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Celebrating 20 Years of Legal Specialization

Specialization's 20-Year History: Program Evolves, Adapts, and Struggles over Growth

By Mike Dayton

This year marks the 20th anniversary of the State Bar's specialization program. More than 600 North Carolina lawyers have earned the right to call themselves board-certified specialists, and hundreds more are certain to follow in the next two decades.

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Specialization has earned its place as a cornerstone of the State Bar's efforts to match the public's need for specific legal services with lawyers skilled in eight practice areas.

But when specialization was launched in 1987, no one could have foreseen the stormy debate the program would ultimately generate. What could be controversial, after all, about giving a formal nod to lawyers in their field of expertise?

Yet specialization's short history in North Carolina has been marked by passionate disagreement over the program's growth and direction, and at times its very existence has been challenged.

The program has weathered critics who questioned whether specialty certification harmed small-town lawyers, and it has faced repeated tests over which practice areas should be recognized for certification. Through it all, the specialization board and its leaders have demonstrated an exceptional resiliency, adapting its rules and procedures with each fresh challenge.

Pre-Certification Activity

The specialization program has its roots in the early 1980's, when State Bar President E.K. Powe established an *ad hoc*

group, the Case Committee, to study various ways "to improve the proficiency of attorneys and the delivery of legal services to the public," according to a report in a 1982 State Bar *Newsletter*.

Among the topics on the committee's agenda were mandatory continuing legal education, specialization, and advertising.

Following 18 months of study, the committee rejected mandatory CLE as a viable option but recommended that a specialization program be established. The committee drafted a proposal that essentially tracked the American Bar Association's Model Plan for Specialization.

Under the plan, lawyers seeking certification had to be licensed for at least five years, devote a substantial portion of their practice to the specialty area, and attend related CLEs. They also had to receive favorable evaluations from their peers and pass a written exam.

The State Bar adopted the specialization proposal in October 1982 and the Supreme Court certified the plan two months later, paving the way for the Board of Legal Specialization. Grady B. Stott was named as its first chairman.

The board presented five potential specialty areas to the Bar before settling on three categories: real estate, bankruptcy, and estate planning and probate. Real estate was split into subcategories of residential and commercial in October 1985.

After the committee worked through several drafts of proposed standards, the plan won approval from the State Bar Council. Separate committees in each specialty area then began the laborious task of drawing up exam questions.

In anticipation of the first tests, scheduled for November 2-3, 1987, in Raleigh, the Bar published a special legal specialization supplement in the spring 1987 State Bar *Newsletter*, complete with rules, standards, and application form. The insert listed A.A. Zollicoffer Jr. of Henderson as the specialization board's chair and Bar Deputy Counsel Fern Gunn as the board's executive director.

The board reported that 112 applicants had applied for the initial exam. The biggest group—49—signed up for estate planning and probate, followed by bankruptcy (38), and real property (25).

State Bar staffer Joyce Lindsay, who has been affiliated with the specialization program since its inception, recently recalled that first test.

"Fern [Gunn] modeled it after the Bar exam," Lindsay said. "We gave each lawyer a card with a number on it, and we had assigned seating. We held it at the McKimmon Center. I remember we worked really hard because we had such a large group taking it. It was labor-intensive."

From those initial exams a freshman class of 92 lawyers emerged who could boast of certification by the State Bar.

Early Struggles

The following year, Zollicoffer gave a glowing progress report and said another 25 applicants were poised to take the 1988 exam.

"By the end of the present year, there should be well over 100 lawyers certified by the State Bar as specialists in the three fields," Zollicoffer said.

Indeed, his prediction proved accurate: a notice in the spring 1989 State Bar *Newsletter* indicated 106 attorneys had achieved specialization status.

But there were signs that the program was not getting the traction the specialty board had anticipated, and some small-town attorneys complained that stringent requirements discouraged them from seeking certification.

Albemarle attorney Early Singletary, who had a substantial practice in estate planning and real estate, said in a July 1988 interview that "the very nature of practice in a small town makes the requirements difficult—if not impossible—to meet."

The board pressed forward with other proposed specialties and got the green light in the spring of 1989 for a fourth category, family law. An additional 47 lawyers were certified in 1989, including 31 family law specialists.

A committee chaired by Raleigh lawyer Joseph B. Cheshire V explored whether a criminal law specialty should be established. That practice area joined the line-up in the spring of 1990. However, plans to hold the first criminal law exam in the fall fell through when only two applicants signed up. The board postponed testing in that specialty until 1991.

Apparently "interested persons did not receive notice of the particular requirements far enough in advance to permit the timely

acquisition of CLE credit in the required categories," according to a report in the fall 1990 State Bar *Newsletter*.

As for the other four specialty areas, only 18 lawyers were certified following the 1990 exam. Bar officials openly acknowledged those numbers fell short of their expectations.

"Too many qualified lawyers are shunning the program," State Bar President Tommy W. Jarrett said in a February 1991 interview. "Everybody can't qualify as a specialist but I'd like to see the program broadened."

In 1991, 38 lawyers applied for the fall exam, an especially low number given that a new specialty, criminal law, was up for testing. By early 1992, 213 lawyers were board certified.

The board scrambled to attract applicants and weighed several measures to achieve that end. Under one controversial proposal, lawyers who had sufficient experience in a recognized specialty would be grandfathered in without an exam.

That idea was scuttled in April 1992 after being roundly criticized as an unacceptable dilution of the program.

"After a considerable amount of debate and giving due consideration to a significant amount of comment from persons who have already been certified, much of which indicated opposition to alternative standards, the board has decided not to recommend alternative certification standards at this time," according to a report in the spring 1992 State Bar *Newsletter*.

Turning the Corner

While the program might have been lagging behind the board's expectations on the recruitment front, the news about retention was encouraging. Once lawyers were certified, they stayed in the program, statistics showed. Under the board's rules, specialists had to be recertified every five years. Of the 91 lawyers up for recertification in 1992, 87 renewed.

To boost participation, the board embarked on an aggressive public relations campaign, running testimonial ads from specialists that praised the benefits of the program. It also pursued a few perks—for example, lining up a separate listing for specialists in the business pages. This not only attracted new recruits, but also advanced the program's mission to assist consumers to find a qualified attorney. The board continued publication of a directory of board certified specialists like the one released in January 1991.

Another 35 specialists were certified in 1992, bringing the total to 248. Still not satisfied with the numbers, the board sought other steps in 1993 to broaden the program's appeal, including a split of bankruptcy and criminal law into narrower subspecialties.

"We want to encourage more lawyers to specialize," said Asheville lawyer Sara Davis, who chaired the Board of Legal Specialization during that period. "We're tailoring the subspecialties to attract as many lawyers as we can."

The board's various efforts appeared to pay off in 1993 when 50 lawyers were certified—the biggest influx of new blood since the program's first exam. The program increased to 292 specialists, or about 2.4% of the 12,000 North Carolina lawyers.

"This year was a real turning point," said State Bar Assistant Executive Director Alice Neece Mine.

The following year, another 42 applicants were certified, including the first specialists in criminal appellate practice. Also certified in criminal law were Buncombe County DA Ronald Moore and assistant DA Kate Dreher, also from Asheville. Moore commented at the time: "It's a matter of professionalism for me. People come in and say the defense lawyer is a specialist. Now I can say, 'We've got the same paper hanging on the wall.'"

Debates over New Specialty Areas

In the fall of 1995, Oxford lawyer Jim Cross, then chair of the specialization board, declared the program to be on solid ground.

"There were 213 specialists in 1992," he said. "We now have 323, not including those taking the exam in the next week or two. That's a 66% increase in a three-year period."

But if the program had turned the corner on attorney participation, it was about to run head-on into new trials over the designation of additional specialty areas.

In the spring of 1995, personal injury was proposed as the sixth specialty, and revised guidelines were drafted over the summer. With little or no negative feedback during a public comment period, quick approval by the State Bar Council at its October meeting appeared to be a formality.

Instead, Walt Baker, a Bar councilor from High Point, raised several objections to the proposal, sending it back to a study committee. It never reemerged.

In 1996, the board took steps to insure that its finances remained on firm footing. While the specialization program had been self-sufficient since 1992, its only source of income was the initial application fee of

$250 plus a $100 exam fee, and another $250 when specialists came up for recertification every five years.

The board's solution: annual dues of $50, beginning in January 1997. Surprisingly, a survey of the specialists revealed that 83% supported the measure. Specialization board vice-chair Christy Myatt, a Greensboro bankruptcy specialist, said much of the money would be used to market the program.

In 1997, immigration law was approved as the sixth specialty area but a proposal to add civil trial advocacy met the same fate as personal injury.

Where other specialty areas focused on knowledge of substantive law, the recommended standards for civil trial advocacy required applicants to demonstrate proficiency in the nuts-and-bolts skills of a litigation practice, including pleadings, discovery, evidence, ADR techniques, and appellate rules.

In November of that year, the Bar's Executive Committee rejected the proposal. Some members complained the standards were too broad.

That prompted State Bar Executive Director Tom Lunsford to rise to the program's defense.

Lunsford said that it was "fair to question whether a proposed specialty, as defined, is really meaningful. If an area of practice is so broad that a consumer is likely to have difficulty finding among those certified someone with relevant expertise, then the purpose of certification is defeated. Those who objected to the creation of a specialty in civil trial advocacy had a very valid point in this regard."

But, he wrote, "As a self-regulating profession, our primary obligation is to govern in the public's interest. The specialization program fills the bill admirably in that it facilitates the intelligent selection of counsel and it encourages competence. It is deserving of your support."

The Next Battleground: Workers' Compensation

Next up was a two-year battle to have workers' compensation designated as a specialty. Board officials had hoped to launch that program in 1998 but twice were forced back to the drafting table because of opposition from members of the workers' comp section of the North Carolina Bar Association.

One concern voiced by section members was that specialists from larger cities would take comp cases from small-town practitioners.

"There are people in the smaller communities who don't have the high volume of workers' comp cases because of where they practice," NCBA workers' compensation section chair Rick Lewis said at the time the proposal was under debate. "They wouldn't qualify as specialists under the requirements, but they can handle workers' comp cases competently."

The proposal also drew opposition from all seven commissioners and 18 deputies at the Industrial Commission.

"We are concerned that having such a specialty will have the effect of discouraging claimants from going to local attorneys who are experienced and quite competent in the field of workers' compensation law, but who must maintain a broader practice because of the size of the community in which they

practice," the commissioners' letter stated.

The debate also showed that many lawyers still harbored doubts about the fundamental concept of specialization. Lewis said a vote by comp section members turned up significant opposition to the program.

"The opposition was to specialization in general, not anything specific to the workers' comp proposal," he was quoted as saying. "There was also a poll taken of the section membership at a CLE. They also expressed opposition."

The original workers' comp proposal required 25 comp hearings tried to an opinion and award, another point of contention. The Bar eliminated that after lawyers and commission officials complained the hearing figure would be nearly impossible to meet, given the trend toward mediation at the Industrial Commission.

The specialty finally won council approval in January 2000, becoming the state's seventh recognized certification area, and the November 2000 exam drew a large pool of workers' comp hopefuls. Among 83 sitting for the specialization exams, 48 were comp lawyers. By the end of the year, there were 489 specialists, a 16% increase over 1999. Application fees from the class of 2000 helped put the specialization program ahead by $60,000.

"This is an important turning point for specialization," Bar Assistant Executive Director Alice Neece Mine said at the time. "It's the first new specialty in several years to have such a large initial application class. And it couldn't be in a better field. Workers' comp is an area where people who need legal help may not be very well educated, don't know where to get a referral, and can't find a lawyer in any way other than phone book advertising. This gives them legitimate information on who to see about a workers' comp claim."

Land Condemnation Rejected Twice

By the year 2002, the state had more than 500 board-certified specialists. The most popular specialty area, estate planning, accounted for 23% of all specialists, followed by family law (22%), real property (15%), bankruptcy (14%), criminal law (12%), workers' comp (11%), and immigration (3%).

That same year, a new dispute developed over a proposed specialty in land condemnation after the State Bar Council okayed publication of recommended standards for that field.

"I am excited about it," said Raleigh attorney George B. Autry Jr., who chaired the committee that drafted the standards. "Land condemnation law is off the beaten path enough so that folks who don't practice it on a regular basis can get in trouble."

But the Bar council turned down the proposal by a close 28-24 vote at its October 2002 meeting. One councilor was vocal in his opposition.

"I would submit that nothing is special about land condemnation cases, and certainly nothing that would rise to the level of a specialty," Gastonia councilor Jim Funderburk said at the council meeting. "It's probably one of the easiest cases to try. A law student with the ink just drying on his law license would be able to try one."

Councilors were asked in April 2003 to reconsider their vote. This time, they rejected the proposal by an even wider margin of 29-17 despite pleas from several speakers who argued land condemnation was a complex area worthy of specialty status.

Once again, the debate called attention to a philosophical rift over specialization.

"I recognize there are a lot of members of the council who don't like specialization, period," said Raleigh lawyer and councilor John B. McMillan, the vice-chair of a committee that drafted the proposed certification requirements. "They don't like the concept. I respect your right to have that opinion. But the issue is not whether there ought to be specialization, but whether this qualifies as one. Our board believes it does, and our committee believes that it does."

Rethinking the Application Process

Following that setback, the board took a hard look at the review process for proposed specialties.

"We took that as a learning experience," Mine said. "We learned that the council wanted any new categories to be recognized as specialty areas by consumers and the Bar. And we learned the council wanted support for that specialty area among the Bar at large as well as lawyers in that practice area."

As a result of that soul-searching, the board revised its procedures for submitting new categories. From now on, any proposed specialty that was pitched to the board would have to be accompanied by the signatures of 100 lawyers who backed its formation and signatures from 20 lawyers interested in seeking certification.

The first specialty to pass muster under those new rules was Social Security, which was approved by the council in October 2005. The first class of 27 Social Security specialists earned certification in 2006.

Another potential specialty area emerged in 2006 when construction lawyers initiated discussion on possible certification. A survey by the NCBA's 530-member construction law section indicated a majority of the 200 respondents favored a specialty designation.

The Future

As the board looks toward the future, it has begun to forge alliances with national accrediting groups. The first agreement was reached with an ABA-accredited agency in bankruptcy, the American Board of Certification.

"Now North Carolina lawyers who take the ABC certification exam can also become certified by the state if they meet the rest of the North Carolina criteria and become dually certified," Mine said.

ABC also grandfathered in existing North Carolina specialists. The arrangement has been so successful that the State Bar is looking for similar deals with other groups.

"We're looking at doing the same thing with the National Elder Law Foundation," Mine said. "We want to set up so that the lawyer can be dually certified but they're only taking one exam, and that's the national one."

Mine predicted the program would continue to evolve, just as it has done for the past two decades.

"I wouldn't be surprised if we don't start seeing other states follow our lead, which may ultimately lead to a situation like the medical fields where they have national certifications," Mine said.

A controversial idea? Only time will tell. ■

Michael Dayton is the former editor of North Carolina Lawyers Weekly *and* South Carolina Lawyers Weekly *and co-author of a book on the history of Wake County lawyers published in 2004. Some of the facts and quotations that appear in this article were drawn from articles he wrote for* Lawyers Weekly *and are used with permission.*

Specialization Focus: A Closer Look at Immigration Law, Business Bankruptcy Law, and State Criminal Law

By Laura Deddish Burton, James B. Angell, and Kate Dreher

Immigration Law

Laura Deddish Burton

"It seemed like a good idea at the time." This is what I remember thinking as I entered the McKimmon Center in Raleigh several years ago to sit for the immigration specialization exam offered by the North Carolina State Bar. I had, like many attorneys, sworn after the bar examination that I would never again take another such test. So what was I doing taking another day-long exam?

My reasons were varied. Immigration law is an intricate and frequently changing practice area that demands constant attention to the laws, regulations, rules, policies, "informal" letters, and whims of a variety of federal agencies and entities. Each case is unique and requires rigorous attention to numerous permutations of applicable facts and laws, as well as the ability to anticipate the potential factors that the client "forgets" to mention but that could make or break the case. It has become clear to me that it is impossible to dabble in immigration and do it well. There are too many exceptions to the rules and the rules change, often retroactively, at a moment's notice. Another element in the practice is the risk that unscrupulous non-lawyers, often "notarios," will take advantage of unsophisticated individuals, charging thousands of dollars and ruining lives. It is important that individuals and companies seeking immigration counsel be able to identify attorneys who will be able to assist with their specific issues and concerns.

