and federal guidelines for pandemic response as possible. The fluctuation in conditions, especially in relation to avian influenza, is constant worldwide and the government's measures for responding are subject to alteration at any time.

In addition, employers should ensure that their pandemic response plan covers the basic aspects of emergency planning in a way that employees can understand. The following is just a handful of concerns that a business's pandemic response plan should address:

(1) Does the response plan designate a person within the company who is responsible for pandemic contingency planning?

(2) Does the response plan designate a contact person for employees in case emergency conditions disrupt communications?

(3) Does the response plan identify the company's leave policies and outline in a clear and understandable fashion the steps an employee must take to qualify for leave?

(4) Does the response plan identify a back-up arrangement if the company's IT person becomes ill and is unable to provide assistance and ensure the proper storage of electronic data?

(5) In a similar vein, will the pandemic response plan include a pre-pandemic cross-training program for employees?

(6) Does the response plan provide any guidelines for employees who are stranded due to business travel?

(7) If the response plan provides for work absenteeism options such as telecommuting or shift-swapping, does it outline the procedure for employees to follow if they wish to engage in these optional forms of working?

(8) Does the response plan provide for actions an employee should take if schools and daycares are suddenly closed and what an employee should do if these closures will continue for an extended period of time?

(9) Does the response plan outline the company's conditions for business closure and re-opening?

(10) Does the response plan summarize a contingency plan for paying employees their wages in case banks or financial institutions are closed as a result of emergency conditions?

These concerns, and many others, should be addressed clearly and concisely. Once approved, the pandemic response plan should be distributed to all employees either via the employee handbook or special publication. Each employer should also maintain a copy of the response plan on their premises for easy access.

Conclusion

In the very worst of pandemic scenarios, employers may be called upon to be creative and flexible beyond the requirements of employment law in order to assist employees and maintain a stable work force.[54] Expanded employee assistance, leave, and attendance policies, and extra efforts to communicate about benefits and provide arrangements for the continued payment of wages during facility shutdowns can be instrumental steps in maintaining a loyal work force. As employers become more attuned to the significant risks of pandemics, prudent planning for such contingencies will become a normal part of their emergency preparedness. ■

Don Benson is a shareholder in Littler Mendelson's Atlanta office who has been quoted by USA Today *and* BNA *along with publishing articles in* The Georgia Bar Journal, The Tennessee Bar Journal, Mondaq *and* Employment Law 360 *regarding MRSA Staph Infections in the Workplace and Pandemic Preparations in the Workplace. Mr. Benson is a graduate of Davidson College, has an MA in philosophy from the University of Georgia and JD from the University of Utah. He may be contacted at dbenson@littler.com.*

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Endnotes

1. Recent news reports again place avian flu on the front page of pandemic concerns. *USA Today* reports on January 16, 2008, that "Bird flu has resurfaced in parts of Asia, with human deaths reported in at least four Asian countries and fresh outbreaks plaguing other nations during the winter months when the virus typically flares." *The New York Times* reports on January 3, 2008, that "Egyptian authorities and The World Health Organization announce that four women died in Egypt of avian flu in the last week in unrelated cases."
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10. World Health Org., *supra* note 2.
11. US Dept. of Health and Human Servs., Centers for Disease Control & Prevention, *supra* note 6.
12. World Health Org., *supra* note 2.
13. *Id.*

CONTINUED ON PAGE 30

Examined Life 101

By Dorothy C. Bernholz

Can a lawyer learn to lead an examined life while running "willy-nilly" throughout one's professional life? Should a lawyer want or need to have introspection about one's value to society? In a profession that equates success with dollar signs and big name firms, was my contribution as a pre-paid legal services lawyer representing university students meaningful? Most importantly, did I personally need to reflect on the value of my professional contribution over the past 32 years of my practice?


Steve Dininno/images.com

My participation in the inaugural seminar for the Center for Law and Humanities provided me with an opportunity to attempt an "examined life" and to evaluate those everyday events that have formed both my professional and personal identity. I write to share with you my reflections as a participant in the four-day seminar held at the Kanuga Conference Center in March 2007. My remarks are intended as personal to my experience and, therefore, may be quite different to those held by my fellow participants, all seasoned and respected North Carolina attorneys and members of the judiciary. In a companion piece, Walter Bennett Jr., a seminar facilitator, describes what the Center for Law and the Humanities seeks to accomplish.

Prior to our arrival in the mountains for the seminar, all 18 participants received a compilation of selections in the humanities, from poets such as Auden to philosophers such as Plato. Our readings and sessions were thematic, focusing on "Truth, Justice, and Law," "Law and Morality," "Justice in America," "Law and Lawyers," "Reflections on Professional Aspirations," and "A Code of One's Own." Ironically, it was spring break at the uni-

versity where I work, so I had the time to be an industrious student, and I relished every minute of it. I proudly arrived at every discussion feeling fully prepared.

Our discussion leaders were stimulating and kind. The relaxed atmosphere helped each of us share many of our doubts and anxieties, both personal and professional. It was stunning to see that my "successful" colleagues, as well as Tolstoy's "Ivan Ilyich," had also struggled with whether this life of ours was "the real thing." Each reading sparked a memory of some personal event as a practicing attorney that had long been buried. The "Justice in America" readings enabled me to re-examine how my childhood in a segregated eastern North Carolina town was so divergent from my view of a just legal society today. With the sweep of legal jurisprudence whirling past, I painfully questioned whether I had done any affirmative act to contribute to a better society. As Tolstoy chided in our assigned reading, what if my life was not as it should have been?

The most meaningful session took place late one evening in front of the fire. Walter Bennett had us read aloud excerpts from his collection of oral histories with prominent North Carolina lawyers, prepared by his UNC-CH law students. One of my fellow attendees read from his personal oral history, encouraging story telling as a way to communicate and appreciate one's own life and those of others. As we lawyers work through philosophies and debate the complex legal theories that underpin our daily law practice, it is the personal stories, after all, that communicate the humanistic value of what we do. The discussion helped me think carefully about my daily life and practice, as I realized (and hoped) that it had reflected the potential value and goodness of human beings. I concluded that I could respond to the common human needs of my clients more effectively if I developed rational ways to tell their stories to the courts and society. What better way to hone this skill than with the humanities!

I left the seminar with the realization that the very process of discussing the fundamental moral and ethical aspects of law and its practice had created a new hunger in me. Of course, I could embark on a course of further study of the humanities on my own, but it would not be fulfilling without the critique and challenge of my peers. Wouldn't it be wonderful to interact in this fashion with others in my district bar on a regular and informal basis? How about a book and film club meeting once a month in an informal setting? First assignment: watch and discuss the film *The Crucible*. Next month's assignment: read Plato's *Allegory of the Cave* and debate its' meaning. I came away inspired to help my community of lawyers relate to one another in ways that will re-energize our pursuit of personal and professional excellence.

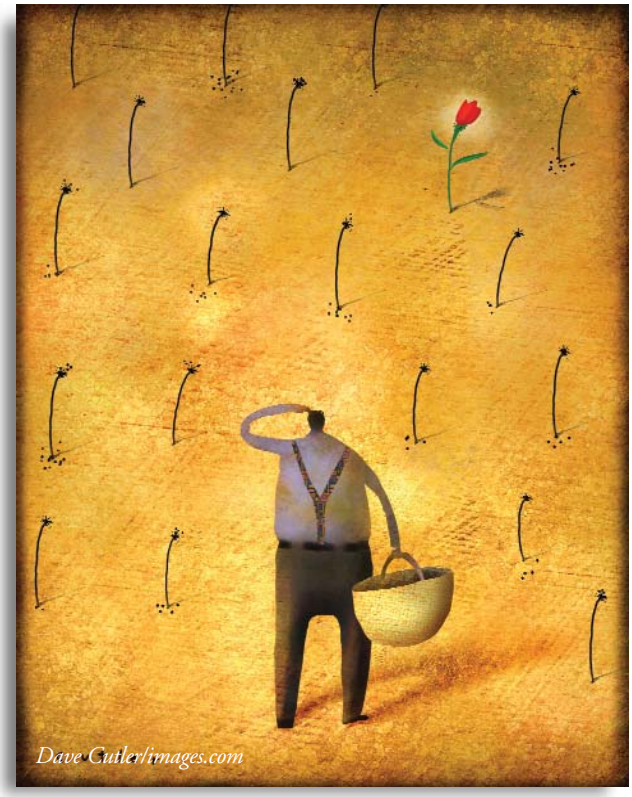
Based on my seminar experience, I have concluded that lawyers do want and need to have introspection about one's value to society. I encourage all members of the bar to support the efforts of the new North Carolina Center for Law and the Humanities. ■

Dorothy Bernholz is currently the director of Carolina Student Legal Services, Inc. She is a State Bar Councilor representing Judicial District 15B.

Rediscovering Humanity within the Law—The New North Carolina Center for Law and the Humanities

By Walter Bennett

Once upon a time the idea of law as separate from either humanity (one's existence as a caring human being) or the humanities (disciplines of study that grew therefrom) was unthinkable. Early philosophers treated law as another facet of philosophical inquiry. As nations and the rules governing them became more complex, people began to need other people who, through innate ability or self-taught skills, could help them with "legal" problems. The "practice" of law developed, evolved into a craft, and then into a profession. Its members became a distinct group whose special skills earned them status, privilege, and power. The skills they employed were either self-taught or passed down from practitioner to apprentice by "on-the-job" training, supplemented by modest study.


