NORTH CAROLINA CENTRAL UNIVERSITY SCHOOL OF LAW
CONTINUING LEGAL EDUCATION SERIES
JUNE JOY OF LEARNING
Friday, June 7, 2013

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The NCCU School of Law Library and
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AGENDA

8:30 am  Registration

9:00 am  Divorce: It’s Not as Simple as You Think!
          *Nakia C. Davis and Tameka Lester*

10:30 am  BREAK

10:45 am  Free Legal Research for North Carolina Attorneys:
          Search Engines, Research Websites, Government Resources,
          and Fastcase
          *Lauren Collins and Adrienne DeWitt*

12:00 pm  LUNCH

1:00 pm  Driving While Impaired for Beginners
          (Or a Refresher for Those Who Aren’t)
          *Jeffrey Edwards*

2:30 pm  Ethics: The Effect of Social Media and Technology on the
          Rules of Professional Responsibility
          *Patricia Dickerson, Moderator with*
          *Shonnese Stanback and Gerald Walden*
Divorce-It’s Not as Simple as You Think!

I. “I WANT A DIVORCE!”: What does your client really mean? Initial Client and Identification Issues

When I first started practicing in 2002, I was “wide eyed and bushy tailed” and was under the impression that when potential clients came into my office, they would know what they wanted, even though I was the attorney. I soon learned that more often than not, when the consultation begins with potential clients, they are at a loss as to what they really want and need, especially as it relates to a divorce. Normally, the first sentence out of a client’s mouth is “I want a divorce.” My “seasoned” response, “let’s talk about what the word divorce really means legally and for your situation.”

This CLE manuscript will address the remedies available under North Carolina law for separation and the dissolution of a marriage as well as issues (aka road blocks) that may present themselves when you are discussing with your clients how they may wish to proceed, or issues that may arise after the legal process of separation or divorce has begun. Although the emphasis of this manuscript is on separation and the dissolution of marriage, other domestic issues that normally arise as a result of the desire to sever the bonds of matrimony, such as post-separation support, alimony, equitable distribution, child custody, and child support, are also discussed as matters that are incident to separation or divorce. If any of these other domestic issues are applicable to your client, they should be discussed along with the ultimate issue of separation and divorce.
To obtain a strong understanding of what your clients consider to be the facts of their situation, it is vital that you provide them with a detailed family law consultation form/checklist (hereinafter “intake form”) to complete before you meet with them. If you are a general practitioner, it is very important that you have consultation forms that are tailored to each area of law that you practice. See Appendix 1.-Gold-Bikin, et al., Divorce Practice Handbook 63-66 (1994). The more detailed the intake form, the more overwhelming it may be for potential clients. Thus, a practitioner must consider the client when drafting certain sections of the intake form that are vital to the initial consultation. One of the most important sections of the intake form is the Vital Statics Section, which provides a practitioner with general information regarding the potential client, the opposing party, their children and basic information about their marriage and the life of their children. This information will prove to be crucial for the practitioner and the client, as it will probably be needed for the initial draft of pleadings and the gathering of further information for potential litigation. Information and documentation about pensions, retirement plans, and other assets and debts may also be obtained by the practitioner during the consultation.

Consequently, I would strongly suggest that if you have been practicing for less than five years, you make it a priority to obtain basic information about pensions, retirements, real property, and other assets and debts as these things tend involve some of the more complex issues in family law. If, after obtaining this information, you determine that the potential client has significant assets and/or debts, you should seriously consider referring the potential legal matter to a more experienced attorney or inquire as to whether a more experienced attorney would be willing to assist you with these particular legal matters.

In addition to obtaining certain background information from the intake form, it is very important that a practitioner allows the potential client to “exhale” as potential divorce clients are usually emotional and very nervous during the initial consultation. Give them some time to just talk
to you about where they are and how they got there. As attorneys, we sometimes forget that this is our job, while this is their life. It is very important during the initial consultation that you “lend them your ear,” so that they feel that you are either empathetic or sympathetic to their situation. In displaying your concern about the situation, you may want to address the emotional stages of divorce in which stage your potential client may be. “A [potential] client’s emotions can have significant impact on the progress of the case.” Gold-Bikin et al., supra, at 42. According to the Divorce Practice Handbook, there are five emotional stages of divorce that you should share with potential clients:

1. Denial (this is not happening).
2. Depression (this is happening).
3. Anger (my spouse has some nerve).
4. Acceptance (I’m going through a divorce and I’ll survive).
5. Going on with my life.

Id. at 42. Finally, after a review of the information obtained from the intake form and potential clients’ accounts of matters, advise them of where they stand legally and what their options are as it relates to moving forward with separation and divorce— all of which we will discuss momentarily.

You should never encourage separation or divorce. Encourage potential clients to take some time to evaluate all of their options before making the decision to proceed with filing an action. In the domestic world, at times, being a counselor is just as important as being an attorney.

It is also very important that you give potential clients other alternatives to the legal remedies discussed herein. For example, you may want to discuss the benefit of therapy, individually or for the entire family. If therapy is not an option, inquire as to whether the clients have a spiritual advisor. In addition, provide them with information that they may review before making a final decision about proceeding with litigation. There are pamphlets available on separation and divorce,
child custody, and child support produced by the Public Service Committee of the North Carolina Bar Association, or the Divorce Manual: A Client Handbook or Protecting Your Children During Divorce: A Model Parenting Plan and Guidelines, which are just two of the many publications produced by the American Academy of Matrimonial Lawyers.

II. GROUNDS FOR DIVORCE IN THE STATE OF NORTH CAROLINA

In North Carolina, one will commonly hear the term “absolute divorce.” The North Carolina Family Law Marital Claims book states that “[a]n absolute divorce ends a marriage so that (except for matters involving children [and the support thereof] all of the rights and obligations between spouses that are not preserved by an agreement, a court order, or a pending claim are ended. Tenancies by the entirety are transformed, estate claims are voided, and rights to alimony and equitable distribution cease to exist unless claims are pending or have been resolved.” Carlyn G. Poole, North Carolina Family Law Marital Claims 1 (3rd ed. 2006). And of course, the obvious result, one can marry again.

When interviewing potential clients, it is not uncommon to hear how their spouse’s actions or lack thereof are the cause of the marriage failing, how their neighbor who was divorced twelve years ago in another jurisdiction told them that the spouse’s actions are grounds for divorce, and how their divorce should take no time based on the “evidence” they have. Thus, before we discuss the grounds of divorce that are recognized in North Carolina, it is important to note that North Carolina is a “no fault” state. This simply means that one is not granted or entitled to a divorce based on a finding that there is an “innocent” spouse who desires a divorce due to actions of marital fault committed by a “guilty” spouse. Suzanne Reynolds & Jacqueline Kane Connors, North Carolina Family Law 12 (5th ed. 1999)
There are two grounds for an absolute divorce in the State of North Carolina: (1) incurable insanity of a spouse, and (2) one year’s separation.

A. DIVORCE BASED ON INCURABLE INSANITY

N.C.G.S. § 50-5.1 addresses the grounds for absolute divorce in cases of incurable insanity.

N.C. Gen. Stat. § 50-5.1 (2012). The elements of absolute divorce in cases of incurable insanity are:

1. That either the husband or wife has been a resident of the state of North Carolina for at least six months preceding the action.

1. A valid marriage as recognized by the State of North Carolina.

2. That the parties have lived separate and apart for three consecutive years due to the incurable insanity of the defendant.

3. Proof of the incurable insanity of the defendant by one of the three methods set out in North Carolina General Statute section 50-5.1.

4. The three methods are “a) by confinement or examination in an institution, b) by adjudication; and by c) examination.”

Id. at 74 (citing N.C.G.S. § 50-5.1); see Appendix 2 for the entire statute and Appendix 3 for the Pattern Jury Instructions as it relates to divorce by incurable insanity.