I have found over the years that immigration practitioners tend to focus on a specific area of immigration law, such as business, family, removal (deportation), or asylum. I focus on business immigration, generally assisting companies, hospitals, universities, and other entities to bring or keep talented foreign nationals and businesses in the United States (the increasing challenges in doing so are topics for another article). However, business immigration cases often spill over into other areas that require familiarity with the full range of immigration law issues, including family, criminal, and removal, making it impossible to truly practice in a single area. There are also frequent *pro bono* opportunities to assist those in need without the resources to hire a lawyer, which can be an enriching experience.

One of the benefits of the specialization exam itself was the opportunity to carefully study all aspects of immigration law, including several outside my daily practice. This rigorous review increased my ability to spot hidden issues and problems and to provide my clients with a more robust range of options for their cases.

The specialist program is a benefit to practitioners as it encourages and demonstrates a commitment to the practice of immigration law. Immigration specialists in North Carolina are a collegial group dedicated to assisting their clients ethically and vigorously, as well as to increasing awareness of the immigration issues

faced by individuals and businesses, foreign and American. This is partly because immigra-

tion law is quite complex and, I am convinced, partly because we are generally all on the same side of the fence with regards to the needs of our clients (although I hesitate to use that word in the immigration context).

The specialist program is also a benefit to those seeking assistance with a challenging and confusing area of the law, often at a time when they are already dealing with a great deal of uncertainty. The ability to find a lawyer who has been certified in the field is a comfort to clients, both business and individual. Many potential clients specifically seek out board-certified immigration practitioners.

In answer to my own unspoken question on the day of the specialist exam, it WAS a good idea to go through the extensive application process, to study for and take the exam, and to step forward and be counted among the specialists in the field. I am proud of my work and proud to be an immigration law specialist in North Carolina.

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Business Bankruptcy Law

James B. Angell

Business bankruptcy has a quite a few characteristics that cry out for specialization.

First, it has its own set of federal statutes, its own procedural rules, and even its own courts and judges. Few lawyers who fancy themselves general practitioners dare to dive into the unknown waters of the Federal Bankruptcy Court—unexpected provisions of the Bankruptcy Code can have sometimes perverse effects on contracts, state statutes, and even other federal laws. A few brave souls risk filing motions to lift the automatic stay, only to be confronted with esoteric concepts such as adequate protection and indubitable equivalence.

Second, when a business client files for bankruptcy, usually it is either seriously ill or dying a slow death—not the best client. Representing a debtor is like driving the old car you had in law school—once you fix the head gasket, the radiator springs a leak or the clutch goes out. The patience it requires is reminiscent of the entertainers on the old Ed Sullivan Show who kept 20 to 30 plates at a time spinning on the end of a stick. You often have to keep 30 different creditors from pouncing on the debtor by promising enough but not too much to each one. If you represent creditors, it is a careful balance between picking the already slim carcass clean and leaving enough meat for the debtor to recover and fatten up for a later meal. For those of us who don't have the intestinal fortitude to address botched operations or maimed accident victims as personal injury attorneys do, bankruptcy practice is the financial equivalent.

And third, it's almost always a stretch. Business bankruptcy is the mother of all law-

suits. A bankruptcy petition is an invitation to every potential plaintiff against your client to state and prove a claim. A bankruptcy practice can require knowledge of domestic law, construction law, tax law, securities law, business law, contract law, the UCC and/or franchise law, to name a few.

But it can be tremendously rewarding and fun. It is wheeling and dealing at its best—it is a rugby match fought over a limited pile of money, with each party trying to jockey for position. The careful balance a bankruptcy lawyer must strike is to efficiently represent your client so that the cure doesn't aggravate the disease. It involves financial planning, capital restructuring, litigation, business deals, and plenty of meetings and hand-holding. A successful bankruptcy can be a financial resurrection of the client and the fresh start takes on quasi-religious meaning.

Each bankruptcy raises unique issues. In my early years practicing bankruptcy, the parable of the blind men and the elephant often came to mind. One case might involve rejecting a lease, while another might focus on lien priorities and perfection. The next case might focus on a shareholder's right to keep its shares, while another might involve preferences and fraudulent transfer actions.

There are some who have practiced long enough to have a feel for the entire elephant. To me, taking the specialization exam was an opportunity to force myself to put my thoughts in order, to read the entire Bankruptcy Code and Rules from cover to cover, and to put things in perspective. Although there are still bankruptcy lawyers who are more experienced than I am, and certainly smarter than I am, it gave me an opportunity to jump start my knowledge of the practice area and to understand for the first time exactly how the difference pieces fit together. As a lawyer relatively new to the practice, it gave me the confidence that comes from knowing that I have proven to myself and the world that I have competent knowledge of what I am doing. And I still enjoy proudly telling prospective clients that I am recognized as a business bankruptcy specialist and it seems to put them at ease to hear it.

By my count, there are 65 other certified business bankruptcy specialists in the state spread through our three federal districts. When I review the list, I am flattered to be listed among the names I read, from my friend Richard Sparkman, a sole-practitioner par excellence in Angier, to the always gracious high priest of the Middle District, Dick Hutson who heads a medium-sized firm in Durham, and proven experts such as Mike Booe and Terri Gardner, who both practice in some of largest law firms in the state. It takes some effort to get there, but specialization is open to anyone who cares enough to work for it. Being a specialist raised the bar for me and gives me the satisfaction of being listed among many of the elite practicing in my field. I would recommend it to anyone.

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State Criminal Law

Kate Dreher

Certification is a program of the North Carolina State Bar Board of Legal Specialization (the board) designed to help members of the public in choosing legal counsel to address legal problems in specific areas of law. The criminal law specialty is unique in that very often the person needing the services of a lawyer does not get to choose but instead relies on appointed counsel chosen for him by the court. In the case of crime victims or their surviving families, the criminal action is brought by the state and all relevant decisions are made on behalf of the state by a district attorney chosen by the voters, or by an assistant district attorney hired by the district attorney. The victim therefore does not directly choose a lawyer.

The life of a victim may have already been lost and the life of an accused remains at stake in the proceeding and neither individual selects the attorney who ultimately pleads their case. Considering the trauma and loss inflicted on the victims and their families as well as the uncertainty facing most victims and defendants, board certification as a criminal law specialist is an excellent way to demonstrate to a victim or a defendant that if they had had an opportunity to choose their lawyer they would have chosen you. The criminal law specialty certification provides confidence and encouragement to those who find themselves involved in the criminal justice system.

Participating in the board's certification process requires the applicant to set aside some time for a comprehensive review of criminal procedure, the rules of evidence, motor vehicle laws, non motor vehicle laws, misdemeanors, felonies, and juvenile law. Each day's cases require research and practices

designed to address the specific issue of that day. The comprehensive review engaged in by the specialty applicant allows the daily details to coalesce into a recognizable base of knowledge possessed by the specialist. In addition to insuring excellent representation to the client, the availability of the criminal law specialist is a genuine asset to less experienced practitioners in the field of criminal law, as they are naturally inclined to seek the advice of the criminal law specialist in their own daily efforts in the criminal justice system.

As more public defenders and their assistants seek and obtain criminal law specialty status, the public can be better assured of efficient and effective use of tax dollars. Ineffective assistance of counsel claims can reasonably be expected to decline as more members of the criminal defense bar attain specialty certification. The attainment of criminal law specialty certification by district attorneys and their assistants can be expected to have a similar impact on public perception in addition to providing reassurance to victims. It is also worth noting that the courts benefit from having a list of board certified criminal law specialists to rely on when appointing counsel in very serious cases, both in the direct representation of individuals who are facing very serious penalties and in the opportunity to pair less experienced lawyers as co-counsel with the specialist in order to provide valuable training to the less experienced lawyer in a setting that insures protection for the defendants' rights. This factor contributes directly to the efficient functioning of the criminal justice system and provides for the growth and development of the system for future generations. Board certification allows for a more efficient administration of justice by the courts for all of these reasons.

The personal and professional rewards for the criminal law specialist include knowing that the court trusts him or her to be well prepared with accurate information, and that the client or the victim trusts him or her to demonstrate a high level of proficiency on their behalf. Other rewards include knowing that the bar relies on the specialist to assist with the growth and development of his colleagues in the practice for the future well-being of the system as well as to preserve and enhance the reputation of the profession in the present day.

It is clear that those practitioners devoting more than 25% of their practice to the criminal justice field, where the most fundamental rights are so often at stake, and where the right to counsel is guaranteed by the Constitution, should be motivated to attain specialty status. The greater the number of those practitioners seeking recognition as specialists becomes, the greater the benefits to society, the profession, the client, the particular body of criminal law, and to the individual practitioners. ■

Kate Dreher is an assistant district attorney in the 28th judicial district.

Specialists on Specialization

By North Carolina Certified Specialists

With more than 600 board certified specialists throughout the state, North Carolina boasts one of the top programs in the country. Here, lawyers who have chosen to pursue certification share some of the ways certification impacts their legal careers.

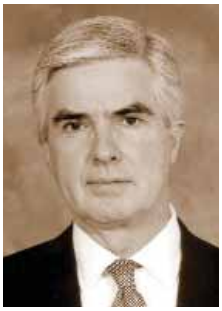
Bill Janvier, Business and Consumer Bankruptcy Law—I am a member of the Bar Association and we have a relatively small Bankruptcy Section. We're very collegial and work together well. When I looked around at my colleagues, most of the ones that I admired and respected were already certified. I thought certification was a good credential, an easy way to show the world that you know what you're doing.

Martha Milam, Family Law—I believe that when the consuming public looks to hire a lawyer, there really is a difference in those who are substantially involved in a practice area and those who just practice a bit in that area. I didn't want to do a disservice to my clients by not really dedicating myself to family law.

Bruce Jobe, Bankruptcy Law—Becoming a board certified specialist certainly helped increase the percentage of my practice that was related to bankruptcy. I became a sole practitioner in 1989 and, in the past several years have really devoted my work to bankruptcy. I think it was a result of becoming certified, rather than a conscious decision. At first about half of my practice was bankruptcy, but I found that I had to back away from other things due to conflicts. I couldn't handle other cases if I was in bankruptcy court the majority of the time.

Mike Colombo, Estate Planning and Probate Law—The things that I hoped would come with achieving board certification have happened. I was a young lawyer with a small firm, in a small town. My certification made a statement to other lawyers, bank officers, the local community, and even the wider community of lawyers state-wide and I began to see a difference in the way they related to me. I had a credential that others could see as an objective validation of my knowledge and experience.

Renny Deese, Family Law—The practice of law is so complicated, particularly in family law these days, that I actually consider it a luxury to concentrate in an area of the law that I enjoy so much. Family law is what I do. It takes me less time to complete a task because I know this area of the law. I get a lot of personal satisfaction from seeing my clients through a difficult time.



Sean Devereux, Federal and State Criminal Law—Certification helped my practice, mainly through other lawyers referring clients to me. I also became active in the Criminal Defense Section of the North Carolina Academy of Trial Lawyers and joined the National Association of Criminal Defense Lawyers (NACDL) and really began to focus my practice on criminal law. I have served as the vice president for membership of the academy and am

reached out to other criminal lawyers to expand the roster of members. Since becoming certified, I've also taught CLE courses at the Academy of Trial Lawyers and at Wake Forest School of Law. When I became certified, I started to view myself as a criminal defense lawyer. It's really been an important part of shaping my practice, my goals, and my view of myself as a lawyer.

Garth Dunklin, Commercial and Residential Real Property Law—The biggest benefit to my clients comes through my devotion to the practice area. When I teach throughout the state to commercial real estate agents I learn so much about the impact of the law and current regulations on business practices. What they see in the marketplace helps me to enhance my understanding of the legal and procedural issues as well.

Kathleen Glancy, Workers' Compensation Law—There was a lot of debate in the beginning about creating a workers' compensation specialty area, but the decision to move forward was clearly the right one. Consumers are better served since the specialty area was designated, and I hope to see more lawyers pursuing the certification in workers' compensation law.

Janet Lyles, Workers' Compensation and Social Security Law—The program raises the quality of the work we do for our clients. It also appears to raise the level of respect for our work. We are all trying to improve our knowledge base and the service that we provide. It's nice to see some recognition for the work and for our commitment to the practice of law.

Cynthia Aziz, Immigration Law—In an ideal world, certification would serve to discourage dabblers who really provide a disservice to clients. Immigration law has become too intricate and full of oddities

for someone to dabble successfully. Certification encourages continuing education and limiting one's practice to the specialty area, both of which ultimately make us better advocates for our clients. Immigration practitioners have been around in the Carolinas for about 30 years and the need is greater today than ever before. There are also a lot of non-lawyers doing this work. It is a consumer protection issue. Unfortunately, the nature of our clients makes it easier for them to fall prey to the unqualified.

Charlie Brown, Estate Planning and Probate—Certification raises the level of practice. By not doing 50 different types of things and specializing in one area, you raise your knowledge base in that area. You interview clients and know what to do to help them. You don't have to re-learn every time something interesting comes in the door.

Kate Dreher, State Criminal Law—Becoming a specialist helps to keep the level of enthusiasm up. It keeps practitioners remembering that they are professionals. And it helps people to enjoy their work, to know that it is not simply a job. I believe that this is a profession and I came here to help. I learned this well and I am comfortable with my work.

Ann Robertson, Immigration—My father, who is now 87, practiced as a family physician. He was one of the first advocates of board certification for doctors. He even believed in regular re-testing to keep your knowledge and skills strong. So I am a strong believer in specialization and hope to see the program continue to grow. It just makes sense to focus your practice and challenge yourself.

Valerie Johnson, Workers' Compensation Law—There are lots of attorneys in the Triangle area. Certification does help to differentiate between individual attorneys and their areas of practice. It can be hard for consumers to know where to go when they need legal help. Certification also allows attorneys to be able to locate which lawyers concentrate on a specific area for referral purposes.

Jimmy Narron, Estate Planning and Probate Law—Board certification has done a lot to help the public to realize that competent legal services are available in smaller communities, where access may be easier and overhead is smaller. We also have to be aware of the public perception of the legal profession. A large part of our job is to foster in the minds of the public the perception that lawyers are good and capable people. That is the whole intent and purpose of the board certification program.

Jim Gillespie, Workers' Compensation and Social Security Disability Law—I think specialization is one of the great successes of the State Bar because I have seen the caliber of the practice of lawyers substantially enhanced after they become certified. Specialists also become an identified resource for the other members of the bar and that works both ways. I've gotten calls and made calls to others based on seeing the specialization certification. ■

National Trends in Specialty Certification

BY CHRISTINE L. MYATT

Specialty certification is a fairly recent phenomenon. In 1977, the United States Supreme Court held that states may regulate advertising by lawyers only to the extent necessary to prevent "false, deceptive, or misleading" communication. *Bates and O'Steen v. State Bar of Arizona*, 433 U.S. 350 (1977). Following the *Bates* decision, 12 states adopted state-sponsored specialty certification plans in the late 1970's and the early 1980's to deal with the proliferation of lawyer specialty advertising. Among the states was North Carolina.

Chart 1

In 1990, the United States Supreme Court further expanded the scope of specialty advertising holding that states may not unconstitutionally impose a blanket prohibition on truthful communication by a lawyer that he or she is certified by a bona fide organization as a specialist. *Peel v. Attorney Registration and Disciplinary Comm'n of Illinois* 496 U.S. 91 (1990). As a result of the *Peel* decision, disciplinary rules in many states were invalidated. Consequently, these states and the ABA were forced to amend their rules to allow disclosure of certification by lawyers who were designated by programs which met certain criteria. In August 1992, the ABA amended its Model Rules of Professional Conduct to allow lawyers to hold themselves out as specialists.

Since 1993, a number of lawyer certification programs have increased or evolved. These programs certify as specialists lawyers who meet certain criteria. Among the criteria are a certain level of skill and expertise in a specific practice area as evidenced by peer references, the length of practice, substantive involvement in a par-

ticular area, certain continuing legal education requirements, and a passing score on a specialty examination given by an accredited entity. Currently, state-sponsored board certification is available to lawyers in Arizona, California, Connecticut, Florida, Idaho, Indiana, Louisiana, Minnesota, New Jersey, North Carolina, Ohio, South Carolina, Tennessee, and Texas.

In addition to these state programs, a number of national programs sponsored by private legal specialty groups have been created. In 1993, the ABA adopted its "Standards for Accreditation of Specialty Certification Programs for Lawyers." The ABA further established and delegated to the Standing Committee on Specialization the task of developing and conducting a process for accrediting these national programs. While lawyers can publicize their certification by these programs, most states require the programs to be accredited by the ABA and approved by the state's regulatory authority or both before such publication is allowed.