Dave Cutler/images.com

By the time Oliver Wendell Holmes attended Harvard, law schools were well established as separate from other "schools" in universities, and attendance at a law school was fast becoming the norm for training lawyers. Today's law students, unlike the law

students of Holmes's day, are frequently not versed in the "classics" or even in what, until recently, we knew as the "liberal arts." In addition, experts have confirmed what many of us know from our own law school experience: the intense focus of legal study tends to make many law students, if not less humane, less in touch with their own human-ness and their humanitarian role in society.

The modern world of practice has done the same for lawyers. The work is increasingly intense, competitive, and specialized. Pressures have grown accordingly. Effective human contact has declined. Time for personal aspects of lawyers' lives has diminished. Much of the "old time" humanity has been lost, both in the profession and unfortunately, as the statistics on quality of life show, in the lawyers themselves.

The Center for Law and the Humanities is founded upon the belief that the separation of lawyers from the broader, more reflective aspects of life, found in the humanities, is an underlying cause of many problems affecting the profession. The Center seeks to delve deeply into our cultural heritage to reunite the law with its historical roots and lawyers with their basic qualities as human beings. The Center does this through innovative approaches in both method and materials. (Dottie Bernholz relates specific examples of each in her essay on page 20 of this *Journal*).

Essentially our method is to "reconvene the campfire"to gather lawyers and law students in groups for meaningful discussion of what it means to be a lawyer and a professional in our hectic society. We revisit ideals of ethics, justice, and fairness; we reaffirm the duty of care to self, family, and fellow man; we attempt to re-envision ideals of a professional "calling," courtesy, and public service. Our format is reflective conversation (led by a moderator or moderators) which deepens as it progresses. Participants do what members of a professional community should do: they talk, listen, and learn. They teach themselves and each other. They find renewal and inspiration.

So far, we have convened campfires in the form of two highly acclaimed seminars (taught by Center Director David Hostetler) at Campbell Law School and North Carolina Central Law School, and one four-day retreat in the North Carolina mountains for lawyers and judges, which, based on reports of participants, was also highly successful. (Dottie relates her experience at the retreat in her piece). Another such retreat was held at Graylyn Conference Center in Winston-Salem in February 2008. A third—again set in the mountains—is scheduled for May 2008. Ozzie Ayscue, chairman of the Center's Board of Directors and co-moderator of the retreat, held an inter-firm workshop in the summer of 2007 for interested lawyers and summer associates. Law schools at Duke, Carolina, Elon, and Wake Forest have expressed interest in future seminars or coordinated teaching projects. Additional, small-scale retreats/workshops are contemplated for several local bars. When we are fully funded, we hope to hold retreats, workshops, and seminars at every level of the bar as well as in individual law offices and firms. We view outreach as a crucial component of the Center's work.

We draw our materials from the humanities: literature, philosophy, history, the law, etc. because, when well-chosen, they are excellent vehicles for raising the crucial issues, igniting give and take discussion and deep reflection, and promoting inspiration and renewal.

Lawyers are thinkers—highly skilled at focusing the power of intellect on specific, legal problems. The Center for Law and the Humanities operates on the premise that they also have the desire to think large, to connect their everyday work to the great issues facing society and their role in addressing those issues, both as a profession and as individual lawyers. We hope that by helping lawyers do this, they will find a fulfillment of the heart and a more productive life in the law.

As President Emeritus Bill Friday said when he advised and assisted us in getting the Center started: "There's a great hunger out there."

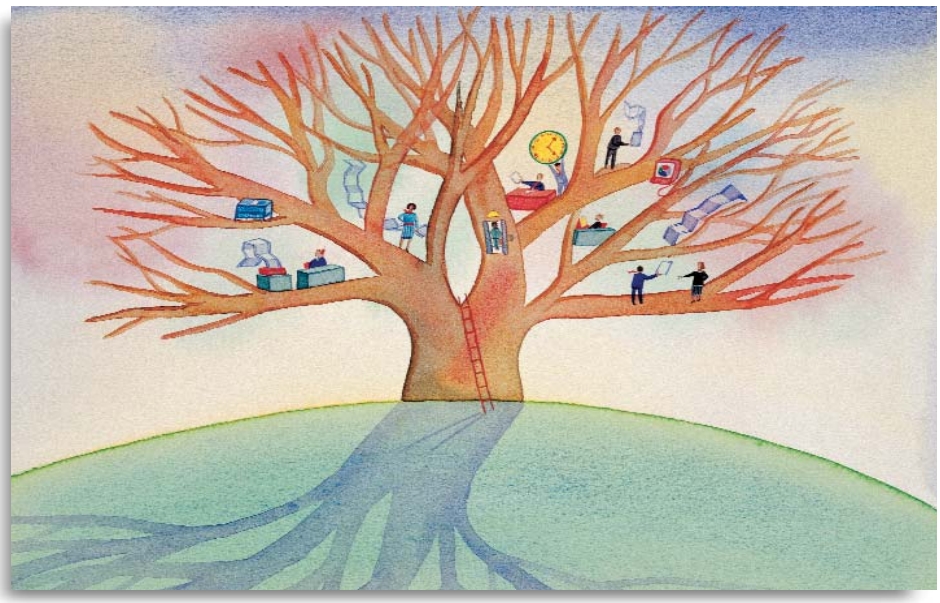
We aspire to feed it. ■

Walter Bennett is a former trial lawyer, judge, and law professor who lives and writes in Chapel Hill and devotes time to organizations and projects which enhance morale and a sense of professionalism among lawyers. One of those projects is The Center for Law and the Humanities. His book, The Lawyer's Myth: Reviving Ideals in the Legal Profession*, was published by the University of Chicago Press in 2001.*

Thirty-Plus Years of Family Law in North Carolina

By Howard L. Gum

Lawyers who practice in my arena are called many things, some merely descriptive of the type of cases we handle and some ascribing to us attributes that contain moral judgments that are generally less than flattering. Of the former variety, we are known as divorce lawyers, family lawyers, or more currently matrimonial lawyers. In the United States we are most generally referred to as engaging in the practice of family law.



I began the practice of family law in the mid 1970s. The landscape in which I practice has changed dramatically as I am well into my third decade. During my early years, North Carolina did not have an Equitable Distribution Statute, there was no such thing as "no fault" alimony, and we commonly dealt with legal concepts now generally considered quite antiquated. You seldom hear terms such as recrimination, divorce *a mensa et thoro*, or divorce *a vinculo matrimonii*,used in today's practice.

At that time there were no family courts, the "tender years" doctrine generally reigned supreme in custody matters, and none of us had even a passing acquaintance with mediation, arbitration, collaborative law, neutral evaluation, or other current forms of alternative dispute resolution.

Our district court division was a recent creation and all family law matters previously heard in the superior court were now transferred to the district court division (much to the relief of every superior court judge in the state!). Our district court judges had little or no special training in family law matters and were expected to handle those cases in the same fashion they handled motor vehicle accident cases, summary ejectments, misdemeanor criminal cases, and all other matters that fell within the jurisdiction and purview of the district court. Abandonment and non-support of one's wife or children were criminal offenses routinely prosecuted in order to establish at least minimal levels of support for dependent wives and children. Most of these were "private" prosecutions, with the district attorney standing aside to let the attorney for the prosecuting witness present the case.

Since we had no Equitable Distribution Statute to allocate the material wealth

acquired during a marriage, property rights were determined by common law title principals. Stated differently, whoever held legal title to an asset owned it. Family law practitioners of that era became adept at utilizing other equitable remedies. We became familiar with purchase money resulting trusts, constructive trusts, express oral trusts, unjust enrichment, quasi contracts, and other ancient equitable remedies now only rarely utilized in the practice of family law.

While the married women's property acts of the early 20th Century removed most of the historical disabilities of married women, there were still lingering effects of that 19th Century history. For example, husbands were still entitled to all the rents and profits from property owned jointly with their wives as tenants by the entirety. A wife's contributions to her husband's business were deemed gratuitous absent some express written contract to the contrary. Thus, a wife working from dawn to dusk seven days a week for no salary, no benefits, and no retirement plan, for a corporation whose sole shareholder was her husband, acquired no property rights or accrued benefits of any kind with respect to said business. Upon divorce, the husband kept sole ownership of stock and business assets and the wife had no claims thereto.

Divorce lawyers in the early years of my career were litigators. Of course, good litigators are also effective negotiators, both then and now. However, in the early days of my practice almost all negotiations were based upon litigation that was already pending or the threat of litigation which always promised to be bitter, humiliating, and designed to subject at least one if not both of the parties to the scorn of the public.

Alimony was "fault based" and the rules of pleadings required that each spouse's misconduct be plead exhaustively and in detail. Thus, in virtually every complaint (and responsive pleading) there were allegations of adultery, cruel and barbarous treatment, indignities such that one's life became burdensome and intolerable, physical abuse, drug and/or alcohol addiction, abandonment, and other marital offenses all plead with premeditation and malice aforethought.