It is very important to note that what is deemed insanity may vary depending on the applicable statute. Criminal and civil cases have different standards that are applied when making a determination as to what constitutes insanity. If there is a question as to whether a defendant is insane in a criminal case, the M’Naghten test is normally applied to make that determination. The Queen v. M’Naghten, 8 Eng. Rep. (1843). According Black’s Law Dictionary, this test is used to determine if a person is “criminally responsible for an act when a mental disability prevented the person from knowing either (1) the nature and quality of the act or (2) whether the act was right or wrong.” Black’s Law Dictionary 433 (5th ed. 2000).
Scott v. Scott provides further instruction as to the distinction that should be made in civil cases depending on whether insanity is an issue in a divorce case or criminal case. 336 N.C. 284, 442 S.E.2d 492 (1994). In Scott, the plaintiff filed an action for absolute divorce based on a one-year separation and the defendant filed a motion to dismiss, asserting N.C.G.S. § 50-5.1 as an affirmative defense based on her suffering from a combination of manic depression and paranoid schizophrenia, which was argued to be incurable mental illnesses. Id. at 289, 442 S.E.2d at 496. As such, the defendant argued that the plaintiff should have filed an action pursuant to § 50-5.1. Id. at 286, 442 S.E.2d at 494. The North Carolina Supreme Court held that the lower court had properly denied the defendant’s motion to dismiss as she did not “. . . prove by the greater weight of the evidence that she [was] incurably insane . . .” as addressed in the statute as testimony was given by a medical expert that “[h]er mental illness was treatable and was controlled by medication”. Id. at 293, 442 S.E.2d at 498.

Specifically in Scott, the court stated,

[the] mental impairment must be to such an extent that defendant does not understand what he or she is engaged in doing, and the nature and consequences of the act. The term "incurable insanity" in N.C.G.S. § 50-5.1 will not be redefined to equate it with severe and persistent mental illness as defined in N.C.G.S. § 122C-3(33a) of the Mental Health, Developmental Disorders, and Substance Abuse Act[.]

24 Am. Jur. 2d Divorce and Separation § 88 (2013). N.C.G.S. § 122C-3(33a) provides,

“severe and persistent mental illness” means a mental disorder suffered by persons of 18 years of age or older that leads these persons to exhibit emotional or behavioral functioning that is so impaired as to interfere substantially with their capacity to remain in the community without supportive treatment or services of a long term or indefinite duration. This disorder is a severe and persistent mental disability, resulting in a long-term limitation of functional capacities for the primary activities of daily living, such as interpersonal relations, homemaking, self-care, employment, and recreation.

POTENTIAL ROAD BLOCKS/PRACTICE TIPS:

There are several important issues that a practitioner should know and bring to potential clients’ attention about a divorce being granted by incurable insanity. First, once incurable insanity has been established before the court and the court finds that the insane defendant has insufficient means, which includes income and property to care from him or herself, “the court shall require the plaintiff to provide for the care and maintenance of the insane defendant for the defendant’s lifetime. N.C.G.S. § 50-5.1. Second, if a finding is made that the actions of the plaintiff have contributed to the defendant’s condition, the plaintiff’s request for relief will be denied. Third, since only a sane spouse can bring an action for divorce based on incurable insanity, the defendant may raise the incompetence of the plaintiff as a defense. Reynolds & Connors, supra, at 82-83. Notably, even if a plaintiff brings an action for divorce based on one year separation under N.C.G.S. § 50-6, the defendant may use § 50-5.1 as an affirmative defense to a pleading stating an action for divorce based on one year separation. Id.

If § 50-5.1 is used as an affirmative defense, the success of the defendant would turn on the intent of the plaintiff. Id. It would have to be proved that the plaintiff’s intent to separate and divorce the defendant was “motivated by the mental condition of the impaired spouse” and not the intent to end the martial relationship, which is required under § 50-6. Id.

B. DIVORCE BASED ON ONE-YEAR SEPARATION

An absolute divorce based on one year’s separation is the most common method of securing a divorce in North Carolina. However, before discussing the intricacies of N.C.G.S. § 50-6, I must bring to your attention that there has been some active discussion within the North Carolina Legislature on amending this law. Senate Bill 518 entitled the “Health Marriage Act” will require a two-year waiting period before being able to file an action for divorce. S.B. 518, 2013 Gen. Assemb.,
Reg. Sess (N.C. 2013). During the two-year waiting period, the parties would be required to take part in various courses in an effort to prevent the dissolution of the marriage. Id; see Appendix 4.

The four elements that must be met to secure a divorce based on one-year separation are the following:

1. The parties to the action must have entered into a lawful marriage.

2. At least one of the parties must have been a resident of the state of North Carolina for at least six months before filing the complaint.

3. That upon separation, it was the intent of at least one the parties to live separate and apart.

4. That the parties have lived separate and apart for one year, preceding the institution of the divorce action.
   a. The one year requirement is actually a year and one day. You are eligible under the statute to file the action the day after the year waiting period has expired.
   b. Isolated incidences of sexual intercourse between the parties during the separation does not toll the statutory period.

See Appendix 5.

POTENTIAL ROADBLOCKS/PRACTICE TIPS!

The elements are straightforward as written, but further investigation of the alleged facts in preparation to file the action may present unanticipated road blocks to a successful separation or divorce action, especially as it relates to the elements of residency and separation.

1. Residency/Service Members

In the context of divorce, a practitioner must understand that residency is actually based on one’s domicile. Domicile is defined as a person’s fixed, permanent, and principal home or dwelling place for legal purposes. Merriam-Webster Dictionary 289 (5th ed. 1999). To meet the residency requirement in a divorce action, the plaintiff must prove by a greater weight of the evidence that either party was physically present within the state for at least six months before filing the complaint and that it was the intent of that party to make the state his or her permanent home. N.C.P.I. Civil
815.40 (2004). So long as the requirement is met at the time the action is filed, the plaintiff, nor defendant have to reside in the state after the filing date. Reynolds & Connors, supra, at 35-36. As it relates to proving physical presence within the state, tangible evidence such as a person’s voter registration card, driver’s license and/or registration, property taxes, and proof of employment in the state may all serve as evidence to be presented and considered by the court in addressing the residency question. The conduct of the alleged resident, such as the nature and extent of social activities on a regular basis, the extent of investment in the repairs and alternations made to the home within the state, where children born of the marriage attend school may also assist the court in making a final determination as to residency. Family Law & Practice § 3.01(2)(a)(Arnold H. Rutkin, ed. 2012).

It is important to note that the above examples do not necessarily establish physical presence in a literal sense, but in a legal sense. It is not required that a person be physically present within the state for six months to meet this requirement. Also, if a resident is physically present within the state, the statute does not require that the action be filed in the county where he or she resides; however, a practicing attorney may be presented with a motion to change venue from opposing counsel if a counterclaim is filed for other domestic issues such as equitable distribution or child custody.

Although a party may physically reside within the state for legal purposes as discussed above, the party must also have had the intent for the state to be his or her permanent residence for at least six months prior to the filing of the action. “[I]f the resident never formed the intent to abandon the original residence, it remains the legal residence.” Reynolds & Connors, supra, at 37.

Residency “road blocks” are most common in divorce actions that involve service members. A service member’s military duty station is not considered his or her domicile. For example, James is a member of the army and lived in New York until his military assignment caused him to be
stationed in North Carolina. James has been stationed in North Carolina for five years and his wife, Sara, who still resides in New York, files a divorce action in the state of North Carolina. Pursuant to the residency requirement under N.C.G.S. § 50-6, if there is no evidence presented that James had, or has, the intent to change his permanent residence from New York to North Carolina, a strong argument can be made by James that the North Carolina residency requirement has not been met.