Since August 1993, the ABA has accredited 14 certification programs sponsored by seven private groups. A sampling of these programs and the dates of accreditation are set forth in Chart 1.[1]

The ABA recently compiled statistics on its certification of its accredited certification programs. According to these ABA statistics, certification of specialists has continued to grow steadily. According to Chart 2, there were over 32,714 certified specialists as of 2006.

Currently, there are 47 specialty certification fields in state and private programs, as set forth in Chart 3.

Chart 4 reflects the number of certified specialists by practice area. In 1994, civil trial advocacy accounted for 29% of the certified specialists followed by criminal law, real estate, family law, and personal injury.

Since 1994, there has been little change in the mix of specialty area certifications. Most lawyers still seek specialty certification in civil trial advocacy. This group has more than twice the number of certified specialists as all of the other groups. As of 2006, there were 7,839 certified specialists in civil trial advocacy, 3,064 criminal law specialists, 3,033 family law specialists, 2,727 estates, wills, & trusts specialists, 2,568 personal injury specialists, 2,433 real

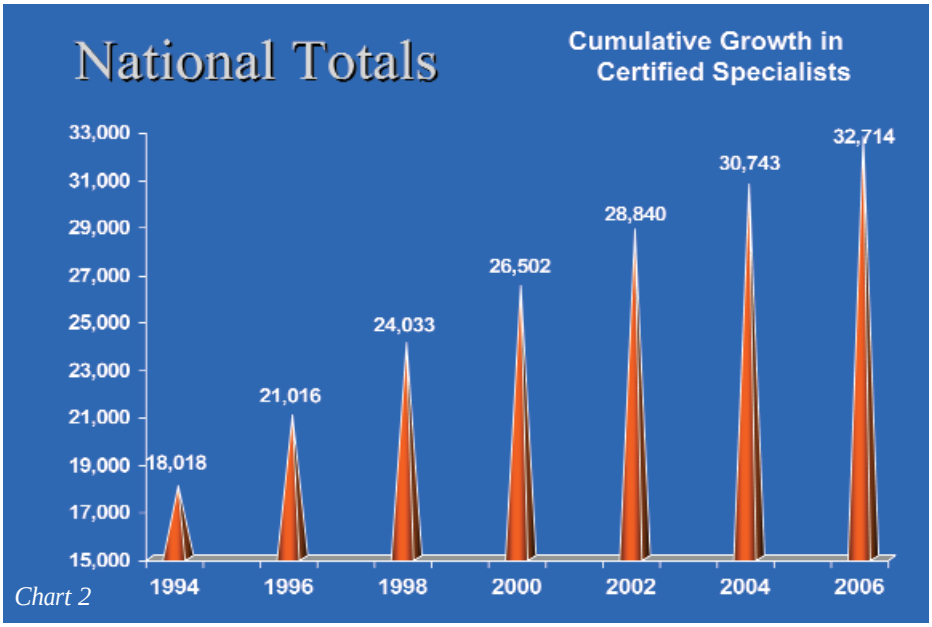


Chart 2

Chart 3

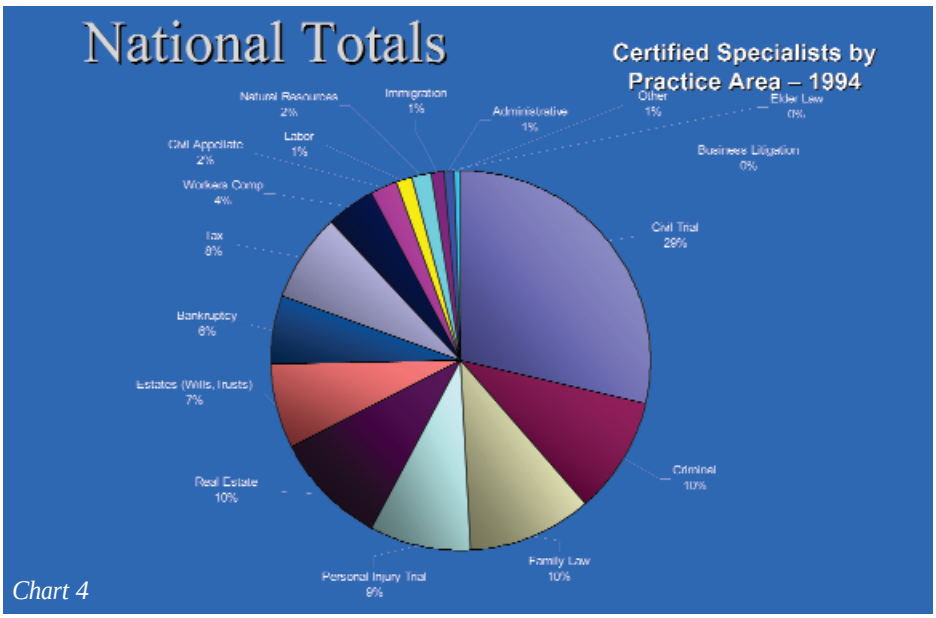


Chart 4

Chart 5

estate specialists, 2,052 workers' comp specialists, 1,944 bankruptcy specialists, and 1,741 tax specialists, among other specialists.

The growth patterns for the different specialty areas vary widely. It seems that the fastest growing areas include health law, elder law, workers' comp, and labor/employment. The more traditional practice areas such as criminal, personal injury, real estate, and tax continue to grow but at a much slower pace.

Growth in applications between 1994 and 2006 has been sporadic as demonstrated on Chart 5. The largest number of specialists was certified between 1994 and 1998 with approximately 2,225 applications filed in 1996. Since 1998, new applications have averaged around 1,600 per year with the lowest number of applications being filed in 2003. In 2006, approximately 1,500 applications were filed.

It appears that lawyers seeking specialty certification will continue to increase. As shown on Chart 6, certification projections to 2010 anticipate a 3% growth rate in the number of lawyers becoming certified as specialists. Note that since 1994 the total number of specialists has increased by over 81%.

The ABA Standing Committee on Legal Specialization continues to review and accredit new national specialty programs. The Standing Committee and ABA frequently provide assistance to both national certifying organizations and state certifying organizations through an annual round table, listserve, and personal responses to individual organization requests. Recently, the Standing Committee published *A Concise Guide to Lawyer Specialty Certification* to help national organizations explore the development of lawyer specialty certification programs. ■

Christine L. Myatt recently served as a member of the ABA Standing Committee on Legal Specialization. She is a former chair of the North Carolina State Bar Board of Legal Specialization. Ms. Myatt certified as a specialist in bankruptcy law by the North Carolina State Bar Board of Legal Specialization and in business bankruptcy law by the American Board of Certification.

Endnote

1. All charts referenced in this article may be viewed at www.abanet.org/legalservices/specialization/. Copyright © 2007 by the American Bar Association. Charts reprinted with permission.

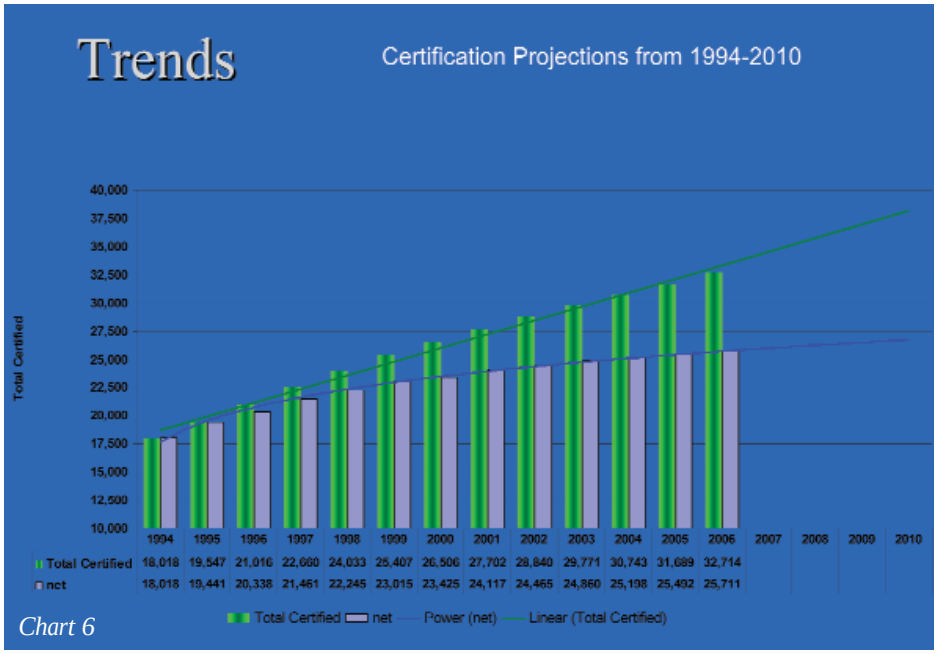


Chart 6

A Big "Thank You" to Those Who Have Built Specialization

Members of Specialty Committees

The specialization program relies heavily on the volunteer efforts of attorneys throughout the state. Over the years, the following lawyers have served as members of the specialty committees, writing and grading the specialty examinations, reviewing all initial and recertification applications, and making policy recommendations to the board.

Real Property

Richard E. Glaze, Bruce H. Robinson, Charles E. Melvin Jr., Janice L. Mills, Harold D. Colston, Peter F. Best, William E. Rouse Jr., E. Fred McPhail Jr., Clifton W. Everett Jr., Thomas E. Cummings, Donald A. Donadio, Howard L. Borum, David J. Witheft, R. Woody Harrison Jr., Steven I. Goldstein, Dewitt T. Scarborough III, E. Cordell Avery, Thomas E. Wagg III, J. Clark Brewer, Brent A. Torstrick, Laura K. Howell, Robert B. Hobbs Jr., Holly H. Alderman, Edward P. Tewkesbury, Douglas O. Thigpen, Margaret Shea Burnham, Samuel T. Oliver Jr., Robert S. Thompson, William E. Manning, Kim Gallimore, Steven I. Reinhard, Jeff Dunham, Barbara Christy, Terry M. Taylor, and Kimberly R. Coward

Estate Planning & Probate

Mark B. Edwards, Robert B. Lloyd Jr., Molly Griffin, Jeff D. Batts, Neill G. McBryde, Brian F. D. Lavelle, J. Guy Revell, James W. Narron, C. Gray Johnsey, Nancy S. Rendleman, Thomas W. Sinks, C. Wells Hall III, Doris Philips Loomis, Thomas R. Crawford, Michael A. Colombo, Jo Ann T. Harllee, Robert H. Haggard, Carl W. Hibbert, Julie Z. Griggs, Maria M. Lynch, Matthew T. Dill, Edward G. McGoogan Jr., J. Stanley Atwell, Rudy L. Ogburn, Debra L. Foster, J. Alan Campbell, Larry H. Rocamora, Sandra M. Clark, Elizabeth N. Sumner, and Barbara C. Ruby

Bankruptcy

J. Michael Booe, Trawick H. Stubbs Jr., J. Larkin Pahl, Alfred E. Cleveland, Donald R. Billings, Anita Jo Troxler, David G. Gray Jr., Richard M. Hutson III, Richard D. Sparkman, N. Hunter Wyche Jr., David R. Badger, Robert K. Johnson, Rayford K. Adams, Edward C. Hay Jr., Catharine R. Carruthers, Rory D. Whelehan, Terri L. Gardner, Marjorie K. Lynch, Robert M. Pitts, John A. Northen, Charles M. Ivey III, Rebecca Henderson, Carl E. Allman III, James B. Angell, Albert F. Durham, Cindy G. Oliver, John H. Small, and Christine L. Myatt

Family Law

Howard L. Gum, Thomas R. Cannon, Mary E. Wright-Hunt, Charles W. Kafer, Ronnie M. Mitchell, Gary B. Tash, Stephen C. Woodward Jr., Renny W. Deese, Sally Sharp, Robert E. Riddle, Fred A. Hicks, A. Doyle Early, Carlyn G. Poole, Dallas C. Clark Jr., James J. Hugenschmidt, L. Stanley Brown, M. Douglas Berry, Marcia H. Armstrong, Jaye P. Meyer, Richard D. Stephens, Lana S. Warlick, Charles W. Coltrane, Tate K. Sterrett, Michael W. Drye, and Robert A. Ponton Jr.

Criminal Law

Joseph B. Cheshire IV, James E. Ferguson II, David K. Fox, Thomas C. Manning, Thomas F. Loflin III, John Nobles, Douglas W. Parsons, Mary Ann Tally, John P. O'Hale, David S. Rudolf, Douglas E. Kingsbery, Charles A. Lloyd, R. Daniel Boyce, Eben T. Rawls, David Freedman, Locke T. Clifford, J. Matthew Martin, James A. Davis, Lisa S. Costner, Kate Dreher, Robert Hensley, Ames C. Chamberlin, Henry M. Whitesides, and Jeffrey E. Noecker

Immigration Law

Alan S. Gordon, Gerard M. Chapman, Robert Donat, George N. Miller, John L. Pinnix, Mary C. Tolton, Cynthia A. Aziz, Steven H. Garfinkle, Ann Robertson, Benjamin Li, Jeremy L. McKinney, C. Lynn

Calder, Laura D. Burton, and Jorgelina E. Araneda

Workers' Compensation

R. James Lore, Paul L. Cranfield, Kathleen L. Glancy, Hatcher B. Kincheloe, Henry N. Patterson Jr., Linda Stephens, Jeri L. Whitfield, Valerie A. Johnson, J. Griffin Morgan, Neill S. Fuleihan, Louise C. Root, Anthony T. Lathrop, Buxton Copeland, and Leslie Wickham

Social Security

Charles T. Hall, J. Michael Duncan, Mason Hogan, Deborah F. Maury, Susan O'Malley, Brian L. Peterson, and Rachel Pickard

Board of Legal Specialization

The Board of Legal Specialization reports to the State Bar Council, oversees the specialty committees, and administers the specialization program. Over the years the following lawyers have served as members of the Board of Legal Specialization

Grady B. Stott, A. A. Zollicoffer Jr., Larry McDevitt, Robert Vaughn, Patricia A. Wagner, Douglas Moretz, Carolyn G. Hisley, James H. Kelly Jr., James E. Cross Jr., P. C. Barwick, Sara H. Davis, J. Fred Riley, Charles L. Fulton, Roger W. Smith, Buddy O.H. Herring, Robert B. Lloyd Jr., Christine L. Myatt, Howard L. Gum, Gary B. Tash, Robert W. Sumner, Daniel D. Khoury, Christy E. Reid, Franklin E. Martin, Thomas R. Crawford, Terri L. Gardner, Michael E. Weddington, Dallas C. Clark Jr., Edward P. Tewkesbury, and Jeri L. Whitfield

The invaluable voice of the consuming public is provided to the board by its non-lawyer members. The following people have served as public members of the Board: Beth McAllister, Leander R. Morgan, Ed Lilly, Bryant D. Paris Jr., Janis L. Ramquist, Ernest H. Brown Jr., Jaroslav F. Hulka, William M. Place, Phillip Stover, Brent D. Wright, M. J. Kober, Karen D. Golden, Christopher Scott, Dr. S. Mitchell Freedman, Steven L. Jordan, Dr. Robert E. Gaddy Jr., and Carl W. Davis Jr. ■

Hats Off to the Class of 1987

The following attoneys were certified in the first class of legal specialists in 1987. This list includes only those lawyers who have continued to meet the requirements to maintain their certification on an annual basis, for the entire 20-year period.

Bankruptcy Law

Rayford K. Adams III
Herbert Frank Allen
David R. Badger
Steven Levi Beaman
J. Michael Booe
Terri Gardner
Gregory Byrd Crampton
Donald A. Davis
Sara H. Davis
Albert F. Durham
David G. Gray
Joseph Williamson Grier III
Holmes Plexico Harden
Edward C. Hay Jr.
Richard M. Hutson II
Bruce Forrester Jobe
Robert Keith Johnson
Anita Jo Kinlaw
Richard Meriwether Mitchell
Roger Alston Moore
Robert Moores Pitts
Wayne Sigmon
Richard Dewitte Sparkman
Trawick H. Stubb Jr.
Douglas Q. Wickham
John Smauel Williford Jr.
N. Hunter Wyche Jr.