Child custody cases were decided on the basis of the aforementioned "tender years doctrine" (which held that young children naturally had to be with their mother) or with respect to which parent appeared to have committed the fewest number of marital offenses despite the fact that the case law directed that such decisions be made with the child's best interest as the "polar star" to guide the court's decision.

In short, a divorce practice routinely involved bare-knuckle litigation and tough, no holds barred negotiation.

Since those early years of my practice many things have changed. These changes have encompassed both significant amendments to the substantive law and the advent of various techniques under the umbrella of alternative dispute resolution.

Changes in the substantive law included the enactment of the Equitable Distribution Act in late 1981 and a complete overhaul of our alimony and spousal support statutes in 1995. Other statutory changes came as well. For example, husbands were no longer exclusively entitled to the rents and profits from property held as tenants by the entirety and those profits are considered to be jointly owned by the spouses.

Equitable distribution completely altered the manner in which property is allocated as part of the dissolution of a marriage. Equitable distribution is analogous to, if not entirely synonymous with, the concepts of community property that had been long extant in many of our western states. The inquiry shifted from who held legal title to the property, to a concept that marriage as an economic partnership acquires property that is presumptively to be divided equally between the parties as part of the marriage dissolution.

Equitable distribution in North Carolina, as elsewhere, was largely in response to the changing role of women in families, society, and politics. Equitable distribution allows both spouses to share in the wealth acquired by the marriage and created a whole new and very fertile ground for lawyers to apply their skills on behalf of their client.

The advent of equitable distribution also required lawyers to acquire new skills and different tools. Lawyers in this field now must become experts in business valuations, real property law, tax law, partnership and corporate law, and acquire a keen and thorough knowledge of accounting and finance. Since equitable distribution also authorizes the division of various retirement and other deferred compensation arrangements, family lawyers also found themselves in need of a working knowledge of ERISA and the arcane language and procedures used by actuaries and pension plan administrators.

North Carolina's alimony and spousal support laws were turned upside down. Prior to 1995, for a woman to receive alimony from her husband she not only had to prove that she was actually financially dependent on her husband for support but, in addition thereto, had to prove that she had "grounds" for alimony. This meant she had to prove that her husband was guilty of some type of marital misconduct as that was defined in our statutes and case law. Adultery, abandonment, cruel and barbarous treatment, indignities, drug and/or alcohol addiction, etc., not only had to be pled but proved. The 1995 revisions to the alimony law deleted the requirement that a dependent spouse prove that she or he had "grounds" to receive alimony. The inquiry shifted to one of financial dependence to determine initial entitlement. Fault still plays a role in our alimony scheme inasmuch as the trier of fact can consider each spouse's marital misconduct in determining the amount and duration of alimony that would otherwise be awarded. The one exception that is still a holdover

from the early days is that if a dependent spouse has committed adultery prior to separation and the supporting spouse can prove that adultery, the dependent spouse will have forfeited any and all rights to receive alimony. Even here there is some retreat from adultery as an absolute bar. Adultery is not an absolute bar to a spouse receiving temporary alimony (currently called post separation support) and if both spouses have committed adultery prior to separation, a court may, in its discretion, award or deny alimony.

Our law currently focuses more on an equitable restructuring of families' finances as part of the divorce process and less on the relationship issues that lead to the demise of the marriage. While the debate continues in our society as to the merits of either of these approaches, it is clear that in North Carolina and elsewhere across the country, the courts are much less concerned with relationship issues than they once were and are much more concerned with treating the marriage as an economic partnership and attempting to make an equitable restructuring of assets, debts, and income streams as part of the divorce process.

As a result of this shift, I have, for several years during my initial contact with a potential client, taken great pains to explain the difference between the emotional divorce and the legal divorce so that early in the process a client begins to understand that the courts will devote little time, nor award much importance, to the misbehavior of a spouse.

Another dramatic change driven by statute is in the area of child support. For approximately the first half of my practice (thus far) child support was determined on a case-by-case basis. We litigated issues of marital lifestyle, reasonable expenses for children, incomes of the parties, a reasonable allocation of responsibility to meet children's expenses, etc. This was a separate and complex trial in each and every case. Somewhere in the late 80s was the advent of the North Carolina Child Support Guidelines. Most cases involving child support are now determined by an application of the guidelines, a formula approach based on the family's income, number of children, etc. There are still cases that are litigated individually when there are very high incomes or unusual problems in determining income, as is often the case for self-employed families and individuals.

These significant statutory changes require lawyers handling divorce cases to acquire some very new, very sophisticated, and often very complex skills and knowledge bases.

The challenge presented to lawyers and their clients by these sweeping statutory changes also dramatically affected our judges and court system. The number of case filings rose exponentially and our judges were required to acquire the same knowledge and skill sets that family lawyers were required to obtain. An inevitable result of the need for lawyers and judges in possession of such skills was specialization.

Lawyers began specializing in family law much as lawyers had historically specialized in patent law, admiralty law, tax law, commercial real estate law, and others. Specialization in the legal world continues to mimic the specialization that has been occurring for decades in medicine.

Specialization extended to the courts. We now have a growing number of judicial districts in North Carolina that have been designated as Family Court Districts. This requires a specialized administration and specialized judiciary in response to the increasingly complex nature of these cases, and the increasing volume of these cases with which our courts are faced on a daily basis.[1]

Therefore, those of us who practice in Family Court Districts have been required to "re-learn" how we handle family law litigation. Prior to the advent of the family court, litigants determined what issues would be scheduled for hearing or trial and when. The family court wrests this prerogative from the litigants and their lawyers and places it within the court itself. Now the court schedules hearings based upon predetermined timetables set out in the family courts mandate. Family court has also largely dispensed with the time honored tradition of "judge shopping," which was publicly declared to be an inappropriate activity in which lawyers should not engage, but whose prohibition was honored much more in the breach than the observance. When a case is filed it is assigned to a family court judge and that judge handles all aspects of the case until its conclusion.

Family lawyers still need to be good litigators and good negotiators—or do they? Another significant branch in the evolutionary tree of the practice of family law has been the advent of alternative dispute resolution techniques, the most commonly used of which is mediation. Other types of alternative dispute resolution techniques have received much attention but less universal acceptance in family law. These include arbitration, neutral evaluation, and the newest kid on the block, collaborative law. We are also seeing various types of fusion of these techniques. In my opinion, the most effective family law mediators are those who are also in a position to offer a neutral evaluation of an issue that is the subject of the mediation. While in my experience neutral evaluation is seldom used as a "stand alone" process it is nearly always a part of mediation in any complex family law case.

There are also those, myself included, who are experimenting with something called "med-arb." In this construct, the lawyers, their clients, and often expert witnesses meet with a neutral who begins the process as a mediator. If the mediation is unsuccessful in resolving all of the issues, the mediator morphs into another type of neutral entity and becomes an arbitrator, thus shifting from the mediator's role of assisting the parties and their lawyers in reaching agreement to the arbitrator's role of decision maker and actually making the decision much as would a judge.

Collaborative law, as its label suggests, presupposes an agreement between the parties and their lawyers that they will collaborate in an effort to resolve the legal issues. The collaborative law arrangement, while having some variants, contemplates that the parties and their lawyers agree that they will make a full and complete disclosure of all information pertinent to the issues. In equitable distribution, child support, and alimony matters this means a full and complete disclosure of all financial information necessary to analyze the case. In child custody matters it means a complete disclosure of all matters necessary to assist the parties and any experts in making appropriate parenting recommendations.

In the collaborative process the parties agree that, if expert witnesses are needed for any purpose (business valuation, tax calculations, psychological advice or evaluations, etc.), the experts will be jointly retained so that only one expert for each such issue will be employed and the fees of such expert allocated in some agreeable fashion between the parties.

Perhaps the most controversial aspect of collaborative law is the agreement by the par-

ties and their lawyers that they will not go to the Court with any of their disputes. If either party withdraws from the collaborative process and desires to resort to the court system, then both lawyers must also withdraw and both parties must retain new lawyers with their former lawyers being prohibited from having any further involvement in the case.

Arbitration of family law disputes is also gaining traction. In the last few years, North Carolina has enacted a special statute to deal with this issue. The Family Law Arbitration Act sets forth the procedures for some or all of the issues presented in any divorce case (within the exception of the divorce itself) to be submitted to an arbitrator chosen by the parties and conducted in accordance with procedures and rules also selected by the parties and their attorneys. The parties can select one or more arbitrators who have special knowledge and experience to address particular issues in their case.

Arbitration typically streamlines the process of having decisions made as to which no agreement can be reached and allows these decisions to be made in private. An arbitrator's award can be confirmed by the court and, thereafter, enforced as a court order. In effect, the parties and their lawyers can use their judge, their rules of procedure, their choice of applicable law, and in effect have a designer court determine issues relative to their divorce.