Sara may, however, attempt to counter James’ argument by alleging that the residency requirement is met pursuant to N.C.G.S. § 50-18, which states that if a member of the armed forces has “resided or been stationed” within the state of North Carolina due to military duty for six months preceding the institution of the action, the residence requirement will have been met provided that “personal service is had upon the defendant or service is accepted by the defendant.” N.C. Gen. Stat. § 50-18 (2012). When reading the statute, on its face, it seems as if Sara would prevail; however, case law, such as Martin v. Martin, 253 N.C. 704, 118 S.E.2d 29 (1961), shows that North Carolina incorporates the intent requirement when applying this particular statute.

“In Martin v. Martin, . . . the North Carolina Supreme Court interpreted the statute to mean that a [service member] living on base (which is federal territory) does not qualify the [service member] from claiming that he or she is living in the state of North Carolina. The statute merely allows an otherwise eligible service member-domiciliary to file for divorce in the state when his or her recent physical residence has been ‘on base’ instead of in the surrounding civilian community. [T]his statute is not to be construed to mean that true domicile in North Carolina is not required for the court to assert jurisdiction over the marriage of the parties.” Mark E. Sullivan, The Military Divorce Handbook 342-43 (2006) (emphasis in original) (citing Martin, 253 N.C. at 710-711, 118 S.E.2d at 31, 34; see also Hutson v. Huston, No. No. COA10–1177, 2011 WL 705136, *___ (N.C. Ct. App. Mar. 1, 2011) (unpublished). To assist the practitioner with making a determination as to whether there is a
residency issue, I have included a checklist that was created by Mark E. Sullivan for service members and spouses. I find it helpful in general. See Appendix 6.

2. INTENT AND ACTUAL PHYSICAL SEPARATION

As it relates to intent to live separate and apart, it is not required that the “departing” spouse verbally state that he or she no longer intends to cohabitate. See Smith v. Smith, 151 N.C. App. 130, 132, 564 S.E. 2d 591, 592 (2002). “[Case law in North Carolina] . . . has consistently required that the spouses live in separate residences in order for them to live ‘separate and apart’ within the meaning of the statute.” Reynolds & Connors, supra, at 44. The physical separation is a strong indicator of the intent to sever the marital relationship, but is not conclusive of such. Id. at 45. Since the statute does not give a clear meaning of what constitutes separation as it relates to this statute, this may present a road block. In making a determination as to whether the parties are still “holding themselves out as husband and wife,” you must consider all of the fact and circumstances of the parties relationship during the marriage and how, if any way, those facts and circumstances have change during the required separation period. N.C.P.I. Civil 815.40 (1999).

In Lange v. Lange, the plaintiff appealed the lower court’s decision to dismiss his claim for divorce from bed and board, equitable distribution, child custody, and child support due to a validly executed separation agreement that had not been terminated due to reconciliation since its execution. No. COA03–1070, 2004 WL 1325790 (N.C. Ct. App. June 15, 2004)(unpublished). The plaintiff contended that the living arrangement, agreed upon by the parties and documented in the separation agreement, violated the requirement that the parties must live separate and apart. Id. at *1-3. The North Carolina Court of Appeals affirmed the lower court’s decision, stating that “although the parties both resided in the marital residence, albeit in separate living quarters, when
reviewing the totality of the circumstances, they did not reconcile following the execution of the their separation agreement. *Id.* at *8.

In *Lin v. Lin*, the husband claimed on appeal that the parties living in adjacent apartments from 1979 until 1990 met the “separate and apart” requirement. 108 N.C. App. 772, 774, 425 S.E.2d 9, 10 (1993). The record and the court’s order reflected that although the parties lived in adjacent apartments, the parties still engaged in activities that supported the marital relationship on a consistent basis, such as continuing to share in family chores, family meals, jointly entertaining overnight house guest and occupying one hotel room when on business trips. *Id.* at 774, 425 S.E.2d at 10. The North Carolina Court of Appeals affirmed the decision of the lower court, stating “It is well settled that there is no separation where ‘the parties have held themselves out as husband and wife living together, nor when the association between them has been of such character as to induce others who observe them to regard them as living together in the ordinary acceptation of that descriptive phrase” *Id.* (citing *In re Estate of Adamee*, 291 N.C. 386, 392, 230 S.E.2d 541, 546 (1976)).

In *Leford v. Leford*, the Court of Appeals vacated and remanded the lower court’s decision to grant the husband’s summary judgment motion in objection to his wife’s action for the divorce based on one-year separation. 49 N.C. App. 226, 234, 271 S.E.2d 393, 399 (1980). The husband provided the lower court with an affidavit, which included a list of activities that he contended established an ongoing marital relationship during the alleged year of separation. *Id.* at 230-31, 271 S.E.2d at 397. The list of activities provided in the husband’s affidavit, included occasional cooking and cleaning by the wife, eating a restaurants together on three different occasions, and attending church together. *Id.* “The court held that [upon review of the record, specifically the affidavit of social activities that occurred between the parties] we see nothing that would warrant finding as a matter of law that the parties held themselves out as man and wife. The acts listed appear to be
isolated or occasional and not of a character to be inconsistent with the parties’ status as separated spouses.” *Id.*

### III. COLLATERAL ISSUES TO ADDRESS BEFORE FILING AN ABSOLUTE DIVORCE

Even if it appears that based on the fact and circumstances provided, obtaining an absolute divorce will not present any of the statutory issues discussed above, practitioners should still make their clients aware of various collateral issues that may need to be addressed before the filing of the action or before the entry of the trial court’s judgment.

#### A. EFFECTS ON ALIMONY AND EQUITABLE DISTRIBUTION

I have heard, on many occasions, the phrase, “I don’t want anything but out!” However, it is important that clients understand “the anything” they are giving up, especially as it relates to possible alimony and equitable distribution. N.C.G.S. §§ 50-11 (c)-(f) addresses the effects of an absolute divorce judgment on a spouse’s right to alimony and equitable distribution.

The right to alimony or post-separation support of either spouse is forever waived unless there is a pending claim at the time the divorce judgment is granted. N.C. Gen. Stat. § 50-11 (c) (2012). Even if the parties consent to modifying the divorce judgment to include alimony and there was not a pending claim at the time the divorce was granted, the court lacks subject matter jurisdiction to modify the judgment. See *Magaro v. Magaro*, No. COA 10-96, 2010 WL 3466419 (2010). The exception to this rule is found in G.S. § 50-11 (d), which states, “[a] divorce obtained outside the State in an action in which jurisdiction over the person of the dependent spouse was not obtained shall not impair or destroy the right of the dependent spouse to alimony as provided by the law of this State.” G.S. § 50-11(d). In addition, a judgment or decree for alimony or post-separation
that was rendered before, or at the time of, the divorce judgment is granted shall not be affected by that judgment. N.C.G.S. § 50-11 (c).

Similarly, the right to equitable distribution is forever waived unless there is claim that has been asserted prior to entry of the divorce judgment. N.C.G.S. § 50-11 (e). An exception is permitted if the defendant was properly severed via publication, pursuant to N.C.R. Civ. P. 4, and the defendant did not appear before the court or the court lacked jurisdiction over the defendant or the property. Id. In these instances, the defendant has six months from the date of judgment to assert his or her right to equitable distribution. Id.

An interesting topic as it relates to equitable distribution claims and divorce judgments is the effect of a voluntarily dismissal without prejudice under Rule 41 (a)(1) of the North Carolina Rules of Civil Procedure. The timing of the dismissal is very important and determines whether the action can be refilled within the one-year period allotted under the statute. If the claim was asserted and dismissed under Rule 41 (a)(1) before final judgment was rendered, the petitioner may not refile; however, if the claim is dismissed after final judgment, the petition shall have one year from the date of final judgment to refile the claim. North Carolina Trial Judges' Bench Book, District Court, Volume 1 Family Law 5-23 (2012) (citing, Rhue v. Pace, 165 N.C. App. 423, 598 S.E.2d 662 (2004) and Stegall v. Stegall, 336 N.C. 473, 444 S.E.2d 177 (1994)). The statute does not provide for a verbal motion asserting an equitable distribution claim. See Webb v. Webb, 188 N.C. App. 621, 656 S.E.2d 334 (2008).