Estate Planning and Probate Law

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Lawrence E. Bolton
Herbert H. Browne Jr.
Thomas M. Caddell
Michael Allen Colombo
Thomas Rich Crawford
Charles D. Dixon
Michael H. Godwin
Robert Curtis Gunst
Robert Howard Haggard
Charles B. Hahn
John C. Hine
Graham D. Holding Jr.
C. Gray Johnsey
Ronald P. Johnson
Brian F. D. Lavelle
Scott Edward Lebensburger
Paul H. Livingston Jr.
Robert B. Lloyd Jr.
Neill G. McBryde
Michael Lee Miller
James Wiley Narron
Richard Anthony Orsbon
Robert G. Ray
Christy Eve Reid
Barbara C. Ruby
W.Y. Alex Webb

Real Property Law - Residential, Business, Commercial, and Industrial Transactions

Alfred Gray Adams
Steven I. Goldstein
Douglas O. Thigpen

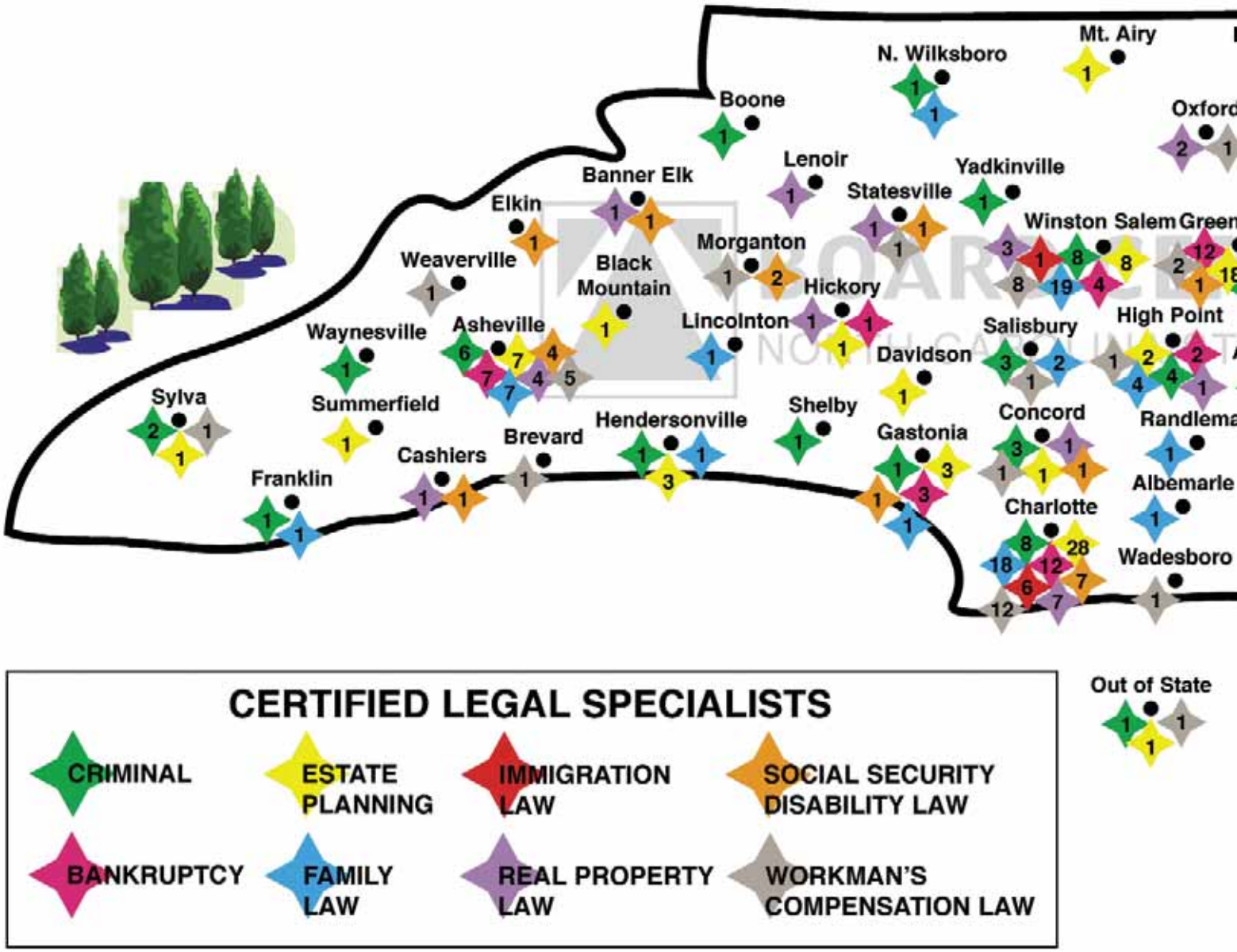
Real Property Law - Business, Commercial, and Industrial Transactions

Howard Leigh Borum
M. Jay DeVaney
Samuel T. Oliver Jr.

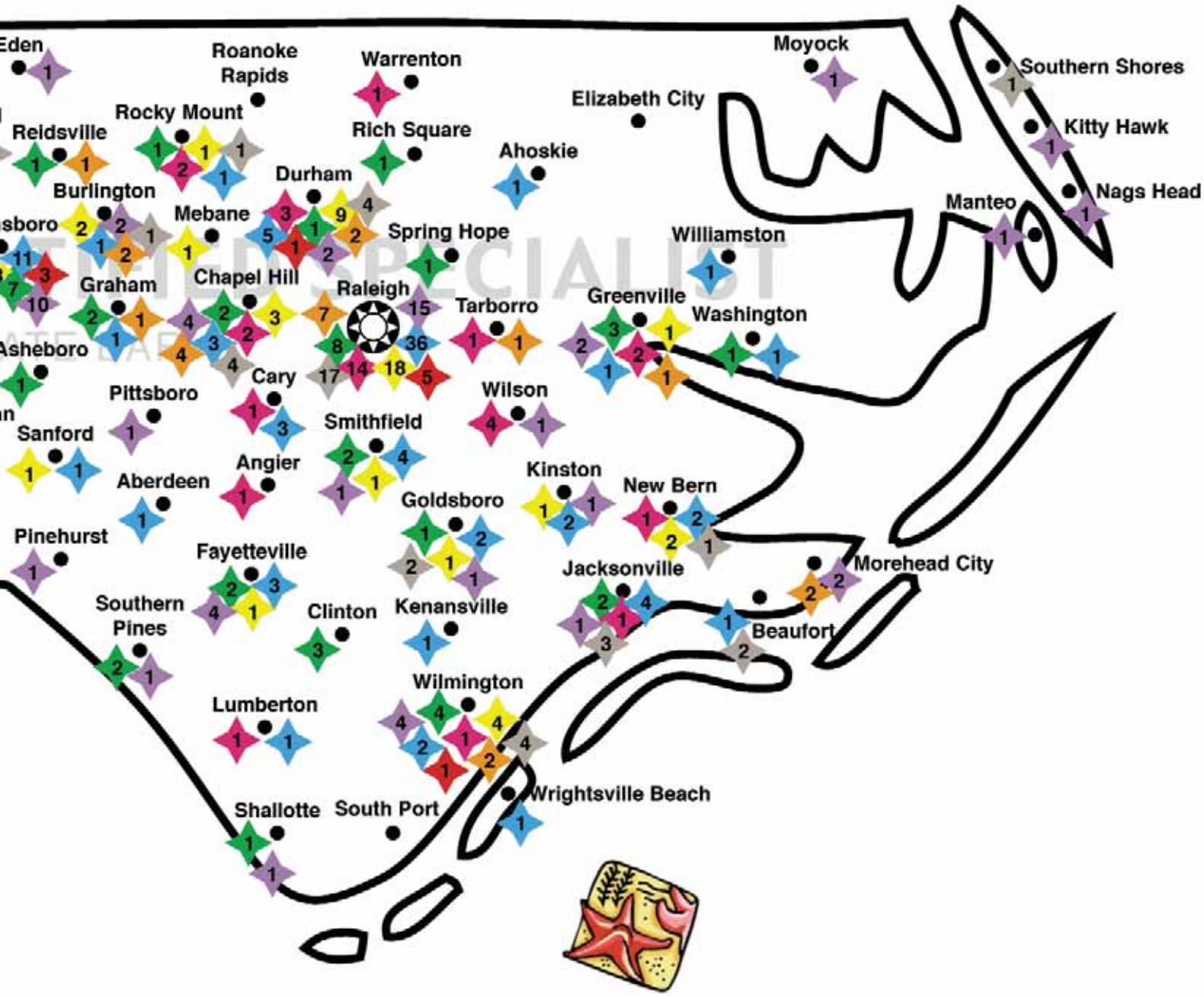
Real Property Law - Residential Transactions

E. Cordell Avery
Frank Woodson Erwin
R. Woody Harrison Jr.
Sheryl Howell Williams ■

Specialists Span the State—*From the Mountains to the Coast, Certified Specialists are Proud to Practice in North Carolina*



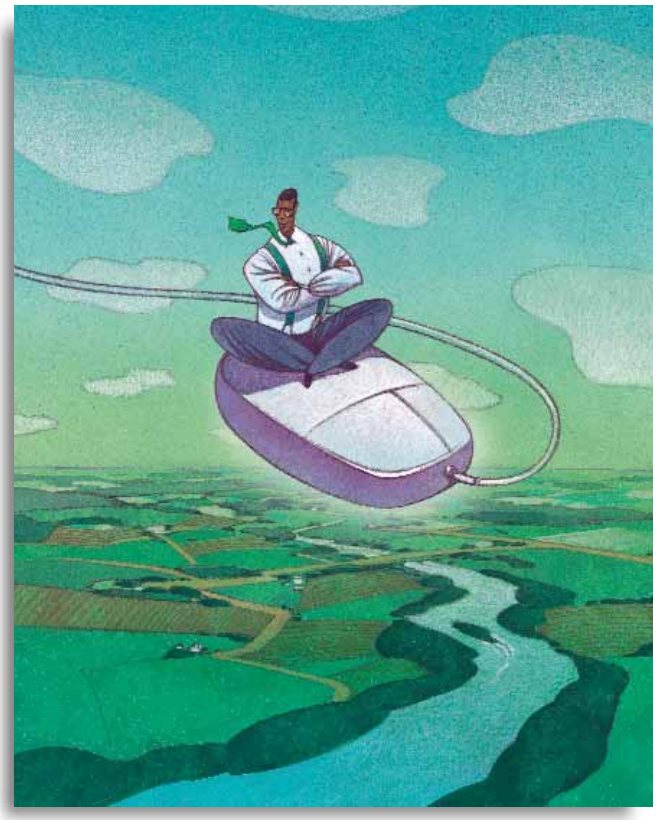
in Big Cities and Small Towns,



Traveling through Cyberspace on the Road to Personal Jurisdiction in North Carolina

BY MARK B. CANEPA

You just received a telephone call from corporate counsel to a large newspaper chain based in the Midwest. It seems that the editor of one of their papers in Iowa has had a complaint sitting on his desk for more than a month. An answer, or other responsive pleading, is overdue.



The anxious attorney on the other end of the phone explains that the complaint is a defamation action, filed in Mecklenburg County by a North Carolina businessman. It is based on allegedly libelous statements published in a news story that was posted on the Iowa paper's internet site nearly a year ago. The complaint alleges that the story ruined the man's Charlotte-based business and seeks $5 million in damages.

Corporate counsel needs advice, and she needs it yesterday: "We don't have any offices or reporters or subscribers in Charlotte," she explains. "Should we just ignore the complaint, risk a default, and then fight it later?" she asks. "Is it really possible that a North Carolina judge will find personal jurisdiction arising out of the website of our Iowa newspaper?"

The answer, as is often the case, is maybe.

The exercise of personal jurisdiction over a distant defendant based solely on internet activity is generating a lot of cases in state and federal courts around the country. North Carolina is no exception. In the past five years a number of decisions on this subject, both published and unpublished, have worked their way through the courts here as attorneys and their clients—and state and federal judges—deal with the increasing number of disputes that arise out of activity conducted on the world-wide web.

Most of the courts that have addressed internet jurisdiction have tried to fashion practical and common sense rules that not only comport with the due process traditions of fair play and substantial justice, but also serve as guideposts for attorneys and their clients as they make their way into the 21st century way of doing business. The common theme of these cases, if there is one, is that the defense of lack of personal jurisdiction is alive and well on the internet, and the mere act of participating

in the web does not equal a waiver of jurisdictional issues in every forum where a user can gain access to cyberspace.

But there are pitfalls, and personal jurisdiction can—and does—arise solely from internet activity.

This article discusses the current state of the law in North Carolina with regard to the assertion of personal jurisdiction over a non-resident defendant based solely on internet activity. It analyzes recent state and federal court decisions here, including decisions from the Fourth Circuit Court of Appeals and other jurisdictions, and contains suggestions as to how to approach this issue in light of the case law that has developed over the last decade.

A Little Jurisdictional Background

Before examining the current state of internet-based jurisdiction, it is helpful to conduct a quick review of personal jurisdiction fundamentals in North Carolina.

In North Carolina a two-step analysis is used to determine whether an out-of-state defendant is subject to the personal jurisdiction of our courts. First, the transaction or issue at hand must fall within the reach of the state's long-arm statute. Second, the exercise of jurisdiction must be consistent with the limitations of due process. *Tom Togs, Inc. v. Ben Elias Industries Corp*., 318 N.C. 361, 364, 348 S.E.2d 782, 785 (1986); *see also* N.C.G.S. 1-75.4.

Since North Carolina's long-arm statute permits the exercise of personal jurisdiction to the full limits of federal due process, the pertinent inquiry is whether jurisdiction comports with due process. *See Dillon v. Numismatic Funding Corp*., 291 N.C. 674, 675-676, 231 S.E.2d 629, 630-631 (1977); *see also MRI/Sales Consultants of Asheville, Inc. v. Edwards Publications, Inc.*, 156 N.C.App. 590, 577 S.E.2d 393 (2003)(North Carolina's long-arm statute is liberally construed to find personal jurisdiction over non-resident defendants to the full extent allowed by due process).

To meet the requirements of due process there must be minimum contacts between the non-resident defendant and the state, so that allowing the exercise of personal jurisdiction does not offend traditional notions of fair play and substantial justice. *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S. Ct. 154, 158, 90 L. Ed.2d 95 (1945).

In their analysis of minimum contacts and due process, courts will often use the terms "general" or "specific" jurisdiction to categorize the type of contacts the defendant had with the forum state. "Specific jurisdiction" analysis involves the exercise of personal jurisdiction where the cause of action set forth in the complaint arises directly out of the non-resident's contacts with the state. For example, if a non-resident defendant breaches a contract that was entered into and performed in North Carolina, the issue (and analysis) is one of specific jurisdiction. *See, e.g. Kath v. H.D.A. Entertainment, Inc.*, 120 N.C.App. 264, 461 S.E.2d 778 (1995).

"General jurisdiction" analysis is used to evaluate the conduct of a non-resident where the cause of action does not arise out of the defendant's activities in the state. For example, if a non-resident defendant breaches a contract outside of North Carolina, but that defendant has other "continuous and systematic" contracts with this state, general jurisdiction analysis may bring the defendant within the reach of the courts here. *See, e.g., Bruggeman v. Meditrust Acquisition Co.*, 138 N.C.App 612

(2000).

The plaintiff bears the initial burden of proving, by a preponderance of the evidence, not only minimum contacts, but also that a statutory basis for personal jurisdiction over a non-resident defendant exists. *Filmar Racing, Inc., v. Stewart*, 141 N.C.App. 668, 541 S.E.2d 733 (2001).

Does Maintaining an Internet Presence Establish Personal Jurisdiction?

In one of the earlier cases on this subject, a Connecticut federal court actually suggested that a non-resident's website, which could be viewed by citizens of the forum state, was enough to justify the exercise of personal jurisdiction over the website's owner and operator. *Inset Systems, Inc. v. Instruction Set, Inc.*, 937 F.Supp. 161 (D.Conn. 1996).

Fortunately, that decision has not carried the day.

The majority of courts that have addressed this issue—including courts here in North Carolina—have concluded that merely having an internet presence in the form of a website—in and of itself—will not subject a non-resident to personal jurisdiction in a distant state. *See*, for example, *Burleson v. Tobak*, 391 F.Supp.2d 401 (M.D.N.C. 2005); *see also Shamsuddin v. Vitamin Research Products*, 346 F.Supp.2d 804 (D.C.Md. 2004); *Euromarket Designs, Inc. v. Crate & Barrell Limited*, 96 F.Supp.2d 824 (N.D.Ill. 2000); *Millennium Enterprises, Inc. v. Millennium Music*, LP, 33 F.Supp.2d 907 (D.Oregon 1999)(Oregon court declined to assert personal jurisdiction over South Carolina company).

To hold otherwise, noted at least one court, "would subject anyone who posted information on the web to nationwide jurisdiction." *Barrett v. Catacombs Press*, 44 F.Supp.2d 717 (E.D. Pa. 1999).