However, of all the various arrows in the quiver known as Alternative Dispute Resolution, mediation has thus far played the most significant role. Mediation first began to be used extensively in child custody matters. The truth is and always has been that the courtroom is an extraordinarily poor place to make custody decisions. Lawyers being advocates for their client (generally on several matters and not just custody) could not be neutral nor do they truly represent the interest of the children. Mediation provides a process where a trained mediator (often from a mental health background with emphasis on families and children) could work with the parties to assist them at arriving at a custodial arrangement without the collateral damage that is inevitable from a custody trial. To the surprise of some and relief of many it has been hugely successful. Most districts in North Carolina now require that the parties participate in a formal child custody mediation process before they are even allowed to present their case to a district court judge.

The success of mediation with these difficult and highly charged parenting issues lead to mediation of family financial issues. The model is typically somewhat different. In custody mediation only the mediator and the parents participate. The lawyers stay home! The theory behind having the lawyers stay home is the belief (a correct one) that the parents really know all they need to know to come up with a satisfactory custody arrangement. Lawyers would likely be an impediment rather than help in this process since the lawyers can really bring nothing by way of specialized knowledge about the children to the table. There are those who have and continue to disagree with this premise, but I am not among them.

Mediation of equitable distribution, spousal support, and even child support matters typically has lawyers being actively involved and present with their clients as the mediator steers the process of attempting to assist the parties in reaching a resolution of the disputes between them. Often other parties are present at the mediation. If there are disputed real estate values, business or professional practice values, concerns about tax implications and various proposals, or other outside knowledge that would be helpful to the process, then those folks participate.

I am both a mediator and a lawyer who represents clients in mediation, and have found the process to be one with a high probability of success. If successful, a mediated settlement always leaves the parties feeling better about the process and the result than a verdict rendered by a court after a bitter and expensive trial.

Thus, the advent of these various techniques of Alternative Dispute Resolution has required family law practitioners to acquire new skills in utilizing those techniques for the best interests of their clients. The success of Alternative Dispute Resolution, and especially the success of mediation, has helped lessen the burden on the court system. Recognizing this, family courts require that parties and their lawyers attempt to resolve financial issues as well as custodial issues in mediation before permitting the parties to present their case to a court for determination.

Being able to obtain a fair settlement of a case without the financial, psychological, emotional, and temporal expenses associated with a trial is certainly a goal worthy of those of us who represent people in these difficult cases.

Nevertheless, I continue to believe that one has to be an effective trial lawyer willing and able to make a persuasive presentation of a client's case before a court. However, the cumulative effect of the substantive changes in the law, the specialization of lawyers and courts, and the advent and utilization of various alternative dispute resolution techniques has made the process for litigants and their lawyers less brutal and more likely to result in some type of negotiated settlement that does not require a public blood letting or the expense, delay, and risks of trial.

There are those who disagree with my premise that to be an effective family law practitioner you need to be an excellent trial lawyer. The jury is still out on how many cases are really appropriate for approaches such as collaborative law; certainly, collaborative law and whatever variations of that process evolve have a place at the table. However, there are going to be cases that have to be tried, cases that have to be submitted to an arbitrator, cases that will only be mediated while litigation is pending, and cases that can be resolved by wise and experienced counsel without the intervention of any third party neutrals. Those cases have been, and will continue to be, handled by knowledgeable and experienced family law practitioners who know their way around the courtroom. ■

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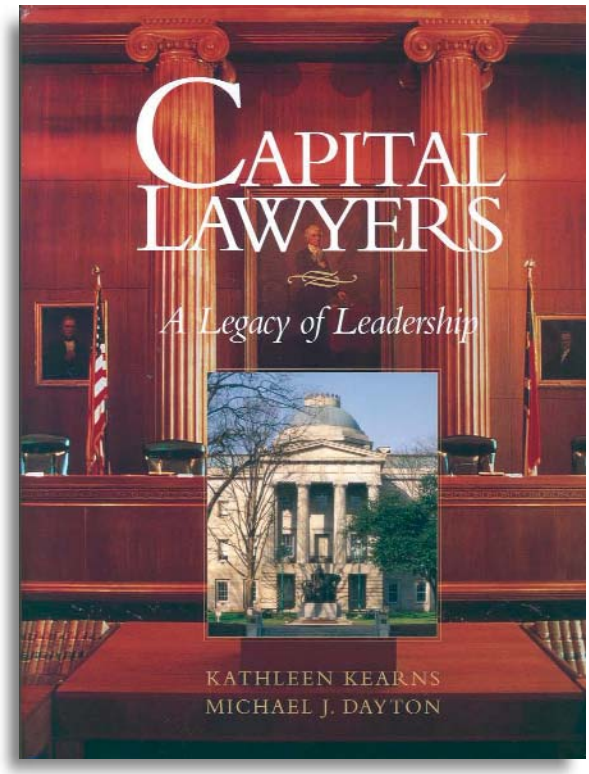
Endnote

1. The passage of various domestic violence statutes and related legislation has created a tremendous burden on the court system with little or no additional funding from the General Assembly. This is not to suggest that these laws are not needed nor that domestic violence is not a significant societal problem. Handling these cases also involves family lawyers. But to delve in any adequate way into the problems associated with our legal system's attempt to deal with domestic violence is beyond the scope of this undertaking.

Law Anecdotes—Some True, Some Fictitious, Some Embellished

By Michael J. Dayton

In the course of almost 50 years of law practice, Robert McMillan has observed many sad, many poignant, many touching, and many humorous stories. A popular speaker on the lecture circuit, McMillan has prepared a list of his favorite stories. Among them:



Lawyer, Can I Get My Whiskey Back?

I was once defending an accused bootlegger for "illegal possession of tax paid whiskey for purpose of sale." Of course it is not illegal to possess tax paid whiskey. But it is illegal to sell the same or to have the same for the purpose of sale. A presumption arises that it was for the purpose of sale if one has more than one gallon—even if taxes are paid.

The evidence against my client was that officers found an abandoned car in a vacant lot next to my client's house in the locked trunk of which car they found 88 pints of tax paid whiskey. The last registered owner of the car was my client, and my client lived closer to the vacant lot than did anyone else. There was a strong case of circumstantial evidence—but the judge nonsuited the case and dismissed the charges on the theory that the prosecution had not proved sufficiently that the whiskey belonged to or was under the control of the defendant.

I told my client to follow me and proceeded down the aisle to the exit of the courtroom. My client asked me in a loud voice what happened. I said, he found you not guilty. My client asked in a loud voice heard all over the courtroom—even to the judge's bench—"Can I get my whiskey back?" Everyone, including the judge, laughed. I told my client to hush up and keep walking.

Roger Smith and the "Virgin Islands"

Once when Roger Smith was a young and struggling lawyer—he is now the best criminal appellate lawyer that I have known—I had him talk to some clients of mine. Some of these people had received injuries in a bus wreck. Roger came to my office and went into the inner room to talk to these people. I stayed outside with Mrs. Miller and chatted about various things for about 30 minutes. Roger finally emerged with the clients and told them he would be back in touch. He then turned to me in great eagerness and said that this was truly a fascinating case of conflict of laws, *lex fori*, *lex loci*, etc. I asked what he meant. He stated that the bus wreck occurred in the Virgin Islands. I said, "No, Roger, it occurred in Virgilina—a town on the

Virginia-Carolina line."

Mr. Breece and His Hog Farm

Mr. Breece practiced law in Raleigh (and later in Fayetteville) and operated a hog farm on land rented from the city at the city farm south of the Cottonseed Oil Mill (now the soybean oil mill on South Wilmington Street) across from the old site of O'Neal Motors. It was his custom to purchase slops from downtown cafes and boil these slops under guidelines of the Health Department and feed this to the hogs. On one occasion, Mr. Breece had a case in the state Supreme Court. When Justice Stacy called for arguments in Mr. Breece's case, no one responded. The court went on to the next case and to the next case, etc. In due course, Mr. Breece came in looking very disorderly and covered with mud, cockleburs, beggar lice, etc. Justice Stacy interrupted the proceedings and advised Mr. Breece that the court had called his case for hearing and he was not there to respond. Mr. Breece was most apologetic and stated that he was detained at his hog farm. This shocked Justice Stacy who asked "Mr. Breece, do you consider the business of your hog farm more important than the business of this court?" Mr. Breece responded, "No sir your honor, but I do find the atmosphere more pleasant." Judge Stacy laughed and let Mr. Breece present his argument at the foot of the calendar.

Judge Branch and Mac Johnson

Upon graduation from Wake Forest Law School in the 1930s, Judge Branch went back to his home in Halifax County and joined the practice of Mr. Mae Johnson. Mr. Johnson was the father of Virginia's Meredith friend, Kitty Johnson. Judge Branch, as all who knew him were aware, was a personable and able attorney. He developed a strong following in a remarkably short time. In due course, the clientele coming into the office started asking for Mr. Branch more often than for Mr. Johnson, the senior attorney in the office. Mr. Johnson was moving on up in years and became a little sensitive about these developments. One hot summer day, long before the era of air conditioning, Mr. Johnson returned to his office somewhat "down" by virtue of the heat and by virtue of having lost a case in court. One of his longtime clients was in the office upon Mr. Johnson's return. Mr. Johnson walked by him and went into his office. Then he summoned the client, in rough tones, to "come on in." The client responded: "I'm waiting to see Mr. Branch." Somewhat miffed by this, Mr. Johnson replied: "Come on in here. I can do anything Mr. Branch can do." The client meekly entered and said, "Mr. Johnson, can you loan me $3 till Saturday?" This, perhaps, explained the mystery of the huge traffic seeing Mr. Branch.