It is important that one understands that a divorce does not become final until it is reduced to writing, signed by the judge, and filed by the clerk. In Santana, the court stated, “[A] judgment is entered when it is reduced to writing, signed by the judge, and filed with the clerk of court.” Santana v. Santana, 171, N.C. App. 432, 434, 614 S.E.2d 438, 439 (2005)(quoting N.C.R. Civ. P. 58). The key is to assert the right to alimony/post-separation support or equitable distribution before this process
is completed. If you assert the right in a timely fashion, the court has the authority to reserve the right to be resolved at a later date. Thus, placing the sentence, “The Plaintiff/Defendant wishes to reserve his or her right to post separation support, alimony and/or equitable distribution,” is of no legal value if a claim(s) has not been asserted before the final judgment. If, after explaining the effects of the absolute divorce judgment on any of these claims, clients still desires to proceed without asserting the aforementioned rights, have them sign an Affidavit of Understanding for your file. See Appendix 7.

B. RESUMPTION OF NAME AND DEATH BEFORE FINAL ORDER

N.C.G.S. § 50-12 provides for the resumption of a maiden or pre-marriage name. The name may be resumed in one of two ways. You may make the request simultaneously with the filing of the divorce action or, after the final action is rendered, you may file an Application/Notice of Resumption of Former Name. See Appendix 8. As it relates to the death of a party, if a party dies before the final judgment is rendered, the claim for absolute divorce will be dismissed. Dunevant v. Dunevant, 142 N.C. App 169, 542 S.E.2d 242 (2001). However, if that final judgment effects property rights of the parties, then the final judgment as it relates to those rights may be amended, altered or modified. Id.

IV. DIVORCE NOT AN OPTION… Separation Agreements and Divorce from Bed and Board

Proceeding with an absolute divorce may not be an option, either because the client does not meet the elements as discussed above or the client is not ready to take that step. If this is the case, entering into a separation agreement with the spouse or filing a claim for Divorce from Bed and Board may be plausible options.

1. SEPARATION AGREEMENTS
A separation agreement is a written contract between a husband and wife that addresses domestic issues such as child custody, child support, equitable distribution, post separation and alimony. A separation agreement is not required to corroborate the intent of the parties to dissolve the marriage. N.C.G.S. § 52-10.1 authorizes a husband and wife to enter into a separation agreement so long as it is “not inconsistent with public policy which shall be legal, valid, and binding in all respects[,]” N.C. Gen. Stat. § 52-10.1 (2012).

“Separation Agreements are void against public policy unless the parties are living apart at the time of execution or they plan to separate shortly thereafter.” North Carolina Trial Judges’ Bench Book, supra, at 5-23(citing Stegall v. Stegall, 336 N.C. 473, 444 S.E.2d 177 (1994). “[In addition], reconciliation voids the executory provisions of the separation agreement of the parties.” Id. at 1-21 (citing Newland v. Newland, 129 N.C. App. 418, 498 S.E.2d 855 (1998). It is important to advise your clients that a separation agreement is an alternative to filing certain domestic actions with the court and that it may be drafted and presented to their spouse for their review and signature indicating the agreement to the terms thereof. However, that spouse is under no obligation to sign that agreement. Thus, before payment is submitted to the attorney, clients may want to carefully consider whether this option is a viable one.

A duly executed separation agreement is governed by contract law, unless the parties to the separation agreement consent to have it incorporated by reference into an absolute divorce decree. See N.C.G.S. § 52-10.1 If the separation agreement is incorporated into a divorce decree, it becomes an order of the court and is enforceable by the contempt powers of the court. See N.C. Gen. Stat. §§ 5A-21-23 (2012). An absolute divorce does not affect the validity of an otherwise duly executed separation agreement.

POTENTIAL ROADBLOCK/PRACTICE TIPS!

The Question of Incorporation
The decision as to whether a separation agreement should be incorporated should not be made lightly and the potential road blocks that may pose for your client should be discussed in detail. It is key to note that the different provisions of an incorporated separation agreement do not have the same legal effect as it relates to enforcement of the various rights and interests that may be addressed before the court. For a more in depth discussion on the implications, please see Appendix 9.

2. DIVORCE FROM BED AND BOARD

A divorce from bed and board is nothing more than a judicial separation of the parties involved. Normally, if you have parties who both are determined to stay in the home but do not want to reside with each other, an action for a divorce from bed and board is the proper assertion to force one of the parties to leave. Unlike an absolute divorce, a divorce from bed and board is fault-based. N.C.G.S. § 50-7 provides the grounds for divorce from bed and board, any one of which the plaintiff must prove the defendant is guilty by the great weight of the evidence. N.C. Gen. Stat. § 50-7 (2012).

IV. V. TAX CONSEQUENCES OF SEPARATION AND DIVORCE

A. TAX CONSEQUENCES OVERVIEW

When discussing a separation or divorce with your client, it is important to be mindful of the associated tax consequences. Those consequences can include changes in the following:

a. Amount of individual exemptions
b. Definition and allocation of dependency for exemption purposes
c. Federal tax credits
d. Taxation of income due to alimony and/or child support payments
e. Tax treatment of children’s medical expenses
In addition, the parties must consider the tax consequences of property transfers related to the divorce and equitable distribution. Failure to consider tax consequences of the divorce can lead to liability for attorneys, as well as professional discipline.

Parties who are involved in a divorce have the freedom to structure their divorce in ways that will significantly impact the tax consequences to both parties. Decisions made for non-tax related reasons can have tremendous and very costly tax consequences.

1. STRUCTURING THE DIVORCE

When working through a divorce, a couple’s primary considerations will likely involve children, financial stability, and the division of property. This CLE will address the tax consequences associated with decisions made in each of those categories.

a. Filing Statuses

Filing a tax return is a yearly requirement for most taxpayers. One of the most important considerations when filing a tax return is which filing status to use. A taxpayer’s choice of filing status is primarily dictated by his or her marital status and can affect the amount of standard deduction to which he/she is entitled, credits that may be claimed, and ultimately the amount of tax owed. The Internal Revenue Service (IRS) provides the following five filing status options: Single, Head of Household, Married Filing Jointly, Married Filing Separately, and Qualified Widow(er) with Dependent Child. For those individuals who are unmarried, Single or Head of Household are the filing options available to choose from. For individuals who are married, they must elect to file Married Filing Jointly, Married Filing Separately, or Head of Household (narrow exception). In the case of a widow(er), a fifth filing status is available (Qualifying Widow with Dependent Child) in certain situations.
Marital status is determined on the last day of the year. A person’s marital status on that day (ex. December 31, 2012) will be applied to the entire year. An unmarried individual is either not married or legally separated from his or her spouse under a divorce or separate maintenance decree. Married individuals, who are not legally separated or divorced and who do not have a divorce or separate maintenance decree, must choose one of the filing statuses available to married individuals. It is important to note that when using the Married Filing Separately filing status, the taxpayer will be ineligible for most of the refundable and non-refundable tax credits. The individual filing status requirements are provided in I.R.C. § 2, as well as Internal Revenue Service Publication 501 (2012).

b. Custody/Child Support

Custody is a major consideration for couples who have children. Pursuant to I.R.C. § 152, the custodial parent is allocated the dependence exemption for the child(ren) unless the custodial parent signs a declaration allowing the noncustodial parent to take the exemption. In situations where both parents qualify for the exemption (ex. joint physical custody), the IRS provides that the parent with the highest adjusted gross income (AGI) shall claim the exemption. The custodial parent is the only parent who may claim the Child and Dependent Care Credit, the Child Tax Credit, the Earned Income Credit and the deduction for the child’s medical expenses. I.R.C. §§ 21, 24, 32, 213.