At the other end of the scale, some non-resident defendants have tried to claim that personal jurisdiction is irrelevant on the web. They have argued that their internet activities physically touch no state and therefore minimum contacts analysis should never apply to them. In other words, they are immune to personal jurisdiction.

This argument has also been rejected. As best summed up by one district judge:

> Although the defendants appear to be correct in their contention that much of the activity in this matter occurred in cyberspace, this can not signify that the increasingly large number of those who deal in e-commerce shall not be subject to jurisdiction in any earthly court…There being no district court of cyberspace…Defendants will have to settle begrudgingly for the Western District of Virginia.

Designs88 Ltd. v. Power Uptik Productions, LLC, 133 F.Supp.2d 873, 877 (W.D. Va. 2001).

Personal Jurisdiction and the Internet

Not surprisingly, most of the cases involving internet activity and personal jurisdiction in North Carolina arise out of the federal district courts and the Fourth Circuit Court of Appeals. However, the watershed case in this area, nationwide, is a Pennsylvania district court case decided just ten years ago, *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*, 952 F.Supp. 1119 (W.D.Pa. 1997). The *Zippo* case has been followed by both federal and state court judges in North Carolina. *See*, *e.g. Havey v. Valentine*, 172 N.C.App. 812, 616 S.E.2d 642 (2005); *Burleson v. Tobak*, supra, 391 F.Supp.2d 401 (M.D.N.C. 2005); *Christian Science Board of Directors of the First Church of Christ, Scientist v. Nolan*, 259 F.3d 209 (4th Cir. 2001).

In *Zippo*, the non-resident defendant, Zippo Dot Com, operated an online news service that was based in California's Silicone Valley. The news service collected information and payments from subscribers all over the country, including at least 3,000 persons in Pennsylvania. The defendant had no "physical presence" in Pennsylvania, such as offices, employees, or sales people. All of the defendant's activities were conducted in cyberspace.

Plaintiff was a Pennsylvania corporation and manufacturer of the cigarette lighter that bears its famous name. Plaintiff sued Zippo Dot Com for trademark infringement in Pennsylvania. The defendant moved to dismiss for lack of personal jurisdiction, claiming, among other things, that the mere operation of a website on the internet was an insufficient basis for asserting personal jurisdiction by the courts in far away Pennsylvania.

In rejecting Zippo Dot Com's motion to dismiss, the court in *Zippo* announced a "sliding scale" test for gauging the sufficiency of web-based minimum contacts and due process. At the heart of the sliding scale was a breakdown of web-based activities into three basic categories: (1) passive, (2) interactive, and (3) semi-interactive.

Passive, Interactive, and Semi-interactive Websites Defined

According to *Zippo* and the cases that have followed it, a passive website is one where a defendant has simply posted information on an internet website that is accessible to anyone on the web. "A passive website that does little more than make information available to those who are interested in it is not grounds for the exercise of personal jurisdiction." *Zippo*, supra, 952 F.Supp. at 1124; see also *Accu-Sport International, Inc., v. Swing Dynamics, Inc.*, 367 F.Supp.2d 923, 928-929 (M.D.N.C. 2005); *and see Citigroup Inc. v. City Holding Co.*, 97 F.Supp.2d 549 (S.D.N.Y.)("This use of the internet has been analogized to an advertisement in a nationally-available magazine or newspaper, and does not without more justify the exercise of jurisdiction over the defendant.").

In contrast, an interactive website is one in which the defendant is clearly conducting business over the internet. "If a defendant enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the internet, personal jurisdiction is proper." *Zippo*, supra, cited in *Burleson*, supra, 391 F.Supp.2d at 408-409.

The middle ground between passive and interactive internet sites is an area of frequently litigated cases—semi-interactive websites that are not entirely passive but which do not rise to the level of a fully interactive site. "In these cases, the exercise of personal jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the [w]ebsite." *ALS Scan, Inc., v. Digital Service Consultants, Inc.*, 293 F.3d 707 (4th Cir. 2002), citing *Zippo*, supra, 293 F.3d at 714; *see also Carefirst of Maryland, Inc., v. Carefirst Pregnancy Centers, Inc.*, 334 F.3d 390, 398-399 (4th Cir.2003).

The *Zippo* sliding scale, and its analysis, has been adopted by many courts all over the country, although it has not been without a few critics, some of whom question *Zippo's* emphasis on website interactivity. *See*, *e.g.*, *Shamsudden v. Vitamin Research Products*, 346 F.Supp.2d 804 (D. Maryland 2004), and the cases cited therein; *see also Millennium Enterprises, Inc. v. Millennium Music, LP*, supra, 33 F.Supp.2d 907. Nonetheless, although it has been modified and altered in

several jurisdictions, *Zippo* remains the seminal case on internet jurisdiction and its definitions of passive, interactive, and semi-interactive websites continue to this day.

The *Zippo* Test is Remodeled by the Fourth Circuit

The *Zippo* sliding scale was modified here in the Fourth Circuit, at least with respect to interactive websites, in the 2002 decision of *ALS Scan, Inc. v. Digital Service Consultants, Inc.*, 293 F.3d 707 (4th Cir. 2002).

In *ALS Scan*, the court looked not only to whether the website was interactive or passive in character, but also to whether the non-resident defendant *specifically targeted* persons in the forum state. Observed the court: "[A] state may, consistent with due process, exercise judicial power over a person outside of the state when that person (1) directs electronic activity into the state, (2) with the manifest intent of engaging in business or other interactions within the state, and (3) that activity creates, in a person within the state, a potential cause of action cognizable in the state's courts." *ALS Scan*, supra, 293 F.3d at 714-715, cited in *Burleson*, supra, 391 F.Supp.2d at 414-415; *see also Havey*, supra, 172 N.C.App. at 816-817.

In other words, said the court, an interactive website—without more—is not enough for the assertion of personal jurisdiction over a non-resident defendant. The defendant must use his interactive website to actually target persons within the forum state before jurisdiction will arise. This targeting of residents in the forum state satisfies the traditional due process concept that jurisdiction over non-residents is appropriate where non-residents "purposefully availed" themselves of the privilege of doing business in the state.

Of course, the best way to understand how these sliding scales, "specific targeting" tests, and other forms of analysis really work is to look at some of the interesting cases—both here in North Carolina and elsewhere—that have been decided in the last few years.

Does a Commercial Website that Allows the Exchange of Emails Invoke Personal Jurisdiction?

The short answer, at least in North Carolina, is usually no.

In *Accu-Sport International, Inc. v. Swing Dynamics, Inc.*, 367 F.Supp.2d 923 (M.D.N.C. 2005), a North Carolina manufacturer of golf training equipment brought suit against a competitor in Southern California for unfair competition and related torts. The suit was filed with the Federal District Court here in the Middle District in Greensboro. The non-resident defendant, based in Carlsbad, California, subsequently moved to dismiss for lack of personal jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(6).

In support of its motion to dismiss, the defendant asserted that its contacts with North Carolina were insufficient to establish the minimum contacts necessary to satisfy due process. Defendant, a California limited liability company, was not qualified to do business in North Carolina, did not have a registered agent here, and had no offices, employees, real or personal property anywhere in the state.

In opposition to the motion, plaintiff claimed, among other things, that the defendant's website, which was readily accessible to all residents of North Carolina and which contained an email exchange ability, was enough for the court to support a finding of general personal jurisdiction. Plaintiff also presented evidence that the defendant had sold at least one piece of its equipment in North Carolina.

The court rejected plaintiff's arguments.

Relying on both *Zippo* and *ALS Scan*, the court observed that the defendant's internet website was basically informational and passive in nature. The court then found that although the defendant's web pages allowed for the exchange of emails between the defendant and potential customers in North Carolina, and also contained a web link to an unrelated finance company, "such interactivity is not enough to tip the scale in favor of finding personal jurisdiction." *Accu-Sport*, supra, 367 F.Supp.2d at 929, citing also *Panavision Int'l. L.P. v. Toeppen*, 141 F.3d 1316, 1321 (9th Cir. 1998). There was no evidence, said the court, that the non-resident specifically directed its electronic activity in a substantial way to North Carolina (as opposed to any other jurisdiction in the world).

A similar result was reached just two months later in the North Carolina state court decision of *Havey v. Valentine*, supra, 172 N.C.App. 812, 616 S.E.2d 642.

In *Havey*, a furniture company in Vermont was sued in Wake County Superior Court for injuries sustained when furniture the company shipped fell off a delivery truck and struck the plaintiff. The injury occurred in Raleigh when the furniture was delivered to plaintiff's residence. Plaintiff filed suit against the delivery company which, in turn, filed a third-party action against the Vermont manufacturer. The delivery company claimed that the manufacturer improperly packed the furniture, causing it to become unbalanced and to fall off their truck.

The furniture company moved to dismiss for lack of personal jurisdiction. That motion was denied by the trial judge. The court of appeals reversed.

The delivery company urged the appellate court to find jurisdiction because the Vermont manufacturer "through the use of its website and catalog, holds itself out as a seller of furniture to residents of North Carolina." The court noted that the evidence revealed that the website not only included information by which customers could order a catalog, but also web pages where potential customers could actually view furniture samples. *Havey*, supra 172 N.C.App. at 817.

Nonetheless, the court concluded that the defendant's website was essentially passive in nature. The court found it most significant that the internet site did not allow customers to *purchase* furniture directly from the company on the internet. In addition, said the court, there was no evidence presented that the Vermont company *actively targeted* North Carolina customers. *Id*., citing *ALS Scan*, supra, 293 F.3d at 714. In the case before it, observed the court, the North Carolina resident made the purchase when he was on a trip in Vermont. The website and related activities were simply not enough for the assertion of personal jurisdiction over the defendant.

Does Entering into a Contract on the Internet Confer Jurisdiction?

The execution of contracts or other agreements via the internet, on or through a company's website, continues to be an important factor in establishing personal jurisdiction. In another very recent case in North Carolina, the court refused to find jurisdiction *in the absence of contracts or agreements*, even where there were thousands of emails exchanged between the non-resident defendant and persons here in the state. *Setra of North America, Inc. v. Motorcoach Financial, Inc.*, 367 F.Supp.2d 853 (M.D.N.C. 2005).

In *Setra*, the court was asked to find general jurisdiction over the non-resident defendant based on, among other things, 3,500 emails between employees of the non-resident and their subsidiary in North Carolina. These emails, claimed the plaintiff, were evidence of the "continuous and systematic" contacts that justified general personal jurisdiction. The court didn't buy it:

> While the email correspondence between EvoBus and Setra was quite frequent and regular, the nature of the correspondence is not sufficient to warrant the court's exercise of general jurisdiction. The emails…contain discussions about advertising and marketing materials, warranty issues, the unveiling of a new motorcoach, and proposed safety testing of motorcoaches, i.e., routine business discussions between a parent and a subsidiary. *Significantly, the emails do not contain contracts for the sale of motorcoaches or any other kind of commercial transactions or agreements.*

Setra, supra, 367 F.Supp.2d at 859 (emphasis supplied).

A similar conclusion was reached by the Fifth Circuit Court of Appeals in 1999 in *Mink v. AAAA Development LLC*, 190 F.3d 333 (5th Cir. 1999).

In *Mink*, the website of the non-resident defendant provided an email address that permitted consumers to interact with the company. The website also allowed consumers to download a printable order form that could be filled out and then be submitted via the mail (not email) to the company. The court found that the ability of a company website to accept and reply to emails, and to offer downloadable order forms, was insufficient, absent other indicia of business transactions, to confer jurisdiction.

In contrast, where an internet site allows customers to not only view information and exchange emails, but also to purchase products and enter into sales contracts, the exercise of personal jurisdiction may be allowed.

For example, in *Euromarket Designs, Inc. v. Crate & Barrell Limited*, 96 F.Supp.2d 824 (N.D.Ill. 2000), jurisdiction by an Illinois court over a company based in Ireland was allowed where the foreign company maintained a website presence that transacted business in the state of Illinois.

Euromarket was a trademark infringement case brought by an Illinois based retailer, Crate & Barrell, against a company in Ireland that had taken the same name. In support of its finding in favor of personal jurisdiction, the court noted:

> …[defendant's] website clearly falls into the first category of interactive websites that allow a defendant to "do business" and "enter into contracts with residents of a foreign jurisdiction over the internet." [The defendant] purposefully and deliberately designed and now maintains a website with a high level of interactivity, enabling customers to browse through an online catalog and place orders via the internet. The website actively solicits all users, including residents of Illinois, to purchase goods. Defendant clearly is doing business over the website.

Euromarket Designs, Inc. v. Crate & Barrell Limited, supra, 96 F.Supp.2d at 838-839 (non-resident defendant also had additional non-internet related contacts with the forum state).

Jurisdiction was also found in *Thomas Publishing Company v. Industrial Quick Search, Inc.*, 237 F.Supp.2d 489 (S.D.N.Y. 2002).

In *Thomas*, the non-resident defendant was a business directory publisher who was sued for copyright and trademark violations. The defendant had an interactive website that not only allowed for the exchange of emails, but also allowed for the transaction of business. The description of these transactions in the court's opinion included the ability of customers to submit company listings, track product areas, and submit emails directly to the defendant's sales department. Although not specifically mentioned, the court made it otherwise clear that the defendant was entering into contracts through its website activities and therefore jurisdiction was appropriate. *See also Zippo*, supra, 952 F.Supp. at 1125-1126 (exercise of jurisdiction proper where non-resident contracted with approximately 3,000 individuals and seven internet providers in the forum state); and *Christian Science Board of Directors of the First Church of Christ, Scientist v. Nolan*, 259 F.3d 209, 217-218 (4th Cir. 2001)(exercise of jurisdiction appropriate over Arizona defendant based on defendant's contributions to website created and maintained in North Carolina).

How Much Business Do You Have to Transact over the Internet before Jurisdiction is Asserted?

There is no hard-and-fast rule here. Clearly, however, a single contract or sale, in and of itself, is probably not enough. Even multiple sales are probably not enough, absent some indication that the sales are truly voluminous and/or represent a significant portion of your business. In *Zippo*, the non-resident defendant had 3,000 paid subscribers and seven contracts with internet access providers all in the state of Pennsylvania. That was enough.

But a single isolated sale or two, as in *Accu-Sport* or *Burleson*, is not. *See also Shamsuddin v. Vitamin Research Products*, 346 F.Supp.2d 804, 813 (D. Maryland 2004)(two sales to Maryland residents and maintenance of commercial website does not rise to the level of contacts necessary to comport with due process). However, every analysis in North Carolina must bear in mind—especially in the

commercial setting—the importance that the courts will attach to the non-resident's act of *specifically targeting* our residents by means of the internet. By targeting persons here in North Carolina, it is reasonably foreseeable that as a result of their activities a non-resident might be haled into court here, or so the theory goes.

It is difficult to come up with a list of those factors that will convince a court that a non-resident is actually targeting the forum state. However, published cases elsewhere contain many examples of situations where, in the context of a commercial interactive website, no targeting was found.

For example, in *Toys "R" Us, Inc. v. Step Two, S.A.*, 318 F.3d 446, 453-454 (3rd Cir. 2003), the court carefully scrutinized the defendant's web pages before concluding that personal jurisdiction was not appropriate:

> Based on the facts established in this case thus far, [plaintiff] has failed to satisfy the purposeful availment requirement. [Defendant's] websites, while commercial and interactive, do not appear to have been designed or intended to reach customers in New Jersey. [Defendant's] websites are entirely in Spanish; prices for its merchandise are in pesetas or Euros; and merchandise can be shipped only to addresses within Spain. Most important, none of the portions of [defendant's] websites are designed to accommodate addresses within the United States…

Toys "R" Us, Inc. v. Step Two, S.A., supra, 318 F.3d at 454-455.

Another good example can be found in the Fourth Circuit's 2003 opinion in *Carefirst of Maryland, Inc. v. Carefirst Pregnancy Centers, Inc.*, 334 F3d 390 (4th Cir. 2003).

In *Carefirst*, a Maryland insurance company brought suit against an Illinois non-profit organization for trademark infringement. The gist of plaintiff's action was that the non-resident's use of the CAREFIRST name and mark was illegal. The suit against the Illinois non-profit was filed in Maryland. In support of its motion, plaintiff relied partially on the defendant's internet site, and the fact that the Illinois company had received $1,542 in donations from Maryland residents.

The non-resident filed a motion to dismiss for lack of personal jurisdiction. In affirming the district court's grant of dismissal, the Fourth Circuit looked carefully at the non-profit's web pages to determine if the Illinois company had targeted persons in Maryland.