Robert, She's Not As Old As She Looks

Once I was representing a mature lady for hit-and-run damage involving a collision between her car, as she was backing out of a parking place, and another car that was parked behind her. It was a terrific impact causing much damage and attracting the attention of office workers in an adjacent building who heard the crash and saw my client leave without stopping. I was able to obtain her acquittal by pointing out that, notwithstanding the facts, she was a mature lady and was not as responsive as a younger driver should be. Judge Winborne took pity on her and on me, but commented to her that at her age she should be reluctant to drive except when absolutely necessary. I was delighted with the outcome, and as her husband approached me after the trial I expected to receive praise and adulation for the good result. Rather, he said in aggrieved tones but with chivalrous demeanor, "The judge need not have lectured her so. Robert, she is not as old as she looks!" Chivalry is not dead -- or is it?

Spencer, You Won't Have Any Trouble This Time

As attorneys who represent clients on charges of DWI know, these clients expect miracles and are never completely satisfied. They resent being stopped—and often condemn the police for not "going after criminals and leaving us good citizens alone."

Once, Spencer Barrow had a client charged with DWI who blew .19 on the breathalyzer. After continuing the case interminably until the witness left the police department, Spencer was able to obtain a dismissal of the charges since there was no witness to testify. Of course, it was by pure luck and chance that Spencer won the case but he did not object to hearing the client praise him to high heaven as the world's greatest lawyer. A short time later, Spencer got a call at about 2:00 a.m. (the normal time for a call on a DWI case) from this same client: "Spencer, they got me again for DWI. I'm in the county jail. You won't have any trouble this time. I didn't blow but.15." Reality hit the man when he was later convicted.

The Bill Joslin Story

This story is a classic and is true. I have quit telling it in person, but posterity deserves to hear it.

Once William Joslin associated me to assist in the defense of a murder case. As a preface it should be noted that William has been one of the foremost and most capable attorneys in Raleigh during the post WW II era.

The case was a brutal murder in which the defendant had beat and stomped his wife to death. We were fortunate in that we were allowed by the solicitor to plead guilty to second-degree murder. (Judge Chester Morris did not like this and told the solicitor that he disapproved.) Judge Morris sentenced the defendant to 28 years in prison. (At that time 30 years was the maximum for second degree murder.) The ink had hardly dried on the commitment before the defendant had filed post conviction writs against myself and William for being incompetent lawyers. A hearing was scheduled before Judge Walter Bone. I was on the witness stand in response to questions by the defendant's lawyer. In commenting, I remarked that the defendant was certainly entitled to say what he pleased about our handling of the case, but that I would do the same again and that I thought we were very fortunate in being allowed to plead to second degree murder rather than face trial for first degree murder. I commented that if he felt I was incompetent, that was his privilege. Whereupon, the defendant stood up in court and said, "It's true, Mr. McMillan, I said you were incompetent, but you're not as incompetent as Mr. Joslin."

Bill Gerald's Paralegal

Judge Mike Payne of the Wake County District Court had become displeased with the cavalier and slipshod fashion of court attendance by several of the lawyers in Wake County. Some were inattentive. Some would send paralegals to court to request continuances and to attend to other matters with which only lawyers should be involved. To address this problem, Judge Payne called a meeting directing that several of the offend-

ing attorneys be present. As the meeting was called to order, every attorney requested to be present was there and on time except for William Gerald. About ten minutes after the scheduled time, Bill Gerald's paralegal appeared to say that Mr. Gerald couldn't be present. Judge Payne's reaction has been censored.

Simms & Simms

One anecdote that should be included involves the story told about the time that N. F. Ransdell, uncle of Buck and Phillip Ransdell and longtime judge of the Wake County District Court, called upon Mr. R. N. Simms to assist in a civil case. Judge Ransdell was a young lawyer and felt that it would benefit him to have Mr. Simms on his side in the litigation. At the time Mr. Simms was senior partner in the firm of Simms and Simms with his son, Robert N. Simms Jr.

When the case was satisfactorily resolved and it was time to divide the fee, Mr. Simms stated that "Here is one third for me, one third for Robert, and one third for you." Mr. Ransdell remonstrated that he had not employed Robert but had only associated Mr. Simms. Since Mr. Simms was a most imposing and impressive looking man—very much like Sidney Greenstreet in the movies. He countered that the fee must be divided three ways as he had mentioned. Mr. Ransdell was cowed and accepted the inevitable with the remark: "It's good that I associated Simms and Simms and did not associate Bailey, Holding, Lassiter and Langston or I wouldn't have had anything left." ■

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Pandemic (cont.)

14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. 29 C.F.R. § 1910.1030 (a)-(i) (2006).
20. *Id.* § 1910.134 (a)-(o).
21. *Id.* § 654(a). See also N.C. Gen. Stat. Chapter 95, Article 16. North Carolina's own version of OSHA provides for the ability to build upon federal guidelines and programs.
22. US Dept. of Labor, Occupational Safety & Health Admin., *OSHA Guidance Update on Protecting Employees from Avian Flu (Avian Influenza) Viruses* (2006), www.osha.gov/dsg/guidance/avian-flu.html.
23. US Dept. of Health and Human Servs., Centers for Disease Control & Prevention, *Interim Pre-pandemic Planning Guidance: Community Strategy for Pandemic Influenza Mitigation in the United States - Early Targeted Layered Use of Non-Pharmaceutical Interventions* (2007), available at www.pandemicflu.gov/plan/community/mitigation.html.
24. US Dept. of Health and Human Servs., Centers for Disease Control & Prevention, *Planning Resolution Between Secretary of Health and Human Services Michael O. Leavitt and Governor Michael F. Easley of North Carolina* (2006), available at www.pandemicflu.gov/plan/states/northcarolina.html.
25. US Dept. of Health and Human Servs., Centers for Disease Control & Prevention, *North Carolina's Pandemic Influenza Response Plan* (2006), available at www.pandemicflu.gov/plan/states/northcarolina.html.
26. See NC Gen. Stat. § 130A-145 which gives the State Health Director power to declare quarantine and prescribe rules and regulations necessary to prevent the introduction of an epidemic disease into the state or control the spread of an epidemic disease within the state.
27. State of NC Dept. of Health Pandemic Influenza Response Plan, p. iv. (last modified February 2007), http://epi.state.nc.us/epi/ gcdc/pandemic.html.
28. State of NC Dept. of Health Pandemic Influenza Response Plan, Appendix S-1, p. 2. (last modified February 2007), http://epi.state.nc.us/epi/gcdc/pandemic.html.
29. State of NC Dept. of Health Pandemic Influenza Response Plan, Appendix S-1, p. 1. (last modified February 2007), http://epi.state.nc.us/epi/gcdc/pandemic.html.
30. State of NC Dept. of Health Pandemic Influenza Response Plan, Appendix S-1, p. 2. (last modified February 2007), http://epi.state.nc.us/epi/gcdc/pandemic.html.
31. *Id.*
32. *Id.*
33. *Id.*
34. State of NC Dept. of Health Pandemic Influenza Response Plan, Part B, p. 2. (last modified February 2007), http://epi.state.nc.us/epi/gcdc/pandemic.html.
35. State of NC Dept. of Health Pandemic Influenza Response Plan, Appendix S-1, pp. 2-3. (last modified February 2007), http://epi.state.nc.us/epi/gcdc/pandemic.html.
36. State of NC Dept. of Health Pandemic Influenza Response Plan, Appendix I-1, p. 2. (last modified February 2007), http://epi.state.nc.us/epi/gcdc/pandemic.html.
37. 45 CFR §§ 160, 164 (2005).
38. *See Id.* § 164.512(b).
39. Under North Carolina's Workers' Compensation statute, N.C. Gen. Stat. § 97-53, if the employee's disease meets certain tests imposed by law, it can be compensated. There must be a causal relationship between the employment and the disease. It cannot be a disease that is an ordinary disease of life to which others are exposed.
40. In this regard, employers must be aware of the risk of possible racial and national origin discrimination if groups of workers in affected industries (e.g., poultry processing) who must be sent home are predominantly from a particular ethnic or racial group.
41. *See supra* note 21 at pg. 47.
42. *Id.*
43. 29 U.S.C. §§ 2601-2654 (2005); 29 C.F.R. §§ 825.100-.800 (2005).
44. The term "serious health condition" is defined at 29 U.S.C. § 2611(11) (2005).
45. *See, e.g., Miller v. AT&T Corp.*, 250 F.3d 820, 832-33 (4th Cir. 2001) (holding that flu symptoms and treatment constituted serious health condition requiring FMLA leave).
46. *But see Ragsdale v.Wolverine World Wide, Inc.*, 535 U.S. 81, 95-96 (2002) (striking down regulations that prohibited employers from retroactively designating leave as FMLA leave). The effect of this decision is that employees will not be entitled in every case to more than twelve weeks leave if an employer fails to designate time as FMLA qualifying.
47. 42 U.S.C. §§ 12101-12213 (2005).
48. 29 C.F.R. § 1630.9 (2005)
49. 29 U.S.C. §§ 1001-1461 (2005).
50. *See, e.g., Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 75 (1995) (holding that an employer could eliminate retiree medical benefits based on reservation of right to amend plan provision set forth in summary plan description).
51. *Id.*
52. 29 U.S.C. §§ 201-219 (2005).
53. "Periods during which an employee is completely relieved from duty and which are long enough to enable him to use the time effectively for his own purposes are not hours worked." 29 C.F.R. § 785.16(a) (2005). Generally speaking, if an employer "suffers or permits" the employee to work, knowing or acquiescing in the performance of work, and such work benefits the employer, then the work is compensable. *Id.* § 785.11.
54. Prudent planning for such pandemic contingencies will become a normal part of an employer's emergency preparedness. Creative approaches to preparedness can be developed using the currently voluntary National Fire Protection Association (NFPA 1600) *Standard on Disaster/Emergency Management & Business Continuity* (2004), which is available at www.nfpa.org/assets/files/PDF/NFPA1600.pdf. This standard has been endorsed by the United States Department of Homeland Security.