Child support is a fixed sum designated in a court order to assist the custodial parent with supporting the child(ren). Child support is not a taxable transaction, thus, it is not treated as gross income to the recipient or deductible to the payor. If child support is not designated in the order, but the payment is closely associated with a contingency relating to child support, the payment will be treated as child support. In addition, if the payor has been ordered to pay child support and alimony and pays less than the amount designated for both, the payment will be treated as child support first. Pursuant to the Omnibus Budget Reconciliation Act of 1981 (Tax Refund Intercept
Program), the Secretary of Treasury may intercept the tax refund of the payor if he/she has delinquent child support. In 1984, this program was expanded to allow states to submit request for tax intercepts for families receiving Aid to Families with Dependent Children (AFDC) services.

c. **Alimony**

Alimony payments are made to a spouse or former spouse under a divorce or separate maintenance decree for his or her own support. Pursuant to I.R.C. § 215, alimony payments are deductible to the payor and taxable to the payee. I.R.C. § 71 sets forth the following requirements for a payment to be considered alimony:

1. Payments are in cash or equivalent, to and for the benefit of the spouse
2. Payments are pursuant to a divorce decree, support decree, or written separation agreement that does not designate the payment as not being alimony
3. Parties are legally separated under a divorce or separate maintenance agreement
   i. Cohabitation not allowed if under a final divorce decree
   ii. Cohabitation permitted if legally separated or temporary divorce decree
4. Payments must stop at death of payee
5. Payments are not designated as child support payments

Id. An excellent illustration of the treatment of alimony for tax purposes is *Hoover v. Commissioner*, 102 F.3d 842 (6th Cir. 1996)). In *Hoover*, the court went through an alimony analysis. *Id.* at 845. The controversy began when the IRS disallowed the taxpayer’s alimony deductions. *Id.* at 844. The United States Tax Court agreed with the IRS and the taxpayer appealed. *Id.* at 843. On appeal, the Sixth Circuit Court of Appeals affirmed the lower court’s decision. *Id.* at 848. The Court of Appeals held that taxpayer’s obligation to make payments under the divorce decree would not
terminate upon former spouse’s death, and thus, such payments did not qualify for alimony deduction. *Id.*

The payee spouse will list alimony as gross income on line 11 of the Form 1040, and the payor will take an above-the-line deduction on line 31a of the Form 1040. The payor spouse will also need to include the payee’s social security number on the form.

d. **Property Transfers**

Pursuant to I.R.C. § 1041, “no gain or loss shall be recognized on a transfer of property from an individual to a (1) spouse, or (2) former spouse.” Such a transfer will be treated as a gift.

e. **Qualified Domestic Relations Order (QDRO)**

A Qualified Domestic Relations Order (QDRO) is critical in determining tax benefits and consequences from the division of pensions, retirement, and benefit plans. N.C.G.S. 50-20.1(d) provides instructions for determining the actual award amount. In *Hawkins v. Commissioner*, a divorce settlement provided that a million dollar award be paid to the wife from the husband’s pension. 86 F. 3d 982 (1996). After the divorce was finalized, both parties challenged the assessment of income tax deficiencies. *Id.* at 985. The wife claimed, and the U.S. Tax Court agreed, that the distribution should be taxed to the husband. *Id.* at 984. The husband appealed to the Tenth Circuit Court of Appeals, and the decision of the U.S. Tax Court was reversed. *Id.* at 994. The court held that the marital settlement agreement that was incorporated into the divorce decree was a QDRO that shifted the income liability to the wife. *Id.* at 993.

VI. THE PROCESS…PROCEDURAL OVERVIEW

A. CONTENTS OF THE ENTIRE FILING

1. **THE COMPLAINT AND OTHER FILINGS**
It is important that the contents of your divorce complaint are in compliance with N.C.G.S. § 50-8. The contents of an absolute divorce complaint based on one year separation, other related documentation, and an actual absolute divorce judgment are found in Appendix 10. Along with the complaint, one should also file: a) a domestic action coversheet- AOC-CV-750; b) a civil summons-AOC-CV-100; c) and any other documents needed, according to the local rules of the court in which you will be filing the action.

2. SERVICE OF PROCESS—DUE DILIGENCE AND A “BREATHING SUMMONS”

Once the pleading(s) and other required documentation has been filed, proper service upon the defendant must take place before obtaining a divorce. Under G.S. § 50-8, if the plaintiff is not a resident of North Carolina, he or she must file the action for divorce in the county in which the defendant resides. *Id.* If for some reason, this rule “slips you mind,” it is not a ground for dismissal. If the defendant does not contest venue before the time to answer expires, the right to do so is waived, and the court where the action was filed may exercise jurisdiction. Reynolds & Connors, *supra*, at 114.

Pursuant to N.C.R. Civ. P. 4, there are several ways that one my serve an opposing party:

a. personal service via certified mail, return receipt requested;
b. personal service by the sheriff of the county in which the action was filed or by some other person duly authorized by law to serve summons]

N.C.R. Civ. P. 4. There are two other methods of service that are allowed under Rule 4, but they need more than mere mention, as they may lead to road blocks. They are acceptance of service by the defendant and service via publication.

Although acceptance of service by the defendant is permitted, an attorney may not provide a defendant with an Acceptance of Service and Waiver form. Pursuant to North Carolina State Bar Ethics Opinion CPR 296, an attorney may not prepare and/or provide a pro se defendant with any
other type of waiver other than for service of process. See Appendix 11. As it relates to service via publication, Rule 4 (j1) states, in pertinent part, “[a] party that cannot with due diligence be served by personal delivery, registered mail, or by a designated delivery service authorized pursuant to 26 U.S.C. sec. 7502 (f)(2) may be served by publication.” Thus, this cannot serve as your first method of service. This method of service is commonly used when your client comes in and states, “I don’t know where his lives.” This statement, even in the form of an affidavit from your client, will not serve as your “due diligence” required under law. “If the plaintiff knew where the defendant was or could have found out with the use of due diligence, service of process by publication is void even if the plaintiff was not guilty of fraud or concealment.” Reynolds & Connors, supra, at 115. Due diligence simply means that all reasonable means must be exhausted in an attempt to locate the defendant. To show due diligence, I suggest the following:

a. Attempt to obtain the defendant’s address by one of the following methods:
   i. ask your client to provide you with the last address at which he or she knew the defendant to reside;
   ii. check to see if the defendant has a criminal record and if so, what address was given by the defendant at the time of arrest;
   iii. if applicable, complete a Department of Motor Vehicles Request form for the state in which the defendant holds a driver’s license. Please note that you must research the method of request as each state is different. I have attached the appropriate form needed for North Carolina as Appendix 12.

b. Upon receiving the most recent address from the suggested methods of inquiry above, attempt to serve the defendant by personal delivery, registered mail, or by a designated delivery service authorized pursuant to 26 U.S.C. § 7502 (f)(2).
c. If the summons and complaint are returned unserved, I suggest that you prepare an Affidavit of Attempted Service explaining your efforts of due diligence and attach a copy of the attempt. (If requested, present the original to the court as you want to ensure there is not tampering.)

d. Serve via publication in the county of the last known address.

Pursuant to Rule 4 (a) of the North Carolina Rules of Civil Procedure, a summons must be issued within five days of the filing of the action. Once the summons has been issued, one must attempt to complete service of the summons within thirty days of its issuance to prevent it from becoming “functus officio.” See Dozier v. Crandall, 105 N.C. App. 74, 75-76, 411 S.E2d 635, 636 (1992). In the event that you are unable to serve the defendant within the thirty day time period, you may “revive” the summons and extend the time to serve the summons by securing an endorsement or swearing out an alias and pluries summons, pursuant to Rule 4 (d) of the North Carolina Rules of Civil Procedure.

These methods of extension do not have to be used in any particular order, nor is any one method preferred by the courts over another. The extension, however, must be secured within ninety (90) days after the issuance of the original summons, or issuance of the last endorsement or alias and pluries summons.