The court determined that the non-resident's site was "strongly local" in character and emphasized its mission to assist Chicago-based residents:

> …the website states that [the defendant] is a non-profit organization that offers assistance to more than 46,000 hurting women and families *in the Chicago area*; that [the defendant] now operates out of seven different locations *in the City of Chicago and Chicago suburbs;* and that [the defendant] teaches abstinence until marriage in public high schools *throughout Chicago's Cook County*. In fact, the only respect in which [the defendant] even arguably reaches out to Marylanders via its internet website is a generalized requests that anyone, anywhere make a donation…Such a generalized request is, under the circumstances, insufficient Maryland contact to sustain jurisdiction in that forum.

Carefirst of Maryland, Inc. v. Carefirst Pregnancy Centers, Inc., supra, 334 F3d at 401 (emphasis in the original), *see also Haney*, supra, 172 N.C.App. 812.

When analyzing cases in which the number of internet contacts with the forum state is low in number, or perhaps even unknown, some courts have looked for something more before asserting personal jurisdiction.

What is the "something more" that these other courts have looked for? There is no hard-and-fast answer to this question, either. But "non-internet contacts such as serial business trips to the forum state, telephone and fax communications directed to the forum state, purchase contracts with forum state residents, contracts that apply the law of the forum state, and advertisements in local newspapers *may* form part of the "something more" needed to establish personal jurisdiction." *See generally Toys "R" Us, Inc. v. Step Two, S.A.*, supra, 318 F.3d at 453-454; *see also Barrett v. Catacombs Press*, supra, 44 F.Supp.2d 717 and cases cited therein.

In other words, more traditional minimum contacts with the forum state are combined with an internet presence to establish, in the appropriate case, personal jurisdiction.

What about Internet Auction Sites such as EBAY?

Do participants on internet auction sites, such as EBAY, who contract and sell products on the web run the risk of being haled into court in those jurisdictions to which they send

their products?

It appears that no published opinion in North Carolina has addressed this issue directly. However, using the analysis set forth in *Zippo*, *ALS Scan*, and the other North Carolina cases cited, it is unlikely that a small number of sales on internet auction sites would subject non-residents to jurisdiction here.

In an unpublished decision in 2005, the North Carolina Court of Appeals affirmed a trial judge's dismissal of plaintiff's complaint for lack of personal jurisdiction in a case involving an EBAY internet sale to a consumer in Alamance County. *Buckland v. Hobbs*, 176 N.C.App. 766, 627 S.E.2d 350 (unpublished-2005).

In *Buckland*, plaintiff was a North Carolina resident who purchased—or attempted to purchase—a tractor from the defendant, who lived in Tennessee. The defendant had listed the tractor on EBAY and plaintiff alleged that he wired money to the defendant as part of the purchase price but he did not receive the tractor, nor did he receive a refund of his money. He subsequently filed suit in Alamance County.

The defendant moved to dismiss for lack of personal jurisdiction. In support of his motion, the defendant stated that he was a resident of Tennessee, he had never worked or lived in North Carolina, and that he had not conducted business in North Carolina. The defendant acknowledged that he sold one tractor on EBAY to the plaintiff a month before the disputed sale, but he sold no other items here. Finally, the defendant claimed that in listing items on EBAY he did not target any particular state through his auction activities.

The appellate court affirmed the dismissal, holding that the solicitation of bids, the emails exchanged between the parties, and the wire transfer of money from plaintiff to the defendant, were simply insufficient to establish minimum contacts.

Elsewhere, it has very recently been held that a seller's participation in an internet auction, in and of itself, does not give rise to personal jurisdiction in the state of the aggrieved buyer. *See Karstetter v. Voss*, 184 S.W.3d 396 (Tex. App. Dallas 2006).

In *Karstetter*, a buyer in Kansas purchased a pick-up truck from an automobile dealer in Texas. The Kansas plaintiff was the high bidder for the truck on EBAY. For reasons not disclosed in the opinion, the unhappy buyer subsequently filed suit against the Texas car dealer for the cost of the truck. The suit was filed in Kansas, the non-resident defendant did not appear, and a default judgment was obtained that plaintiff took to Texas to enforce.

Not surprisingly, on his home field in Texas the car dealer claimed that the Kansas judgment could not be enforced asserting, among other things, the defense of lack of personal jurisdiction in the original case heard in Kansas.

The Texas appellate court, relying on *Zippo* and related Texas decisions, concluded that the EBAY auction site fell into the middle category of the sliding scale, and characterized the site as interactive. The court then noted that although the car dealer had to register and list the truck on the EBAY site, the dealer had *no control* over who would be the highest bidder. In other words, the car dealer in Texas did not specifically target consumers in Kansas. The seller was looking for a purchaser anywhere. Therefore, said the court, it is necessary to look beyond the internet activity to the "degree of interaction" between the parties:

> There was no evidence that [the dealer] traveled to Kansas or engaged in other transactions with appellant or other Kansas residents either through the EBAY service or otherwise. Although [the dealer] did seek some benefit, advantage, or profit by selling the truck to a Kansas resident, their contact with Kansas was random, isolated, and fortuitous. The interaction between the parties did not rise to a level such that [the dealer] should have reasonably foreseen that they would be haled into a Kansas court.

Karstetter v. Voss, 184 S.W.3d at 405. As such, there was no personal jurisdiction and the Kansas judgment would not be enforced.

For a look at a similar case involving suit brought *by the seller* against a buyer arising out of an internet auction, *see Machulsky v. Hall*, 210 F.Supp.2d 531 (D. New Jersey 2002)(no personal jurisdiction in New Jersey over non-resident buyer who bought coins from a New Jersey coin dealer on the internet).

What about Internet Chat Rooms or Forums?

Can personal jurisdiction be asserted over a non-resident based on their operation of an internet chat room, forum, or related discussion site?

In *Burleson v. Toback*, supra, the Middle District in North Carolina was asked to assert personal jurisdiction over a Canadian entity—and several website users—that operated a website and chat room for, of all things, miniature horse owners. The plaintiff in *Burleson* was a North Carolina resident and trainer of miniature horses for the blind ("seeing eye horses"). Plaintiff claimed that the Canadian website was encouraging libelous statements against her and her business of training miniature horses for the blind. She also asserted other tort claims as well as a claim for trademark infringement related to the defendant's use on their website of certain logos and other trade names.

The non-resident defendants moved to dismiss based on lack of personal jurisdiction. The website owners denied that they were targeting anyone in North Carolina, and claimed that the site began primarily as a forum for Canadian miniature horse enthusiasts, but that it eventually attracted an international following. The site was free to the public, although membership was required to post messages on the site forum. There was no fee for membership. *Burleson*, supra, 391 F.Supp.2d at 412.

Plaintiff maintained that personal jurisdiction in North Carolina was appropriate and offered evidence of several internet "contacts" the defendants had with the state: plaintiff said that of the forum's 2,000 members, as many as 44 were based in North Carolina. Plaintiff also said that more than 4,500 messages (about 2.2%) that had been posted on the site were from North Carolina members. Plaintiff claimed that discussions on the forum "occasionally touched on matters of interest in North Carolina," and that the site provided advertising space to North Carolina farms. As such, said the plaintiff, the defendant's website specifically targeted North Carolina and "directs electronic activity into the state." *Burleson*, supra, 391 F.Supp.2d at 412-413.

The court rejected plaintiff's arguments and found that personal jurisdiction could not be asserted over any of the Canadian defendants.

Relying on *ALS Scan*, the court said that there was little evidence that the defendant's internet activities actually "demonstrate a manifest intent to target and focus on North Carolina when viewed in conjunction with the overall character of the website." The court agreed that the website was interactive, at least insofar as the chat forum and related pages were concerned, but that grounds for specific personal jurisdiction were still lacking:

[T]he *ALS* test emphasizes the require-

> ment of purposeful targeting of a particular forum, not just the level of interactivity. ..Thus, despite plaintiff's contention that [the defendant's] direct electronic activity into North Carolina because of its internet presence, it is well-settled in the Fourth Circuit that accessibility alone cannot establish personal jurisdiction…Rather, under *ALS Scan*, "the defendant must *direct* activity into the forum state, with the *intent* to engage in business *within the state*…

Burleson, supra, 391 F.Supp.2d at 414-415 ("[c]ompared to the original *Zippo* test, the *ALS* test emphasizes the requirement of *purposeful* targeting of a particular forum, not just the level of interactivity").

The *Burleson* court said that in examining the entire website, it was apparent that the site focused on individuals who were interested in miniature horses all over the world; the site did not specifically target North Carolina. The court dismissed the site's five North Carolina advertisements as *de minimis*, finding that $300 in ad revenue over an eight-year period was insufficient to establish targeting of residents here. The fact that up to 44 North Carolina residents may have participated in, and been members of, the website's forum or chat rooms was also *de minimis*, said the court. *Burleson*, supra, 391 F.Supp.2d at 414-415; *see also Barrett v. Catacombs Press*, supra, 44 F.Supp.2d at 728-729 ("However, for jurisdictional purposes we find that [posting of messages to listservers] are akin to a passive website and insufficient to trigger this court's jurisdiction.").

What if an Internet Act Causes Injury in North Carolina?

Plaintiff's final argument in *Burleson* is one that continues to pop up all over the country in cases dealing with internet activity: What if the web activity complained of causes injury in the forum state? Is the fact of an injury here in North Carolina, caused by a non-resident defendant's internet acts, enough to warrant personal jurisdiction?

In *Burleson*, plaintiff claimed that she was defamed on or through the Canadian website (and its forum) by several persons, including persons residing here in the United States, and that she suffered and felt injury right here in North Carolina as a result of the statements made on the web.

For guidance on this issue, the Middle District looked to a Virginia case that ultimately became the subject of another Fourth Circuit decision, *Young v. New Haven Advocate*, 315 F.3d 256 (4th Cir. 2002).

In *Young*, the defendant was a Connecticut newspaper that published a story involving the Connecticut and Virginia prison systems. The story was not only included in the paper's regular hard copy newsprint, but also appeared on the newspaper's internet site, available to anyone with internet access. Plaintiff was the warden of the Virginia prison featured in the story. Plaintiff claimed that he was defamed in the story and he filed suit in federal court in Virginia. The non-resident Connecticut newspaper filed a motion to dismiss, based on lack of sufficient contacts with Virginia.

In opposition to the defendant's motion, plaintiff argued that the Connecticut newspaper had sufficient contacts with Virginia based on the following: (1) the paper knew Warden Young was a Virginia resident and it intentionally discussed and defamed him; (2) the paper posted the articles on their internet site, knowing that the site was *accessible* in Virginia; and (3) the primary effects of the defamatory statements—the actual injury to Young—were felt by Young at home in Virginia. *Young v. New Haven Advocate*, supra, 315 F.3d at 261-262.

If Young was a Virginia resident and the Connecticut newspaper wrote about him, wasn't that specific targeting? The district court judge was convinced that personal jurisdiction in Virginia existed, and the newspaper's motion to dismiss was denied. On appeal, the Fourth Circuit reversed.

The court of appeals, looking again to *ALS Scan*, held that there was simply no evidence that the Connecticut newspaper had *specifically aimed or targeted* their stories at an audience in the state of Virginia. It was true, noted the court, that the stories were available in Virginia on the internet. But mere availability on the internet is not enough. The court instead focused on the "overall content" of the paper's internet sites and determined that the web pages were "decidedly local." There was no evidence that the paper contained advertisements aimed at a Virginia audience. Nor was there any evidence that the paper was trying to attract or serve an audience from Virginia. *Young v. New Haven Advocate*, supra, 315 F.3d at 262-264. Although the article did have a Virginia connection, the focus of the article was on Connecticut prison policies, said the court, and the intended audience was in Connecticut.

Finally, said the court in *Young* "although the place that the plaintiff feels the alleged injury is *plainly relevant* to the jurisdictional inquiry, it must ultimately be accompanied by the defendant's own sufficient minimum contacts with the state if jurisdiction...is to be upheld." *Young v. New Haven Advocate*, supra, 315 F.3d at 262-263 (emphasis supplied), citing also *ESAB Group, Inc. v. Centricut, Inc.*, 126 F.3d 617 (4th Cir. 1997), and *Calder v. Jones*, 465 U.S. 783, 104 S.Ct. 1482, 79 L.Ed.2d 804 (1984)(newspaper libel case preceding the internet); *see also Carefirst of Maryland, Inc. v. Carefirst Pregnancy Centers, Inc.*, 334 F3d 390, 401 (4th Cir. 2003).

The same analysis was applied here in North Carolina in *Burleson*. The court said that, although the fact that the North Carolina miniature horse owner felt her injury here in this state had some relevance, it was not enough to carry the day: "[A] finding of jurisdiction on this ground…would unreasonably confer jurisdiction in the forum state of every plaintiff who may be impacted by a posting on an internet bulletin board." *Burleson*, supra, 391 F.3d. at 416.

What about the remaining defendants who

had posted the allegedly defamatory statements on the forum? They were dismissed, too. None of them had sufficient minimum contacts with North Carolina and the court was not about to find such contacts based solely on the posting of their allegedly defamatory statements in an internet chat room or on an internet forum. *Burleson*, supra, 391 F.3d at 417-423.

What Does All of this Mean in the Real World?

In counseling businesses and other clients who are involved with websites and other internet activities, a few principles from all of these cases stand out.

First, if a non-resident operates a non-commercial, passive website it is unlikely, absent other minimum contacts with North Carolina, that personal jurisdiction will be found here. The same is true of a passive commercial website.

Next, in the context of interactive or semi-interactive commercial websites, a fortuitous contract or sale or two of products via the internet to residents in North Carolina will not, absent other factors, give rise to jurisdiction here. How many internet sales, contracts, or agreements are enough to support jurisdiction? There is no set number. In the *Zippo* case there were 3,000 in-state subscribers and seven internet provider contacts. That was clearly enough.

Although the quantity or number of internet transactions or agreements is *relevant* to personal jurisdiction, the more important inquiry is whether the non-resident specifically targeted persons in North Carolina via the internet. If such intent is found, a small number of transactions—perhaps even a single transaction in the right case—might be enough to assert personal jurisdiction.

What should you look for if you are representing clients trying to assert or block jurisdiction based on an internet presence? Obviously, start with the website. Is it directed toward everyone in the world with an interest in a particular subject matter (such as the miniature horse site in *Burleson*), or is it focused on a specific audience in the forum state? If the audience is wide and varied, the chances of a specific intent to target one particular state will diminish. Also, if the audience is very specific and local—focusing on another jurisdiction as in the *Carefirst* case—jurisdiction will likely be denied.

Does the site allow for not only interactive correspondence between the parties, but also for the completion of contracts or other agreements via the internet? If it does, have there been a number of significant contracts or agreements with the forum state? Has there been enough business transacted in this manner for the non-resident to be on notice that they might be haled into court here?

Does the website contain advertisements from sellers in the forum state, or ads from sellers elsewhere specifically directed toward the forum state? Or is the website more closely akin to a national magazine: available to everyone, everywhere with no particular forum or audience in mind? Obviously, the more generic the ads or content, the less likely that a court will conclude that the internet site is directed toward one state or jurisdiction.

Keep in mind that even if the non-resident's internet presence is not enough, in and of itself, to assert personal jurisdiction, their web activity may be used *in conjunction with* other contacts to reach the due process requirements of North Carolina's statutory and case law. This will require some digging into more traditional minimum contacts.

What if you represent a plaintiff and you and your client believe that personal jurisdiction over a non-resident exists, but you need more facts from the potential defendant to prove it? Is there a mechanism for pre-litigation discovery on the issue?

Fortunately, in some situations, the answer is yes. When a plaintiff can show that discovery is necessary to answer a defendant's claim of no personal jurisdiction, "a court should ordinarily permit discovery on that issue unless plaintiff's claim appears to be clearly frivolous." *Rich v. KIS California*, 121 F.R.D. 254, 259 (M.D.N.C. 1988); *see also Toys "R" Us*, supra, 318 F.3d at 456-458. The rules on jurisdictional discovery are beyond the scope of this article, but keep this process in mind as a potential tool to help you fend off a motion to dismiss.

Finally, keep an eye on the advance sheets from the North Carolina Court of Appeals and the federal courts here and in the Fourth Circuit. As the use of the internet by businesses and individuals continues to rise, the number of cases that deal with issues of personal jurisdiction in this setting will only increase.