The Incredible Will of Edna Bell Hall

By Jennifer Harrod

For a prospective client, David Hall was terse. "I'm calling you from my car. I've just seen my mother's will, and I need a lawyer."

"Ok, David, can you come..," Bill Boothby checked his calendar "...at 11:00 tomorrow?"

"That works."

"Who benefits under your mother's will?"

"Woman named Michelle Stokes." David said the name as if it might be an alias.

"I gather you're thinking about contesting the will?"

"You better believe it."

Bill gave David directions to his office and reserved a conference room. He got out a new legal pad and wrote "Hall" across the binding.

The next day, Bill offered his client a glass of water before they settled into chairs at the conference room table. As David drained the glass, he tipped it up to his mouth so violently that the ice cubes broke formation and rattled out of the glass and down his shirt collar. Bill winced and looked busily at his blank legal pad, while David scooped at his collar.

David had arrived with a large folder of documents. He pulled out a handful of photocopied papers and slapped them on the table. The top page was handwritten, on lined stationery with a picture of gamboling kittens.

"Tell me about your mother and what you know about the woman she's left her estate to."

"I can't believe this." David swung his hand in a wide arc at the stack of papers. The papers rustled a little in the downdraft. "You're not going to believe it. In the last year or so, my mother had withdrawn from her family. Me and my wife Jessica, we're about all she had. But Mom had no interest in seeing us, visiting us. I didn't understand it at the time, or believe me, I would have done something about it. I was proud of her for being independent." David gave a short barking laugh. "Which until all this, she always had been."

"Oh?"

"Oh is right. She must have had some sort of stroke that gave her a personality change. Or she was depressed or something. Mental illness is very common among the elderly. I've been researching it. Not to mention, apparently she was a secret drinker. Sign of alcoholism, you know. I had no idea, none at all. Like I said, if I had known how susceptible she was to this sort of manipulation, I would have kept closer tabs on her."

"What do you mean, 'manipulation'?"

"About six months ago, Mom invited her neighbor—this 'Michelle Stokes'—and her daughter to come live with her. Totally out of the blue. I've barely ever set eyes on the woman. Waitress at a meat-and-three. Be honest with you, always thought she was a nutjob. When Mom called to tell me, I about jumped in the car to bring her to our house down in Charlotte. Wife talked me out of it." David mimicked his wife's voice, "'Your mother wants to take care of herself in her own way. She has the right to manage her own affairs.' And when I looked at it that way, I agreed. At the time, anyway. But Jessica admits she was completely wrong. Because that phone call was the last time I spoke to my mother without that Michelle being somewhere around."

Bill took rapid notes on the legal pad. "Sounds like Ms. Stokes may have exercised undue influence on your mother. And you think your mother may have been an alcoholic. What about possible mental illness?"

"Mom seems to have been having some sort of religious mania. Saw visions of angels, that kind of thing. Could be bi-polar disorder. Dementia, at her age. I printed out some articles from the internet, if you want to see them." David patted his fat folder. "And then she fell in with some group that sounds like communists. And gave away all her money. I know it sounds bizarre. But it's all in there." David waved at the papers. He and Bill both looked at them. The kittens looked back.

"Ok, then, I'll take a look and give you a call tomorrow to discuss where we go from here."

"Great. Thanks, Bill. Here's my card, so you have all of my contact info."

Bill saw David to the elevators and went back to his office to read the will.

***

To whom it may concern. David, and whoever else wants to read this after I'm gone.

I, Edna Bell Hall, being of sound mind, write this, my last will and testament. This is all in my own handwriting, which you can check by looking in my recipe box. A lawyer in my church told me this would be legal if I wrote it in my own handwriting and kept it with my important papers. So I have put it in the Whitman's candy box in the back of my

The Results Are In!

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

dresser drawer, which is where I keep the title to my car and David's birth certificate. Don't have a hissy if you find it somewhere else. I have a feeling I may want to get it out and read it over.

My lawyer friend told me that I should say this: I know who my family is and I know what earthly goods I have in this world. My family is mostly my son David and his wife Jessica. They don't have children. And the Lord has blessed me with material things. I've got this house which of course has been paid off since Howard died in 1984. I have all the furniture and doo-dads I've picked up over the years, including my Fiesta Ware collection, which I know is worth a lot. David, I could tell you never thought much of my pretty things. So by all means don't let me forget to mention that my last statement from Bank of America Securities says I have $2,398,245.18 worth of stocks, bonds, and I don't know what-all else. Hard to believe how much daddy's farm sold for. Of course, by the time I die, it may be a lot less money in there, but I'll explain about that. I told my investment advisor just to invest in whatever he thought would be best for me. He wanted me to do all these trusts and such, but I told him that was too much fuss for an old mountain woman. Speaking of which, I still have that house up at the High Vista Country Club. I don't know why Howard ever bought it. Every time I get the tax bill I think about selling it, but David, I know you and Jessica would be disappointed, so I've hung on to it all these years. That's the last little bit of land I have up there.

David, I know you are reading this, and I will tell you right now that you won't like it. But I'm not anywhere near as crazy as you think I am. For one thing, I have never told a soul what I am doing with all my money. Except Brooke, of course.

Here's what I want to say, in a nutshell. David, I'm leaving you that country club house, and $100,000 to pay for the dues and the taxes and all. You and Jessica take any of my what-nots that you want. Let Cynthia and them take one piece of jewelry each, to remember me by. All of my other worldly goods go to Michelle Stokes.

Now, that's my will, and I should probably stop there. But I know you are going to be mad at me David, and probably hurt, so I am going to try to explain it to you. I guess I have your attention at least.

So. When you were a tiny baby, I like to never got off the couch. Your weight, sleeping, held me in that spot for hours. Then your daddy took to complaining about my poor suppers, so I fixed you a little pallet inside a laundry basket and hauled you all over the house. I swan, you were the best little thing. I'd be singing you *Rock-a My Soul*, and you'd look up at me with a little furrow between your eyes and hollering "Ah ah ah!" You and I were a world for each other. It's hard for me to believe sometimes that you're off in Charlotte with a wife and your own business.

I don't know what got me going on your baby days, but I don't want to start over, so let it be. What I wanted to explain is how come I'm leaving most everything to Michelle. I guess you could say the angels made it happen.

Every fall, I get the itch to start on my angels. So I go over to Jo-Ann's and buy ten cones of white thread and one gold for the halos. Crochet just eats up thread. I love the way those stiff cones turn into dainty little angels. Seeing them lined up on the hall table right before I give them away is one of the happiest times in my year. It's like a crowd of beautiful children, going out to give the good news to the world.

You may think this is silly, but every stitch I take I think about someone I'm making them for, and I pray a little. Lot of times I wonder what you're doing, or Jessica. I can see her a little, maybe in Harris Teeter scrunching her face up trying to decide which size detergent will give better value. But I can't seem to think what you might be doing. Best I can do is imagine you sitting in an office. What does a management consultant do? You never have explained it too well. With my friends from church, I pray for them to love the Lord and grow up happy, like that. Maybe I might make up a little story about one of their children resisting temptation, like not picking on a little child who's unpopular.

Year before last I made one for Oprah, but she didn't ask me onto her show. Did you know she was building an orphanage in Africa? It has special guest quarters just for her. Ever since Michelle started renting the house next door, I've been making her an angel. Brooke was just a little bit of a thing. I hardly knew them back then. But something about Michelle and little Brooke just stuck inside of me. Thinking about them gave me a sad sick feeling under my breastbone. All the time they lived in that house, I never saw them plant one flower or have a single picnic. They never seemed to go anywhere but work and school and the grocery store. I guess I thought they could use the prayers, and while I was at it, I just as well do an angel. Every year, I made an angel and carried it over to them. I'd stay just long enough to hand over my angel. Michelle's house scared me a little, it smelled like dirty clothes and it was always too dark. And next day, there would be a nice thank you note stuck in my mailbox. Lots of years, that was about all there was between me and them—an angel and a little note.