3. **DIVORCE VIA SUMMARY JUDGMENT**

Once service has been properly effected, one may secure a judgment of absolute divorce in three ways. First, N.C.G.S.§ 50-10(e) allows for a judgment to be entered by the clerk of court under specific circumstances when the action was for an absolute divorce, or an absolute divorce and resumption of former name. N.C. Gen. Stat. § 50-10(e) (2012). Second, an absolute divorce may be secured by hearing by judge or by jury. Due to the voluminous dockets in many counties, the courts look to operate in an expeditious fashion; thus, this method is normally chosen when there is
a dispute about a material fact that has been alleged in the complaint. Lastly, when there is no genuine issue of material fact in dispute and the plaintiff is entitled to a judgment as a matter of law, N.C.G.S. § 50-10 (d) allows an absolute divorce to be secured by summary judgment pursuant to N.C.R. Civ. P. 56. N.C. Gen. Stat. § 50-10(e) (2012); see Appendix 10 for a sample Motion for Summary Judgment. The motion may be filed thirty (30) days after the filing of the complaint and the defendant is entitled to ten (10) days notice of the summary judgment hearing. Reynolds & Connors, supra, at 123 (citing N.C.R. Civ. P. 12).

If you represent a defendant who claims that there is a genuine issue of material fact that is in dispute, make sure that the answer that you prepare is detailed as it relates to the disputed fact(s). In Daniel v. Daniel, the plaintiff filed an action for an absolute divorce and properly served the defendant. 132 N.C. App. 217, 510 S.E.2d 689 (1999). The defendant filed an answer that generally denied the allegation asserted in the plaintiff’s complaint. Id. at 218, 510 S.E.2d at 689. The plaintiff then moved for an absolute divorce by summary judgment and the motion was granted. Id. The defendant appealed the ruling, stating that the general denials asserted in her answer were sufficient to assert a genuine issue of material fact. Id. The court of appeals rejected this argument on appeal, stating that “the affidavit/complaint raised no issues of material fact and established plaintiff’s entitlement to the divorce. [T]he defendant's general denials, without more, were not sufficient to rebut the allegations of plaintiff’s complaint.” Reynolds & Connors, supra, at 145 (citing Daniel, 132 N.C. App. at 218, 510 S.E.2d at 690).
APPENDIX No. 1

Sample Interview Vital Statistics Form from *Divorce Manual: A Client Handbook or Protecting Your Children During Divorce: A Model Parenting Plan and Guidelines*

Initial Client Interview

*My Marriage*

1. Grounds for divorce.
   a. Incidents.
   b. Evidence.
3. Custody
   a. History.
   b. Witnesses.

***

*Spouses Information Sheet*

Please give an accurate physical description of your spouse (height, color of hair, weight, etc.). Provide a photo of your spouse if possible.

Height _________________ Weight _________________ Hair color __________________
Eye Color ____________ Distinguishing features ______________________________
___________________________________________________________________________
License number, color, and make of car(s) your spouse is driving.
Make ___________________________ Color ___________________________
License Number _____________________________

When and where should divorce or separation papers be served on your spouse?

Address _____________________________________________ Time _________________
Address _____________________________________________ Time _________________

NOTE: In the event this office must reach you on short notice, give name, relationship, address and phone number of the person most likely to know where you are:

Name __________________________ Phone no. ___________________________
Address _____________________________________________________________
Relationship __________________________________________________________
# Vital Statistics

<table>
<thead>
<tr>
<th></th>
<th>HUSBAND</th>
<th>WIFE</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>Full name</td>
<td></td>
</tr>
<tr>
<td>2.</td>
<td>Telephone work</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Home</td>
<td></td>
</tr>
<tr>
<td>3.</td>
<td>Residence (street)</td>
<td></td>
</tr>
<tr>
<td></td>
<td>City</td>
<td></td>
</tr>
<tr>
<td></td>
<td>County</td>
<td></td>
</tr>
<tr>
<td></td>
<td>State and Zip Code</td>
<td></td>
</tr>
<tr>
<td></td>
<td>inside city limits</td>
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</tr>
<tr>
<td></td>
<td>How long have you been a resident of the county?</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Are you presently living with spouse?</td>
<td></td>
</tr>
<tr>
<td>5.</td>
<td>Maiden name</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Do you wish to retain maiden name?</td>
<td></td>
</tr>
<tr>
<td>6.</td>
<td>Are you pregnant?</td>
<td></td>
</tr>
<tr>
<td>7.</td>
<td>Present occupation</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Present employer</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Type of work done during most of working life</td>
<td></td>
</tr>
<tr>
<td>8.</td>
<td>Date of birth</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Place of birth</td>
<td></td>
</tr>
<tr>
<td>9.</td>
<td>Were you ever a member of the U.S. Armed Forces?</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Dates of service</td>
<td></td>
</tr>
<tr>
<td>10.</td>
<td>Date of this marriage</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Place of marriage</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Separation date</td>
<td></td>
</tr>
</tbody>
</table>

Have you talked over the possibility of reconciliation with your pastor or a divorce counselor? ______ How many times? ______

For each legal action state the following:

a. Year commenced _________ In what court (state and county)?

b. Disposition of action (dismissed, divorce, or legal separation granted)
c. Date of dismissal or decree ______________________________________________

d. Respective attorneys involved __________________________________________

11. Number of previous marriages  
   Husband: __________  Wife: __________
   Ended by death, divorce, annulment, __________  __________
   Number of children from previous marriages __________  __________
   Name(s)/birthdate(s) __________  __________

   Who has custody of minors of previous marriages? __________  __________

12. Children of this marriage  
   Name  Birthdate/age
   ____________________________________________________________________
   ____________________________________________________________________
   ____________________________________________________________________

   Who is the custodial parent? Please provide detailed information.
   ____________________________________________________________________
   ____________________________________________________________________

Support obligation ______________________________________________________
College obligation ______________________________________________________
Alimony obligation ______________________________________________________
Special needs for ____________________________________________________________________

13. Medical History  
   a. When was the last time you consulted a physician?
   b. Physician’s name:
   c. For what conditions have you been treated by any doctor or dentist within the last three years?
   d. Have you ever had any major health problems during your marriage?
   e. When was the last time you were hospitalized for a condition other than childbirth?  
      What was the condition?
   f. Does your spouse have a major health problem or any particular physical condition?
   g. Do any of your children have exceptional health needs?

Client Pension/Retirement Plan Data Form

Client name: _____________________________________________________________
Pensioner name: ________________________________________________________  Sex: M _____ F _____
Date of birth: ___________________________ Employer: ___________________________
Date of employment: ________________ Date of plan to participation: ______________
Date of termination: _________________ Occupation: ___________________________
Pensioner’s spouse’s name: ___________________________ Date of birth: __________
Date of marriage: ___________________ Date of separation: ______________________
Pension plan data:
1. Date benefits commenced: ________________ Monthly amount: $ _______
2. Normal form of benefit (i.e. life only, period certain, J&S, etc.)

3. Total compensation for last five years:

<table>
<thead>
<tr>
<th>From</th>
<th>To</th>
<th>Total Compensation</th>
<th>Plan Compensation (if different)</th>
</tr>
</thead>
<tbody>
<tr>
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<td></td>
</tr>
</tbody>
</table>

4. Were spouse (or survivor) options elected? Y ______  N _________
   If so, will benefits be paid to spouse? Amt. if known: ____________
   (circle) Percent elected: 50%  75%  100&
5. Describe any benefit information that might influence the benefit value:

_____________________________________________________________

Attach the following:
1. Plan document, summary plan description, or other plan booklet
2. Last two years’ benefit statements
3. Correspondence with employer concerning benefits
4. IRS Schedule B of Form 5500 (5500C) (last two years)

Other marital assets to consider:
1. IRA
2. Keogh Plan (active or frozen)
3. Profit sharing, thrift/savings, stock bonus plan
4. Annuity plans or terminated employer plans (undistributed)
5. Nonqualified deferred plans
6. Defined contribution plans
7. Predecessor employer plans with undistributed vested funds
8. 401(k)
9. SEP (Spousal Employment Plan)

***

APPENDIX No. 2
N.C.G.S. § 50-5.1. Grounds for absolute divorce in cases of incurable insanity.