Conclusion

And what about that phone call you have to return to counsel for the Iowa paper? Does personal jurisdiction exist over the distant newspaper based on their internet news story? Should they make an appearance in Mecklenburg County now, file a motion to dismiss, and risk the chance of their motion being denied? Or should they wait, and attack personal jurisdiction later when the plaintiff tries to enforce a default judgment in Iowa?

Obviously, based on the decisions in *Zippo*, *ALS Scan*, *Young*, *Burleson*, and the other cases discussed above, you need a few more facts. But if the paper's only contact with North Carolina is their year-old internet story, it will be difficult for the Charlotte businessman to convince a Mecklenburg County judge that personal jurisdiction over the Iowa newspaper is appropriate. ■

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Annual Meeting

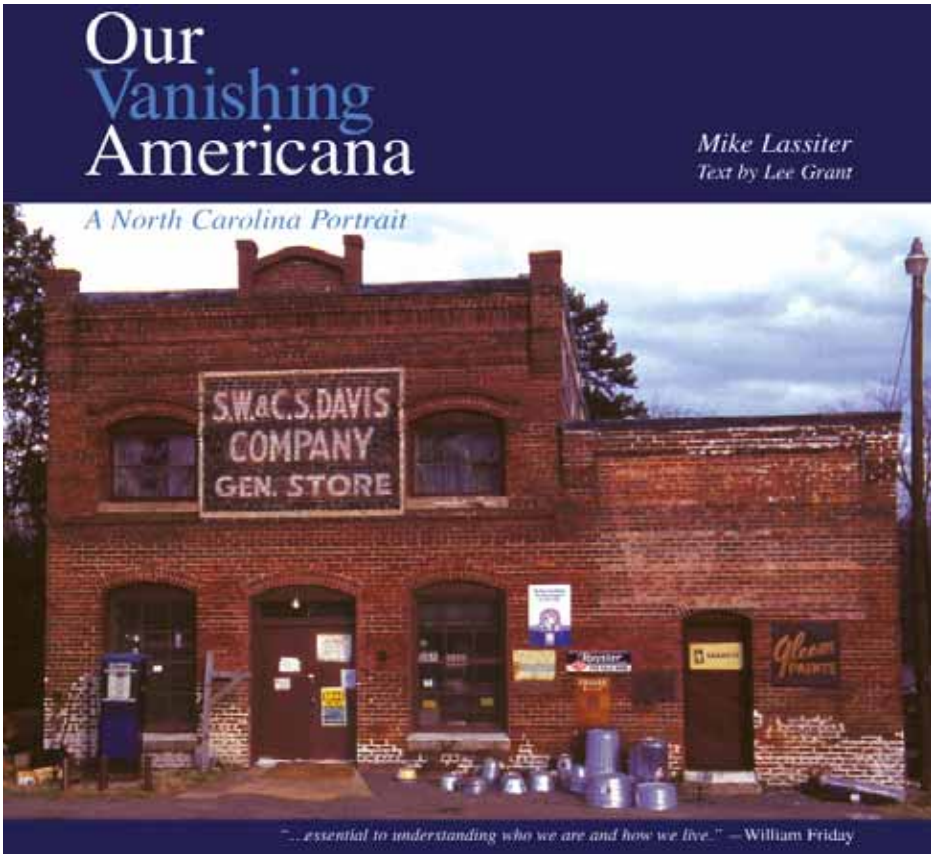
You are asked to take notice that the annual meeting of the North Carolina State Bar will be held on Friday, October 19, 2007, in conjunction with the council's quarterly business meeting, and further that the council will hold an election on Thursday, October 18, 2007, at 11:45 a.m. at the Sheraton Capital Center Hotel, Fayetteville St., Raleigh, to choose the agency's president-elect, vice-president, and secretary-treasurer for 2007-2008. All members of the Bar are welcome to attend these events.

An Interview with Mike Lassiter—*Our Vanishing Americana*

BY DAVID BENBOW

"Someone once said, 'If you start forgetting how things began, you stop beginning things.' With undaunting energy and perseverance, Mike Lassiter spent six years traveling across the state of North Carolina, looking for the lifeblood of small towns, community icons, and historic businesses—the beginnings of Tar Heel commerce, livelihoods, family enterprises. At first it was old storefronts and signage that captured his imagination; soon he became enamored with the people inside the buildings and their stories."

—Our Vanishing Americana



Give me a brief description of your new book.

My book is titled, *Our Vanishing Americana: A North Carolina Portrait*. It is a full color, hardback, coffee table-style book and consists of 244 pages. It is divided into nine chapters with photographs of general stores, hardware stores, fillin' stations, groceries, barber shops, theatres, drug stores, restaurants, and the like which were commonplace in towns throughout North Carolina during the last century.

What led you to author this book?

I have always had a fascination with old store fronts. When I graduated from college in Chapel Hill in 1985, my parents gave me a camera. Before I left town, I took a picture of some of my favorite places on Franklin Street: a newsstand, a theatre, a couple of drug stores, a late night eatery. Not long after, some of them began closing. Back home in Statesville, the theatre I had frequented as a child had been torn down to make way for a new building (which incidentally is now vacant). A few years later, the downtown hardware store closed after nearly 100 years in business. I returned to Statesville in 1994 to practice law with my father. Within a couple of years, our two corner drug stores were closed. I wanted to see how many of these businesses remained in North Carolina and capture them before they were gone. So in 1999, the journey began.

How did you find the time to travel the state and maintain a law practice?

A lot of weekend travel. At first I could slip out of the office for an afternoon and cover a nearby county, but that was not possible for the outlying counties. Six years and over 30,000 miles later, I had driven throughout each of the 100 counties and had captured at least one place in each county.

Did the focus of your project change during the course of your travels?

Yes, it did. I initially wanted to crate a

Shell Station, Winston-Salem

Snappy Lunch, Mt. Airy

Varsity Theatre, Chapel Hill

record of the old storefront, throughout; I began to realize that the value and importance of these old places is the folks who actually run them. So I started talking to the owners of these businesses to get some history behind them. This became one of the most rewarding experiences of this project.

What were a few of the most interesting experiences you had, places you found, or people you met during your travels?

I was in Polk County, which is a small county in the mountains on the South Carolina line. I had driven through all but the western edge of the county with no luck finding any old stores. It was getting late and I had decided to turn back toward home when I stumbled upon the town of Saluda along a railroad. In this quaint town I found a grocery from the 1940s, a lunch counter from the 1950s, and a general store from 1899! That has become one of my favorite small towns.

There are so many places in this state which still have a charm and ambience that can never be recaptured, but anyone with an interest in our cultural history should visit Mast General Store (1883) in Valle Crucis, Turner Hardware (1898) in Mooresville, the old Shell Station (1930s) in Winston-Salem, Conrad & Hinkle Food Market (1919) in Lexington), Graham Barber Shop (1930) in Graham), the Varsity Theatre (1927) in Chapel Hill, Dees Drug Store (1916) in Burgaw, Snappy Lunch (1923) in Mt. Airy, or Dick's Hot Dogs (1921) in Winston-Salem.

I have had the fortune to meet many wonderful people like Mary Todd Miller, who runs Todd's Country Store in Buffalo Cove (Caldwell County) opened by her father in 1924; Robert Pace, who runs the general store his father opened in Saluda in 1988; Davie

Photographer and North Carolina attorney, Mike Lassiter

H.J. Mull Grocery, Morganton

City Barber Shop, Creedmoor

Blackley, who bought Renfrow Hardware (1900) in the 1980s and still does business the old-fashioned way; Jim Hinkle, who runs Conrad & Hinkle Food Market founded by his grandfather, and sells the pimento cheese spread made famous by grandmother; and Kenneth Wood, who has been at Graham Barber Shop since 1953, but has been cutting hair since 1927!

Did your experience as a lawyer benefit you in publishing this book?

Yes, with one small exception. I was photographing a hardware store from the street in a nearby county. I walked toward the front door to go in and ask if I could take some shots inside the store. The owner asked me what my occupation was. When I told him I was a lawyer, he ran me off. Otherwise, I found the people I met to be very genuine, down-to-earth, and even willing to talk about their experiences. In the practice of law, you have to learn to build trust and rapport with people whether it's your client or an adversary. That experience was valuable to me as I met folks with a variety of backgrounds and life experiences.

How has your book been received and where can you get a copy?

The response has far exceeded my expectations. Since the release of the book in December, I have sold nearly 2,000 of the initial printing of the 3,000 copies. I have had so many positive comments from folks who say that the book brings back fond memories for them and who have thanked me for capturing these places. It feels good to hear that kind of response. It reinforces that this has been a worthwhile endeavor and that I wasn't crazy to be driving all over the state putting thousands of miles on my car after all.

I sell the book online at www.ncamericana.com. It is carried at Barnes & Noble and Borders. I'm slowly getting it to the smaller, independent book stores as well.

Do you plan a sequel?

I'm not yet. I do miss the sense of adventure I felt in discovering these places. South Carolina's not too far…and with fewer counties. We'll see…■

Mike Lassiter was raised in Statesville. He is a graduate of the University of North Carolina (BA 1985) and Campbell University School of Law (JD 1991). He's been in private practice with his father in Statesville since 1994.

The Truth about Lawyer Discipline

BY L. THOMAS LUNSFORD II

The North Carolina State Bar's recent disciplinary action against the former prosecutor in the Duke lacrosse case, Michael B. Nifong, has generated a great deal of interest among lawyers and members of the public in the enforcement of the profession's ethical standards. Judging from the many communications we have received concerning the case, and from the extensive media coverage, it is obvious that there are still certain aspects of our work that are not well understood. This article, which originally appeared in a slightly different form as an "op-ed" piece in the Raleigh News and Observer, *was written to explain the process and to dispel some of the most commonly held misconceptions. It is published here with the permission of the* News and Observer.

The State Bar is not the "Bar Association." The State Bar is a state government agency responsible for regulating lawyers. It has the power to establish a code of ethics for the profession, and to investigate and prosecute lawyers for violations of that code. All lawyers licensed by the state of North Carolina are required to belong to the State Bar and to support its administration with their annual dues. The *North Carolina Bar Association* is a voluntary private professional association. The Bar Association has nothing to do with the disciplinary process.

Disciplinary proceedings are public proceedings. The State Bar investigates hundreds of cases each year, receiving reports from a variety of sources including citizens, lawyers, judges, and the media. Once a confidential investigation is completed and the State Bar's Grievance Committee decides there is a reasonable basis to believe that a lawyer has violated the Rules of Professional Conduct, a formal complaint is filed on the public record before an independent administrative court known as the Disciplinary Hearing Commission (DHC). This initiates a completely transparent process that culminates in a trial at which the media and the public are welcome.

The State Bar prosecutes disciplinary cases; it doesn't decide them. The DHC sits as the judge and jury in disciplinary cases. It is composed of 20 members: 12 lawyers appointed by the State Bar and eight non-lawyers appointed by the governor and the General Assembly. Sitting in panels of three, which always include a non-lawyer, the DHC conducts the trials, finds the facts, applies the law, and alone decides which disciplinary sanctions, if any, are appropriate. Once a trial is over, either side can appeal to the North Carolina Court of Appeals if it believes errors of law have occurred.

Disciplinary proceedings are civil proceedings. The DHC is a court of record, much like the state superior court. The State Bar, as the plaintiff/prosecutor, is represented by its legal counsel. The defendant lawyer also has a right to be represented by counsel. The State Bar has the burden of proving its case by evidence that is clear, cogent, and convincing. Matters are decided purely on the evidence presented. Public opinion is not admissible.

Disciplinary proceedings concern the lawyer's license to practice. The DHC can dismiss a case, issue a letter of caution or a letter of warning, or impose an admonition, a reprimand, or a censure. The DHC can also suspend a lawyer's license to practice law for a definite period not to exceed five years. Finally, the DHC can disbar a lawyer. Disbarment means that the lawyer is no longer licensed to practice law in North Carolina. The DHC cannot impose criminal penalties like fines or terms of imprisonment. It cannot remove a public official from office or require a lawyer to withdraw from a case. It has no authority to order that damages be paid to persons who may have been injured by a lawyer's misconduct.

The purpose of professional discipline is protection of the public. In imposing a disciplinary sanction, the DHC's primary duty is to discipline the offending lawyer in the way that is most likely to prevent harm to the public. The DHC takes into account relevant aggravating and mitigating evidence about the defendant lawyer and his or her conduct when determining the appropriate disciplinary sanction.

Disciplinary cases are independent of other related cases. Although disciplinary cases may concern allegedly improper conduct in other civil or criminal cases, they are separate and independent. A disciplinary case does not terminate when a related civil or criminal matter is dismissed. The only parties to a disciplinary case are the State Bar, which is the plaintiff, and the accused lawyer, who is the defendant. Other persons who may have been injured or otherwise offended by the lawyer's conduct are not parties to proceedings before the DHC, although they may be called as witnesses.

The disciplinary procedures described above have been in place since 1977. Since that time they have openly facilitated justice and protected the public's interest in hundreds of cases. During the last ten years alone, lawyers have been disbarred or suspended in 373 cases. Interested members of the public or the profession wishing to learn more can find additional information on the State Bar's website at www.ncbar.gov. ■

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

Then and Now

BY ELLIOT ZEMEK

I had just entered the courtroom. It was one of two created by a subdivision of one large courtroom that had been part of the original brick gothic-like structure built a century earlier. The new courtrooms were evidence of the never-ending losing battle to keep up with the ever-litigious demands of American society. The lighter hued wood paneling seats and counsel tables were in sharp contrast to the somber dark wood of the old bigger courtroom with its faint musty odor of furniture polish and mold. It was about two o'clock on a Friday afternoon in late February, but the weather outside was clear and bright enough to allow shafts of sunlight to shine through the top of the high windows on one side of the room and dapple the floor onto which I made my entrance.

There was a young lawyer standing before the jury box addressing the jurors as I, unobtrusively as possible, sat in the fifth row of public seats. I had come to that courtroom in response to a phone request made earlier that day by the judge's secretary to explain the background of a provision I had inserted in an *ex parte* infant's compromise application that I had submitted to judicially formalize the settlement of a child-client's case. The judge who had made the request and in whose courtroom I now sat waiting for an audience was Wheatly F. MacGruder.

Sometime long ago, when MacGruder first ascended to the bench, he must have been a gentler, kinder man. But at this stage of his career, the milk of human kindness had long curdled in his breast. Not that his knowledge of the law was wonting. No, the problem was his heavy-handed style utilized primarily to keep his calendar of cases moving along at what he considered an acceptable rate of speed. Toward that end, he was not averse to shaping the progress of a trial in the direction he believed it should be going. Those traits and his demeanor of unapproachability to lawyers like myself—who often appeared before him—made me yearn for his retirement. I hoped it would not be too far in the future. I wondered whether many judges, like most lawyers I knew, anticipated they would work for the next hundred years or until they died, whichever came first.

As I settled in, I could hear the young lawyer reciting a quotation that I recognized, attributed to Martin Neimoller, a German clergyman during Hitler's rise to power.

"In Germany they came first for the Communists.

And I didn't speak up because I wasn't a communist.

Then they came for the Jews.

And I didn't speak up because I wasn't a Jew.

Then they came for the trade unionists.

And I didn't speak up because I wasn't a unionist.

Then they came for the Catholics.

And I didn't speak because I was a Protestant.

Then they came for me.

And by that time, no one was left to speak up."

I had always loosely interpreted that quotation to stand for the proposition that if you never tried to help, you didn't deserve to complain. However, I wondered what relevance it would have to a jury in a civil case in an American courtroom. I listened more closely. What the young lawyer's delivery lacked in eloquence, he seemed to make up for in zeal. He addressed the jury in an earnest tone of voice.

His "lordship" (I am a fan of the fictitious English barrister, Horace Rumpole, created by Sir John Mortimer), MacGruder, looked on with a scowl on his face I recognized from past experience. The scowl indicated his patience was being put upon by what he considered to be a lawyer's far ranging attempts to seem erudite by dragging in prose MacGruder deemed irrelevant to the issues in the case. At one point, an objection was made on the basis of lack of relevancy by the opposition lawyer whom I recognized from past experience. I knew him to be someone the greater portion of whose practice was devoted to representing defendants insured by various insurance companies by whom he was retained.

"No, I will allow it," ruled MacGruder, in a tone of exaggerated tolerance in response to the objection. "On summation, the court may allow greater latitude in comments made by plaintiff's counsel than would otherwise be permitted."

"Ouch!" I thought to myself, old MacGruder just ruled in favor of the young lawyer for the plaintiff, with southern finesse equivalent to complimenting a young woman by telling her she didn't look so fat anymore.

Most of the jurors were receiving the young lawyer's closing statements with blank looks on their faces; the remaining ones were staring impassively into the middle distance.