This is last fall I want to tell you about. I was pulling up in the carport after my Jo-Ann's trip. And Brooke was just getting off the school bus. I called out, "Hello there!" She raised her little head up and said something, but I couldn't hear her over my bags rustling. When I looked up, here she was plodding across the yard. And she said, "Have you got any old magazines I could cut out the pictures? For a school project?" That's how it got started. I had some old *Southern Living* and *Better Homes & Gardens*, so I asked her to come into the house. I dumped out my Jo-Ann's bag to give her something to carry the magazines in. She reached out her little hand slow like she was trying to catch a butterfly and she says, "What's that for?" I told her it was for my angels. She picked up the Jo-Ann's bag, said her thank-yous, and headed to the door. "Don't you want a cookie?" I asked her. "No thanks," she said, "Bye." So there she went, back across my yard and up to her house. She could open that door so fast and get inside, that you were wondering if she was ever there at all. House looked just as dark and quiet as before she went inside.

I stood there a while longer looking at the house, and then I reckoned it was about time to have my Miller Lite. Howard always had a beer after work. After he died I thought I might as well drink the rest of the six pack. Somehow I kept it up. I used to bring it to him, while he watched the news in the den. And he would say, "Edna Bell, after a long day, this beer's the only thing prettier than you." When I hear the air hiss out of the can, I can sort of still hear him say it. I might have one or two more before bed to help me sleep, but that's it. The Bible just says "Be ye not drunk with wine," it doesn't say a thing about having a beer or two. That's what your daddy always said.

The next day here comes Brooke again, to give me a thank you note. It was a perfect little bread-and-butter thank you note, just like her mama always gives me for the angels: "Dear Mrs. Hall, Thank you for the maga-

zines. They have lots of nice pictures. Thank you again. Your friend, Brooke." There was a little drawing on it of a mouse holding a flower.

I made a fuss over her picture, and put it up on my refrigerator. And then I asked Brooke if she would like to stay for some hot chocolate. I got out the Hershey's cocoa, and poured some milk in a pan. And she was just watching me the whole time. When it was done, I poured it into two mugs and sat down at the kitchen table with her. She kept picking up her cup and taking a tiny sip, and then putting it down again. Finally, I couldn't stand the quiet anymore. "Do you like it?" "Uh huh. My mom always makes it out of a silver envelope in the microwave," she says. Suddenly, she drank it down, and said, "Thanks for the cocoa. I better go." She skedaddled out the door before I could halfway get out of my chair. "Come back again sometime," I called.

Nothing to do but get busy on the angels. I started with Michelle and Brooke's. While I crocheted, I was thinking about them and asking the Lord to send them a little cheerfulness.

After that, Brooke just kept coming over to my house every day after school. At first, she would sit on the floor in my den and look at your old books, David. She favors books about animals. She didn't say much, but after a few days, she showed me a picture of a droopy old Bassett hound.

"He's nice, isn't he?"

"Oh, yes, most certainly," I said.

"Mama says we can't get a dog. She says she can hardly take care of us."

"Well, now." I didn't want to contradict her mother, but I didn't want to agree with her either. I wanted to pick Brooke up and hug her. But she's not a real huggy-kissy little girl. Before she started coming over here, what did she do by herself all day? I have no idea in this world. Every day we had a little special snack, and then she would run on home before her mother got there.

When she finished looking at your books, she hung over the arm of the couch, watching me. I can whip through one of these angels in a couple-few hours by now.

"That looks hard."

"Naw, sweetheart. My old grandma taught me how to crochet when I was littler than you. You want me to show you?" So the next thing you know, there I am showing her how to make a simple chain with a big hook. She held it all up in the air next to her face, but I didn't say anything. I was practically holding my breath, hoping she would get the hang of it. And she did! When she counted out the first chain and started on the second round, her little eyes went wide.

"I'm doing it!"

"You sure are, sweetheart." I gave her a little smack on her knee, I was so proud of her. Of course that first angel was gray from her sweaty little hands working over it. And it was whopperjawed. But I just washed it, and shaped it up with some cornstarch and water, and you'd never know it was her first one. Every day after that, Brooke and I sat side-by-side on the couch, just crocheting away! When she's concentrating she has this funny habit of holding her breath and letting it out in gasps every few seconds. And she's not much of a talker. If you ask her about school and who she played with she always says "it was fine" and "no one really." But I was glad to have her around. When she finished her first angel, I asked her who she wanted to give it to.

"Mama."

"Who's the next one for?"

She paused. "My teacher?"

"You don't have to decide now. Want to know what I do? While I work, I think about my friends and imagine what they're up to and how much they will like their angel." I watched her out of the corner of my eye while she worked. She had a little frown on her face from concentrating. Every once in a while she would stop and count the stitches or ask me what part comes next. When she was half-way done with a skirt, I said, "Who are you thinking about right now?" Brooke started and almost poked herself in the eye with that hook.

"What? I dunno." She didn't look at me, though, and I didn't really believe her. I let it go. Maybe a little boy she was interested in. It was hard to know what she was thinking.

She kept making angels and I did, too. I put mine on the hall table like always. Brooke put hers on the what-not stand where I keep my cup and saucer collection. She stood her first one up on the little shelf on the top, next to a pink cup with a rose painted inside of it. Once she asked if she could have her hot chocolate out of that cup, but I told her they were just for pretty. Now each time she finishes an angel, she perches it on a saucer "so the angels can enjoy the cups." At first I thought it looked right funny, but now I like to see them there while I'm eating my soup.

So, David, by the time you and Jessica came for Thanksgiving dinner, there were three rows of angels on the hall table and at least ten peeking up from my cup collection. I had a little speech planned. I was going to tell you all about my new friend Brooke when you asked about the angels. But I guess you and Jessica didn't notice. Jessica went straight to the kitchen to put the green bean casserole in the microwave. Her eyebrows went way high up, and she gave you a look over my head. I guess she noticed the soup spatters. It's not something I pay any attention to, usually.

And then we three sat there all during dinner, with me trying to think of things to talk about. Ever time I said anything, you and Jessica would look at each other. And then one of you would finally say something back. With all the eye glances, the conversation never exactly flowed, you might say. I finally brought up the angels myself.

"Do y'all want to go ahead and take your angel with you, so you can put it on your tree before Christmas?" Jessica cut her eyes at you.

"Mom, I told you, we're going on a holiday cruise. We're not going to have a tree this year. I wish you would come with us."

"And I told *you*, a cruise to Jamaica is not Christmas." Really, David. If Jessica had to roll her eyes at you all the way to Jamaica and back, she'd roll them right out of her head and into the ocean. The visit was pretty well over then. Jessica picked out an angel, and the two of you took yourselves back to Charlotte.

I was so glad to see little Brooke after Thanksgiving. When she came over on Monday I said, "Even though you can make your own cute little angels, I'm still going to give you one *I* made. That's our tradition." A shy-like smile came up on her lips, and kept on spreading out like you wouldn't believe. She picked out the smallest one. She held it cupped in her hands like a baby bird, looking in at it with a soft expression on her face.

"Now, let's get on our coats," I said. "It's time for me to start delivering these angels." She put her angel down carefully and got her coat. I made her take a hat too. We loaded up the giftbags in the back of my car, and settled ourselves in the front seat. Brooke buckled up right away. I hate how the seat belt wads up your clothes, but I buckled mine, too. Then I looked over at her and had to laugh. Her hat has a furry trim, and she was peeking out at me like a little Eskimo. "Ready?" I asked.

Every house we went to, I was nervous standing on the steps with Brooke and my lit-

tle angel offering. And then the door would open with a little pop, and a rush of hot air, and there would be one of my friends from church. Like Adelia. "Oh hello, Edna Bell. Merry Christmas!" A little fake-y, but she's that way. When she saw Brooke standing there a little behind me, her voice got even higher, and she said, "Who have we here?" We got invited in, and Adelia gave us Christmas cookies and cider. She sat there with her bright pink lips stretched over her teeth like she wanted to eat Brooke up. Brooke sat next to me, and acted like a little lady.

When we got back in the car, Brooke said, "She doesn't have a little girl."

"No, honey, she had sons, like me. No little girls."

At every house we got a little holiday snack, and had the same conversation about what Brooke was learning in school. You have to go visiting with a little child to realize how doggone old your friends have gotten.

The next day was Brooke's mama's day off so I was surprised to hear a knock on the door. I was resting my eyes a little.

"Miz Hall?" Brooke's little voice found its way down the dark hallway to my room.

"Just a minute sweetheart." I didn't want to scare her by appearing in my old housecoat with my hair ever-which-away. But it was worrisome that she came in without waiting for me to open the door, so I hurried out.

She was standing in the foyer holding a shoe box. She started talking fast.

"Miz Hall, can you keep my angels? Mama says we can't keep a thing, not a thing where we're going." I cut on the light so I could see her. Her eyes were red.

"Come here, come here." I dropped down on the deacon's bench in the foyer, and pulled her down beside me. At last I had my arms around her. She collapsed against my shoulder.

"Brooke, what is it honey?"