In all cases where a husband and wife have lived separate and apart for three consecutive years, without cohabitation, and are still so living separate and apart by reason of the incurable insanity of one of them, the court may grant a decree of absolute divorce upon the petition of the sane spouse: Provided, if the insane spouse has been released on a trial basis to the custody of his or her respective spouse such shall not be considered as terminating the status of living "separate and apart" nor shall it be considered as constituting "cohabitation" for the purpose of this section nor shall it prevent the granting of a divorce as provided by this section. Provided further, the evidence shall show that the insane spouse is suffering from incurable insanity, and has been confined or examined for three consecutive years next preceding the bringing of the action in an institution for the care and treatment of the mentally disordered or, if not so confined, has been examined at least three years preceding the institution of the action for divorce and then found to be incurably insane as hereinafter provided. Provided further, that proof of incurable insanity be supported by the testimony of two reputable physicians, one of whom shall be a staff member or the superintendent of the institution where the insane spouse is confined, and one regularly practicing physician in the community wherein such husband and wife reside, who has no connection with the institution in which said insane spouse is confined; and provided further that a sworn statement signed by said staff member or said superintendent of the institution wherein the insane spouse is confined or was examined shall be admissible as evidence of the facts and opinions therein stated as to the mental status of said insane spouse and as to whether or not said insane spouse is suffering from incurable insanity, or the parties according to the laws governing depositions may take the deposition of said staff member or superintendent of the institution wherein the insane spouse is confined; and provided further that incurable insanity may be proved by the testimony of one or more licensed physicians who are members of the staff of one of this State's accredited four-year medical schools or a state-supported mental institution, supported by the testimony of one or more other physicians licensed by the State of North Carolina, that each of them examined the allegedly incurable insane spouse at least three years preceding the institution of the action for divorce and then determined that said spouse was suffering from incurable insanity and that one or more of them examined the allegedly insane spouse subsequent to the institution of the action and that in his or their opinion the said allegedly insane spouse was continuously incurably insane throughout the full period of three years prior to the institution of the said action.

In lieu of proof of incurable insanity and confinement for three consecutive years next preceding the bringing of the action in an institution for the care and treatment of the mentally disordered prescribed in the preceding paragraphs, it shall be sufficient if the evidence shall show that the allegedly insane spouse was adjudicated to be insane more than three years preceding the institution of the action for divorce, that such insanity has continued without interruption since such adjudication and that such person has not been adjudicated to be sane since such adjudication of insanity; provided, further, proof of incurable insanity existing after the institution of the action for divorce shall be furnished by the testimony of two reputable, regularly practicing physicians, one of whom shall be a psychiatrist.
In lieu of proof of incurable insanity and confinement for three consecutive years next preceding the bringing of the action in an institution for the care and treatment of the mentally disordered, or the adjudication of insanity, as prescribed in the preceding paragraphs, it shall be sufficient if the evidence shall show that the insane spouse was examined by two or more members of the staff of one of this State's accredited four-year medical schools, both of whom are medical doctors, at least three years preceding the institution of the action for divorce with a determination at that time by said staff members that said spouse is suffering from incurable insanity, that such insanity has continued without interruption since such determination; provided, further, that sworn statements signed by the staff members of the accredited medical school who examined the insane spouse at least three years preceding the commencement of the action shall be admissible as evidence of the facts and opinions therein stated as to the mental status of said insane spouse as to whether or not said insane spouse was suffering from incurable insanity; provided, further, that proof of incurable insanity under this section existing after the institution of the action for divorce shall be furnished by the testimony of two reputable physicians, one of whom shall be a psychiatrist on the staff of one of the State's accredited four-year medical schools, and one a physician practicing regularly in the community wherein such insane person resides.

In all decrees granted under this subdivision in actions in which the insane defendant has insufficient income and property to provide for his or her own care and maintenance, the court shall require the plaintiff to provide for the care and maintenance of the insane defendant for the defendant's lifetime, based upon the standards set out in G.S. 50-16.5(a). The trial court will retain jurisdiction of the parties and the cause, from term to term, for the purpose of making such orders as equity may require to enforce the provisions of the decree requiring plaintiff to furnish the necessary funds for such care and maintenance.

Service of process shall be held upon the regular guardian for said defendant spouse, if any, and if no regular guardian, upon a duly appointed guardian ad litem and also upon the superintendent or physician in charge of the institution wherein the insane spouse is confined. Such guardian or guardian ad litem shall make an investigation of the circumstances and notify the next of kin of the insane spouse or the superintendent of the institution of the action and whenever practical confer with said next of kin before filing appropriate pleadings in behalf of the defendant.

In all actions brought under this subdivision, if the jury finds as a fact that the plaintiff has been guilty of such conduct as has conduced to the unsoundness of mind of the insane defendant, the relief prayed for shall be denied. The plaintiff or defendant must have resided in this State for six months next preceding institution of any action under this section.
APPENDIX No. 3

Civil Volume II-NC Pattern Jury Instruction- UNC School of Government

MUST BE SCANNED IN......HARD COPY
APPENDIX No. 4

SENATE BILL 518- The Health Marriage Act

MUST BE SCANNED IN ....HARD COPY
§ 50-6. Divorce after separation of one year on application of either party.

Marriages may be dissolved and the parties thereto divorced from the bonds of matrimony on the application of either party, if and when the husband and wife have lived separate and apart for one year, and the plaintiff or defendant in the suit for divorce has resided in the State for a period of six months. A divorce under this section shall not be barred to either party by any defense or plea based upon any provision of G.S. 50-7, a plea of res judicata, or a plea of recrimination. Notwithstanding the provisions of G.S. 50-11, or of the common law, a divorce under this section shall not affect the rights of a dependent spouse with respect to alimony which have been asserted in the action or any other pending action.

Whether there has been a resumption of marital relations during the period of separation shall be determined pursuant to G.S. 52-10.2. Isolated incidents of sexual intercourse between the parties shall not toll the statutory period required for divorce predicated on separation of one year.

APPENDIX No. 6
# Domicile/Residency Checklist for Servicemembers and Spouses

<table>
<thead>
<tr>
<th>Question or issue</th>
<th>State(s), Years</th>
<th>Comments</th>
</tr>
</thead>
<tbody>
<tr>
<td>For each item below, answer with information covering the last five years (or other period)</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>1. Physical location</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Describe the dates, places, and circumstances of your residing here in State A in the past ____ years on a separate sheet of paper.</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>2. Taxation</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Where have you paid state income taxes?</td>
<td></td>
<td></td>
</tr>
<tr>
<td>(If applicable) Where have you paid local income taxes?</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Where have you paid personal property taxes?</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Where have you paid real property taxes?</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Where have you paid any other state-related taxes? (e.g. intangibles tax)?</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Which state have you shown as your home on DD Form 2058, State of Legal Residence Certificate?</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Which state have you shown for your address on Form 1040 (federal income tax return)?</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>3. Real Estate</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>In what state(s) do you own residential real estate?</td>
<td></td>
<td></td>
</tr>
<tr>
<td>In what state(s) do you own other real estate?</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>4. Motor vehicles</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>For each vehicle you own (or partly own), give the state(s) of your driver's license(s).</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Where is each motor vehicle registered?</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Give the state of your driver's license.</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>5. Banking</strong></td>
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<td>In what state(s) do you have a checking account?</td>
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<td>A savings account?</td>
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<td>A safe deposit box?</td>
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<td>Other investment accounts?</td>
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<td><strong>6. Voting</strong></td>
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<td>In which state(s) are you registered to vote in state, county, or local elections?</td>
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<td>In federal elections?</td>
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### 7. Schooling

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<thead>
<tr>
<th>Question</th>
<th>Answer</th>
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<tr>
<td>In which state(s) have your children attended school?</td>
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<tr>
<td>In which state(s) have you obtained resident tuition for yourself or a family member?</td>
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<tr>
<td>Nonresident tuition?</td>
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### 8. Other

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<th>Question</th>
<th>Answer</th>
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In the above captioned action, this affidavit is to verify that the Plaintiff/Defendant:

1. Is above the age of 18.
2. Is not afflicted by any mental disability or condition;
3. Has not been coerced in any way to make the statement-contained in this affidavit;
4. Have been advised of right to assert a claim to alimony, spousal support, and equitable distribution pursuant to North Carolina General Statute 50-11 by my attorney, and I have chosen no to assert said claim and proceed only with asserting a claim of absolute divorce.