The Results Are In!

In 2007 the Publications Committee of the State Bar sponsored its Fifth Annual Fiction Writing Competition. Ten submissions were received and judged by a panel of six committee members. A submission that earned honorable mention is published in this edition of the *Journal*. The third, second, and first place stories will appear in the next three editions of the *Journal*, respectively.

That was not a good sign, I thought. The rest of his summation, although it seemed to cover all aspects of a generic personal injury negligence case, did not seem to be making any deep impression on the individual jurors—eight men and four women. I mused that this time of month was the end of the trial term and the panel of people left from which to pick prospective jurors probably contained some disgruntled persons who resented being picked over and rejected for service in prior jury cases.

Throughout it all, a middle aged pleasant looking woman seated at plaintiff's counsel table who I guessed was the plaintiff, looked on with avid interest. To me, she appeared to be dressed in a manner and wearing more makeup than appropriate for a woman her age—but hey, who was I to criticize! It was her day in court.

From the closing arguments of the lawyers on both sides, I was able to grasp a fairly comprehensive perspective of the case: the plaintiff was a driver of a car who had been injured when the car she was driving was struck by the defendant's vehicle at an intersection. A stop sign governed traffic coming from the defendant's direction; but he claimed that he had stopped, then proceeded, and was already making a left turn into the plaintiff's direction of travel when he saw her for the first time. The liability aspect of the case appeared to favor the plaintiff's case in that the defendant, if he looked after stopping at the stop sign should have seen the plaintiff's car approaching. Therefore, who was at fault did not seem to me to be the big issue. On the other hand, the injuries sustained by the plaintiff and the damages to which she could be entitled did appear to be very much an issue. I understood the reasoning behind the young lawyer's warning reference of silent acquiescence to the cumulative incremental persecution by the Nazis. It was an appeal to the jury's collective conscience not to minimize his client's pain and suffering because someday in the future those jurors might be seeking monetary damages for their own injuries which were now being trivialized by a scoffing defense lawyer. The young lawyer's argument, I thought, was a bit of a stretch with this judge and this jury—but who was I to criticize another lawyer for trying to reach beyond his grasp.

I remembered early on in my career in another jurisdiction prosecuting a personal injury negligence case between two refugees that had emigrated from Russia, which I had fashioned around the little used legal liability theory of "danger invites rescue." The plaintiff had been a passenger in the defendant's car when it developed a flat tire. The defendant in a scene reminiscent of an old Laurel and Hardy movie had undertaken the task of changing the tire while the passenger looked on. Because of the amateurish manner in which the car had been jacked up to remove the offending tire, the car began to slip off the vertical plane while the driver was within the zone of danger. Heeding the call of distress of his driver, the plaintiff, without thinking, answered the summons to rescue by grabbing the jack and trying to stabilize it, resulting in serious injury to his hand. The application of my legal theory to the facts in the case, I remembered, was ridiculed by defense counsel and got short shrift from the trial judge as well. The sad memory of that experience had mercifully dimmed with time, although I remember with clarity a moment of levity lightening the pain when the court stenographer stopped the proceedings to ascertain the exact spelling of the word, "Oy!" The word was the "excited utterance which the plaintiff cried out at the moment of injury. Though there was some confusion about the spelling, there was no doubt that the word qualified as an evidentiary exception to the hearsay rule.

The defense lawyer now was making his closing statement. His name was Labelle. He was bombastic, and his delivery was heavy

with sarcasm. Somehow, he subtly insinuated the suggestion that the plaintiff was, with the connivance of her lawyer, exaggerating her pain and suffering FAR beyond the trivial injury she had sustained in the accident—and if she was injured at all, it was as a result of an injury sustained five years earlier which she was blaming on the automobile accident. There were a few objections made by the young lawyer to remarks which were improper and inflammatory that caused MacGruder to give a tepid admonishment and plain-vanilla generic curative instructions to the jury. I thought Labelle had stepped over the line in personally attacking the young lawyer and a motion for mistrial should have been made. Such a motion might have helped on the appeal of the "train wreck" I was beginning to see looming up ahead.

Before Milord MacGruder began his charging instructions to the jury I had the opportunity to leave the courtroom and go back to my office before the courtroom doors were locked while they jury deliberated; but it had been a hard week and I did not relish going back just then to whatever new problems awaited me. His instructions to the jury were fairly standard for this type of case, although there was some heated argument over plaintiff's request to charge on the "thin-skulled plaintiff" rule which deals with an aggravation of a pre-existing underlying dormant weakness—an underlying weakness that predisposes the injured party to a greater injury than that which would have been sustained by a healthy plaintiff due to defendant's negligence.

After the jury had been charged, they were excused in order to deliberate and good old Hon. MacGruder had left the courtroom. I approached the young lawyer, introduced myself, and complimented him on his work. Hell, it didn't cost anything and I could feel his pain and frustration.

"What do you think?" he asked.

So now I was expected to become some sort of legal ancient mariner giving advice to a wedding guest. "I don't know. Anyone who says he never lost a case is either lying or has only tried one case," I answered trying to gently prepare him for the "train wreck" that I perceived to be coming closer.

He looked at me inquisitively, "I suppose it shows. I haven't tried too many cases."

Older lawyers like to exchange "war stories" with their younger colleagues, and I was no exception. Besides, I had begun to warm up to the role of lawyer ancient mariner.

"Look," I said. "When I tried my first case I was nervous as hell even though I had spent weeks preparing. If there is such a thing, I over prepared. When the verdict came in I was delighted. The amount awarded as damages was not magnificent, but it was a lot more than I had been offered in settlement. After that, flushed with confidence at my success, I tried two more cases with gratifying results. The next case I tried, though, I lost, as well as two subsequent cases. After that I spent a lot of time trying to figure out what was wrong. It wasn't until I won a minor traffic offense trial that I realized what the problem was. It occurred to me that I was not the kind of person who was a natural born salesman; that the first few times at trial I believed passionately in my clients and the merits of their respective cases. After that, intoxicated with victory, I sort of sacrificed substance to form attempting to reduce my performance to a method or formula which had proven successful in the past. The difference between the lost cases and the traffic offense win was that in the latter case I believed in my client's cause and empathized with his plight. From then on, I never took a successful outcome for granted, nor underestimated my adversaries. I also learned, in time, that you have to be flexible and innovative as the need arises, but above all, you must sell your client's case to the jury. I can't say I always won after that, but my lifetime batting average is not too bad."

The young lawyer's expression brightened. He had heard the words dealing with passionate belief in your case and innovation and creativity, but I'm not sure he heard the part about hard work, salesmanship, and never taking anything for granted.

"I turned down a $50,000 offer before trial. My client has at least one herniated disc, among other injuries. Her case is worth more," he said, sounding a little apologetic.

Like Kenny Rogers used to sing, "You gotta know when to hold 'em, know when to fold 'em…"

He didn't seem too interested in my country music ballad wisdom. I flashed on those few times in the past when I had turned down an offer in settlement only to have the jury come back with less than the offer, or worse, nothing at all.

At that point, the plaintiff herself interrupted our conversation, and the young lawyer busied himself in conversation with her for the next ten minutes. Before we could resume our conversation, the court officer announced that the jury had reached a verdict, and in short order dear old MacGruder returned to the judges' bench, and then the jury filed in and resumed their former seats. They hadn't been out long. That also was an unfavorable portent.

"Have you reached a verdict?" MacGruder intoned to the foreman of the jury.

"We have Your Honor."

"Was the plaintiff injured as a proximate result of the negligence of the defendant?"

"We answer yes."

"Did the plaintiff, by his own negligence, contribute to the accident?"

"No."

"Were the injuries and consequent damages claimed by the plaintiff proximately caused by the defendant?"

"Yes."

"How much do you award in damages?"

"We find in the sum of $15,000 in favor of the plaintiff against the defendant."

The jury had awarded nothing for pain and suffering; only for out-of-pocket medical and other miscellaneous expenses.

The young lawyer's face took on an expression of many emotions, the most obvious of which was chagrin.

"But that's the exact amount of the special damages," he mumbled incredulously, referring to the total amount of medical and hospital bills for treatment and tests, drug bills, and lost earnings.

The "train wreck" had arrived. In sympathy for the plaintiff's injuries, my mind flashed back to a period in the past when I had done a flurry of medical malpractice cases during which time I always imagined I was suffering from the same injuries or maladies my clients were suffering; except, of course, for pregnancy and birth complications.

Now I really felt the young lawyer's and his client's pain.

As the young lawyer was leaving the room with his disconsolate client, MacGruder sent for me and entered his chambers. To my surprise, and unlike our previous meetings, his conversation was almost collegiate. This was making me nervous.

"Sit down. It's been a long week," he said, motioning me to a well-worn couch. I sat.

"Too bad you had to sit through that

waste of time in the court room just now. People expect judges to have unlimited patience in the courtroom, but we're only human and patience often wears thin. For instance, what, really, did that business about the Nazis have to do with that case?" He looked at me expectantly.

Again, I flashed back in time to when I was much younger. It was the first matrimonial case I had ever tried. I represented the wife, the mother of a good friend, who was seeking a legal separation from her husband, who had decided to find the comfort and solace conspicuously absent from the marital home, in the arms of a mistress. The presiding judge was a no-nonsense tyrant with a reputation for citing lawyers for contempt, even though he never followed through with a contempt citation (I later found out).

His Honor had already decided in his own mind to decide in favor of my client. Unfortunately for me, he had not confided his plan to me, or if he did, I was too inexperienced to read his signals. I kept making legitimate objections to exhibits and testimony he was admitting into the record, which he was probably doing in an attempt to hasten the pace of what he deemed was already a foregone conclusion. Finally, in exasperation, he exclaimed to me, "sit down and shut up, or I will cite you for contempt of court."

I didn't and he did. "Counselor, I hereby order you to show cause on next Tuesday at 9:30 a.m. in this courtroom why you should not be held in contempt of court for your behavior in my courtroom." I could feel my bowels beginning to liquefy, and I had visions of losing my license to practice law flying away like a big black bird disappearing beyond the horizon.

After retaining the oldest lawyer I knew at the time, an associate who was 30 years younger than I am now, we both appeared on the appointed time and place to show cause why I should not be cited for contempt. "Well, counselor," (I don't think he even remembered my name), "what do you have to say for yourself?" said my tormentor.

"Apologize," whispered my lawyer friend.

"For what?" I whispered back.

"Never mind, just apologize."

"Your Honor, I am sorry that I disturbed the order and decorum of your court and apologize for my outburst," was all I could think of to say.

"All right, then. Behave yourself and don't let it happen again. My order to show cause is negated."

His Honor turned his attention to other business of the court and I left in the company of my lawyer, a sadder but wiser man. It was some consolation to find out two years later that His Honor had been forced to resign from the bench for improper conduct and other offenses.

With that memory in mind, I looked at MacGruder, who was facing me now, half sitting on his desktop with one foot on the floor and the other dangling over the floor. History seemed to be repeating itself in a situation where I had to choose between the safety of expediency or the danger of speaking my mind. I had no idea what I was going to say until I actually spoke.

"Judge, I half agree with you that the silent acquiescence of the German people before World War II has very little relevancy to the trial you're talking about, but I think that young lawyer's attempt to use the allegory as an argument to bolster his case was novel and worthy of more tolerance than you accorded it. Also, was it really worthy of you to have let opposition counsel impugn plaintiff's lawyer's integrity and honesty without a curative instruction on improper comment to defense?" There is more that I wanted to say, but my more political self realized I had said too much already. A wrong had been done to the young lawyer and, in my opinion, judicial error had been committed on more than one score during the course of the trial. I choked off further comment, counseling myself with the thought of the repeated adage that that's what appellate courts are for, trying to curtain off the knowledge from my conscience that appeals are costly, time consuming. Also, they are argued on the record of the trial minutes, which is unable to reflect a judge's demeanor, attitude, sarcasm, tone of voice, and other subtleties which can prejudice a jury.

MacGruder looked at me somewhat nonplused. He didn't really expect me to disagree with him, and he didn't know how and whether to respond.

"Well, I find your remarks interesting" his lips said, but his eyes were telling a different story. "If you are right, and I don't think you are, I guess that's what appeals are for."

"About your infant's compromise applica-

tion," he began, changing the subject, "I see that the petitioner is the older sister of the child. Why didn't the father or mother bring on the application?"

"That's because the father is dead and the mother is in a long term drug rehabilitation facility. The background was explained in the papers seeking appointment of the adult sister."

"I see," he said. "Just the same, I'd like you to incorporate those facts into the compromise papers as well."

By the way," he said looking straight into my eyes, speaking slowly and deliberately, drawing out each word for dramatic impact, "you do know that I have discretion to reduce your attorney's fee on the infant's compromise below the usual one-third of the recovery? In reading your summary of services rendered in your papers, I think that in view of the services rendered, one-third might be a bit high."

I looked calmly back into his eyes, resolved not to give him the satisfaction of having me complain or try to argue him out of reducing my fee.

"However, though I could do so, I'm not going to reduce the percentage of fee," he intoned, trying to impress on me who was the boss in his courtroom. "Amplify your papers to reflect the information we've discussed and get the completed version back to me as soon as possible." He paused. "Unless there is something else you want to discuss, you are free to leave now," he said dismissing me from his chambers.

I walked out of the courtroom into the fading daylight thinking about the events of the afternoon and my conversation with the young lawyer. I wondered how much erosion or enhancement of his enthusiasm and creativity would occur in the succeeding years by today's experience and future agonies of defeat and ecstasies of victory, to borrow a sport's idiom. Outside, the temperature was dropping and dusk and cold were stealthily creeping in like a panther silently stalking his prey.

Walking to my car, the irony occurred to me of my being intimidated into partial silence against speaking out to a bully who had tried to ridicule a young lawyer who was trying to express himself. Maybe, I thought, I should plan on retiring before I die—or at least within the next couple of years.

When I got home a little earlier than usual, my wife met me at the door.

"Anything wrong? You're home early."

"No, nothing is wrong, but I've had a strange day."

"Really? Well, take the garbage out, and when you come back you can tell me all about it while we eat supper."

Later that night, after we had settled in, my wife (as wives are wont to do) pried the details of my afternoon's humiliation out of me. We had been married long enough for our being in love to mature into loving one another. She had been a very young bride, by today's standards, but it had amazed me how much the potential for growth of understanding and depth of insight I had invariably glimpsed when we first fell in love had grown over the years. Along with such growth had emerged a poised, ambitious, confident, spirited woman where once had been a naive sweet thing. I liked the metamorphosis.

Since getting married she had completed her education with a masters in education and was teaching English in a local high school.

"Look," she said, "you have been treated badly and you had to eat some humble pie.

That's a fact. But you feel you are a coward because you submitted to the indignity: that's not a fact. There's a short story by Robert Louis Stevenson in which the main character keeps trying to assuage his guilt to himself and the authorities for a murder he committed. He recounts all the adversity he has endured during his life and all the gradually more egregious offenses he has committed over time driven by need or opportunity. He consoles himself by insisting that he is not a murderer, but simply a man who has done increasingly more serious criminal acts. The story poses the philosophical problem of at what point in time does a person's acts or omissions cease to be mere character traits and instead define him? That's what you are doing here. Just because you feel you've done a cowardly act here and there because of expediency and practicality doesn't make you a coward any more than the commission of a courageous act in a lifetime necessarily makes a man a hero. Stop beating yourself up. You're giving yourself two headaches for the price of one. Life forces us to make compromises once in a while, and the person who keeps as much of his integrity as possible at the end of his life wins the game."

When she finished I stared at her in awe with equal parts of admiration, affection, and respect that I suppose were showing in the expression on my face.

"When did you get so wise," I asked. She met my gaze, cocked her head, and smiled prettily. I kissed her with the ardor of a man in love with his wife.

"Come to bed," she said. I complied. ■

Elliot Zemek of Fuquay Varina has been practicing law for 45 years and is now semi-retired.

In Memoriam

Hugh R. Anderson
Asheboro

Judge Lowry M. Betts
Pittsboro

Robert B. Broughton
Raleigh

William L. Cooke
Windsor

John R. Elster
Winston-Salem

John H. Fenner
Rocky Mount

Lucius H. Harvin III
Henderson

Thomas G. Lane Jr.
Charlotte

Richard A. Leonard
Raleigh

William N. Martin
Greensboro

Lillard H. Mount
Durham

Jay D. Pickering
Burlington

Robert R. Reilly Jr.
Raleigh

Landon H. Roberts
Asheville

James D. Squires
Greensboro

Grady J. Wheeler Jr.
Graham