"We're getting evicted out of our house, and Mama says no way is she going home, so we're going to stay at her friend's. But we have to sleep on the couch."

"Well, we'll see." I went in the kitchen and made her some hot chocolate. While she was drinking it, I got dressed. And then I did what I should have done two months ago. I went to see Michelle.

Long story short. I don't know why I was so nervous to talk to Michelle about Brooke. She's just like a grown-up version of her. And just as scared. We were three people huddled up in two houses. So I told her how Brooke and I had gotten to be friends. And how sad I would be if they moved away. How I had two whole bedrooms I wasn't using, unless she was dead-set on sleeping on a couch. And before long, we were three peas in a pod. Just that easy.

Next thing you know, the house was like a Christmas movie. I dug out all my Coca-Cola Santas to liven things up, and I started playing Christmas albums. At first, Brooke didn't know the words, but pretty soon she could sing along to every one. Our favorite is *Angels We Have Heard on High*.

While I was out at the grocery store one day, Michelle and Brooke put up a tree to surprise me. Brooke met me at the door bouncing up and down on her toes. She made me close my eyes and then she led me into the living room by my elbow. All the angels I ever made for Michelle and Brooke were hung in a sort of spiraling line threading up the tree. I had no idea there were so many. And the little twinkly lights shone through their skirts. I couldn't take my eyes off of them. It was like a multitude of the heavenly host appearing. It made me think about all the angels I had ever made for everyone—that really would be a host! And a high soft sound began to fill my head. "*Glory to God! Glory to God in the Hiiigh-est!*" Over and over. I got kind of lightheaded.

Brooke was looking up at me, waiting to see my reaction to the tree. I couldn't think what to say. I gave her a little half hug, and said "Aren't you smart! . . . Welp." And I just turned around and went into my bedroom to have my Miller Lite. As the Bible says, I pondered these things in my heart. I was sure Brooke had been put in my life for a reason, but I didn't understand it yet.

Next day, Brooke and I were sitting there crocheting together, and I said, "You have you a whole raft of angels, honey. Who're you going to give them all to?"

She kept on looking down at her crochet, and said something that sounded like "all the other old ladies."

"What do you mean, sweetheart? What other ladies?" But just then, her mama called her from the kitchen, and she ran off. That high angel-type singing came back in my head, like the Lord was trying to tell me something.

There I sat, trying to figure out what had been going on in that round little head of hers. *The other ladies*. What could she mean? Like all my friends? Maybe other ladies who would enjoy a visit from a little girl who makes crochet angels. A little girl to eat their cookies. Had she been sitting there all that time, crocheting and thinking about that? Precious little thing! I couldn't sleep a lick that night. And the music has hardly ever left me since then. I can hear it this very minute. So I know I'm doing the right thing.

First thing next morning, Brooke and I took ourselves to the library. The librarian helped us research on the internet, if you can believe it, and that's how we learned about this thing called an "intergenerational commune." We printed out about a telephone book of pages on that. From that, I learned about a co-housing organization, and I've joined up. They send me all sorts of things. Every Sunday, I read the real estate section in the paper, trying to find the perfect place.

Do you get it yet? The perfect place for the house where old ladies with too much time on their hands can live with kids who need a little attention. And all of the rooms will have one of Brooke's angels. Won't that be cute? I want Michelle to quit her waitress job, so she can go back to school and get her nursing degree. Or maybe something in business. Then she can run the place. She's smart as a whip.

So David, that's why I haven't had a lot of time to visit lately. I'm working on Brooke's House all the time.

Your daddy and I are looking down on you right this minute, I bet. How about that? I love you.

***

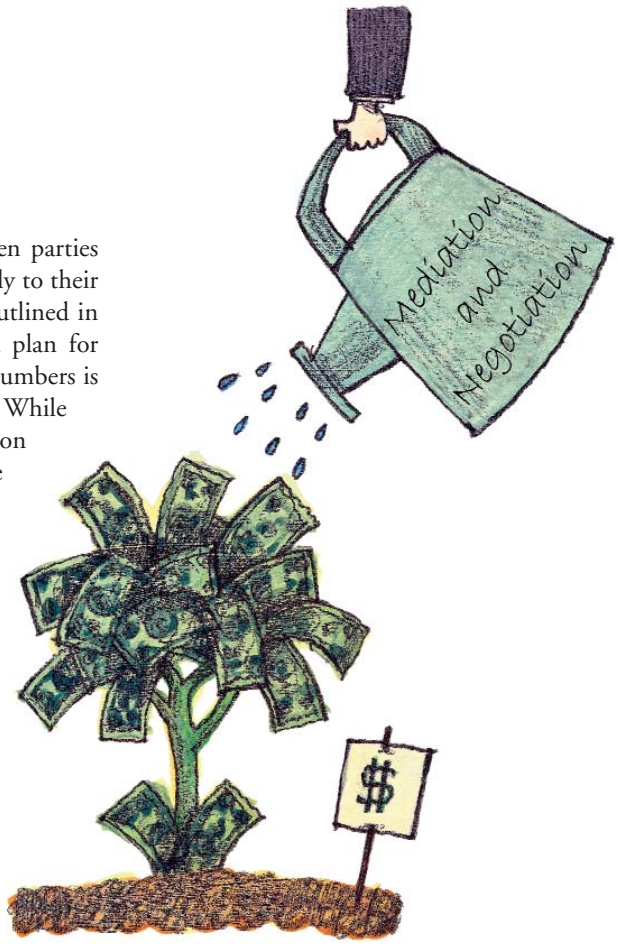
Bill Boothby tapped the bottoms of the pages against his knee to straighten the stack. He walked over to the desk to make a call.

"Josh? Bill. Have you got time to work on a will caveat case with me? . . . Great. . . . Ha. Yeah, not all to the family dog, but pretty close. Should be interesting. Get my assistant to find you the undue influence complaint we did in the Wilson case to use as a go-by." ■

Jennifer Harrod is a partner in the firm of Brooks, Pierce, McLendon, Humphrey & Leonard, LLP. She represents clients in all types of commercial litigation in federal and state courts, and she also assists corporate clients in conducting internal investigations. Her wonderful, unique, and compassionate grandmothers, Rena Harrod and Hazel Watkins, are her constant inspiration.

A Summer Read That Will Pay Off

By M. Ann Anderson



As I was mediating a case where the parties were many thousands of dollars apart and were saying "I will not bid against myself," and "the defendant is not here in good faith," I wished I had finished reading Andy Little's book Making Money Talk: How to Mediate Insured Claims and Other Monetary Disputes. Little's book is a practical guide with specific suggestions about how to assist the parties who reach road blocks in mediation. While the reader may have developed solutions for responding to these reactions from parties, Little offers insights and suggestions that novices as well as seasoned mediators and experienced negotiators will find helpful with money mediations.

Little begins the book with a discussion about the first settlement conference in North Carolina under the court-ordered mediated settlement conference—which he conducted—in 1992. Little outlines his frustration in using the classical mediation model in mediating that civil case, and other civil cases, where the parties are negotiating over money. Little states: "I soon learned that claims for money rarely are resolved with elegant solutions for mutual gain. They are usually settled with prolonged bargaining consisting of numerous rounds of painful concessions" (p. xii). That statement alone should alert most civil case mediators that this is a book by an author who truly understands money mediations. What *Making Money Talk* does is put the practical face on theories of mediating cases where a monetary settlement is the main goal, if not the only goal, of the mediation.

One of the most instructive chapters in the book is Chapter 3, which deals with facilitating dollar movement when parties in a private session react negatively to their opponent's number. Guidance outlined in this chapter about developing a plan for moving through the settlement numbers is a major take away from the book. While numbers communicate information about the settlement, Little observes that ensuring that the numbers communicate the correct information about the settlement range can be an important part of the negotiation plan.

While most of the discussions would be helpful to attorneys, mediators, negotiators, and insurance companies, Chapter 6 gives advice that may be more specific to mediators who hear the same objections over and over to numbers presented to them at a mediation. Chapter 6 outlines "25 Settlement Conference Cliches" and gives transcripts of what a mediator might say to the parties when presented with one of the statements.

The majority of the book is devoted to practical skills; however, Little discusses the various theories and criticisms of mediation. The conclusion Little draws, after discussing the different theories, is that a mediator should use the mediation process that fits the case, whether it be transformative, facilitative, or problem-solving.

Making Money Talk is a must-read for anyone who negotiates either as a mediator or as an attorney. In fact, I am keeping a copy in my briefcase for those instances when someone presents me with Scenario #14: "But We Don't Have Any More Room to Move." ■

M. Ann Anderson is an attorney-mediator from Pilot Mountain, NC, who has been mediating since 1993. She is a former chair of the Dispute Resolution Section of the NC Bar Association and is a member of the North Carolina Academy of Superior Court Mediators.

Article originally printed in the June 2007 issue of Dispute Resolution, *published by the NCBA. Reprinted with permission.*

Making Money Talk: How to Mediate Insured Claims and Other Monetary Disputes. *J. Anderson Little; ABA Publishing, 2007. 261 pages. Softbound $42.00. ISBN-10; 1-59031-825-0; ISBN-13; 978-1-59031-825-6.*