This the _____ day of ____________________, 20_____.

________________________________
Affiant

STATE OF NORTH CAROLINA
COUNTY OF DURHAM
Sworn to and subscribed before me
This ______ day of ________________, 20_____.

________________________________
Notary Public

My Commission Expires:__________________

APPENDIX: No. 8

Application/Notice of Resumption of Former Name – AOC-SP- 600
Implications for Later Modification of Incorporation of Separation Agreements Into Court Orders

Article Date: Tuesday, May 01, 2012

Written By: Samuel B. Johnson

A separation agreement, executed by the parties, may be incorporated in whole or in part by the consent of the parties into a court order and thereby become itself a court order. Clients and their attorneys often do ask, and should ask, what are the implications of incorporation, and specifically, what are the implications of incorporation with regard to the possibility of the terms of the agreement being changed later. (Throughout this memo whenever incorporation of an agreement is mentioned, the phrase "in whole or in part" should be understood to be implied.)

This memo answers those question in general terms.

First, five prefatory observations.

One, a separation agreement can be incorporated into a court order only by consent of the parties, and that consent must be effective at the time of the incorporation. In other words, a recitation in the agreement that the parties agree to its incorporation is unenforceable. Such a recitation is useful because, absent objections, a district court judge will generally honor it. However, if a party informs the court that he or she no longer consents to the incorporation, the agreement cannot be incorporated. Conceivably the objecting party is thereby in breach of the agreement and damages could be sought under a contract theory, but incorporation will not happen. See Suzanne Reynolds, Lee on Family Law (hereafter "Reynolds"), §14.32b, and the cases cited there. This answers the client question: "Once she signs this, must she agree to the incorporation when the time for the divorce comes, or can she change her mind?" Answer: "She can change her mind." Incidentally, one should note that a decree that simply refers to the existence of a separation agreement, and such references are not an uncommon practice in consent divorce judgments, does not thereby incorporate the agreement. The agreement remains a private contract only. Jones v. Jones, 144 N.C. App. 595, 601, 548 S.E.2d 565, 568 (2001) ("[N]or did the trial court specifically incorporate the Separation Agreement, or any terms thereof, into the May 27, 1999, consent order."). (Please note that this article is intended for trial level practitioners, not for brief writers. Cases cited only with a number rather than a reporter cite are probably unpublished and of problematic value as precedent. Readers who wish to cite a case mentioned here, be forewarned.)

Two, an order enforcing a separation agreement does not incorporate the separation agreement in the sense discussed here. A separation agreement can be enforced as a matter of contract law, and an order can issue enforcing the agreement, including a provision for specific performance, without the original agreement thereby becoming an incorporated agreement. Seeking, and achieving, specific performance enforcement of a separation agreement under contract law,

Three, if a separation agreement is incorporated, it has the same status as an order issued by a judge after an adversarial proceeding. Wade v. Wade, 63 N.C. App. 189, 190, 303 S.E.2d 634, 635 (1983) ("The Consent Order dated December 21, 1981 was actually an adjudication by the Court which is enforceable by contempt, rather than a contract approved by the Court."). See also Walters v. Walters, 307 N.C. 381, 298 S.E.2d 338 (1983) ("These court ordered separation agreements, as consent judgments, are modifiable, and enforceable by the contempt powers of the court, in the same manner as any other judgment in a domestic relations case."). This equivalence is made explicit by statute with respect to modification of alimony terms. N.C.G.S. §50 16.9(a) ("whether contested or entered by consent"). See also White v. White, 289 N.C. 592, 596, 223 S.E.2d 377, 379-80 (1976). A narrow exception to the equivalence of consent decrees versus decrees arising from litigation concerns the rights of a parent who has lost custody to take nonetheless by intestate succession. Hixson v. Krebs, 136 N.C. App. 183, 523 S.E.2d 684 (1999). See the discussion in Reynolds, §14.16c(iii), n. 258.

A second narrow exception to the equivalence of consent orders and orders issuing after litigation is that in a consent order as a matter of law it is presumed that the facts sufficed. Thus, a consent order cannot be later attacked under a theory that the evidence did not support the findings of facts or the findings were inadequate to support the conclusions and the decree. Buckingham v. Buckingham, 134 N.C. App. 82, 89, 516 S.E.2d 869, 874 (1999); In re Estate of Peoples, 118 N.C. App. 296, 300, 454 S.E.2d 854, 857 (1995). With those exceptions, all of the following comments that refer to possible changes to a court order apply equally to court orders that are by consent and court orders that issue after an adversarial hearing. (The recent decision in Kenton v. Kenton (2012 N.C. App LEXIS 161 (N.C Ct. App. Feb. 7, 2012) is apparently an exception to the second exception. The failure of a consent domestic violence protective order to recite that an act of domestic violence had occurred was a fatal flaw that deprived the court of jurisdiction to renew the protective order. The implications, if any, for family law consent orders are not clear.)

Four, once an agreement is incorporated, under the concept of merger, it ceases to be a private contract and therefore can no longer be enforced using contract remedies. Cavenaugh v. Cavenaugh, 317 N.C. 652, 659, 347 S.E.2d 19, 24 (1986) (specific performance may be granted only with respect to payments due prior to incorporation); Doub v. Doub, 313 N.C. 169, 326 S.E.2d 259 (1985) ("The parties to a consent judgment controlled by Walters do not have an election to enforce such judgment by contempt or to proceed in an independent action in contract."); Rogers v. Rogers, 111 N.C. App. 606, 611, 432 S.E.2d 907, 909 (1993); Mitchell v. Mitchell, 270 N.C. 253, 256, 154 S.E.2d 71, 73 (1967).

Five, when interpreted as contracts, the presumption is that the terms of a separation agreement are separable and not integrated. White v. White, 296 N.C. 661, 252 S.E.2d 698 (1979) ("'[P]rovisions in a routine agreement for support payments to a dependent spouse and the
transfer of the supporting spouse's interest in the family residence are, in the absence of clear language in the agreement to the contrary, generally separable rather than mutually dependent."); Marks v. Marks, 316 N.C. 447, 456, 342 S.E.2d 859, 864 (1986). See also other cases cited at Reynolds, §14.59c. For example, a breach of child support provisions does not free the other party of custody provisions nor vice versa. Similarly, equitable distribution provisions are presumed separable from spousal support provisions; the implications of that separability are examined further below. The assumption of separability runs counter to the common sense of many clients. Where clients intend for an agreement to be integrated, the text should explicitly say so. Even if the agreement is explicitly made integrated, a court will almost certainly treat child support provisions as separate from custody provisions because of the court's mandate to serve the best interests of the child together with the societal interest in parties' not buying or selling a child's time with a parent. Also, a mere recitation of integration may not suffice. Underwood v. Underwood, No. 447PA09-2 (N.C., August 26, 2011).

The advantages and disadvantages of incorporation with regard to enforcement of the agreement, assuming the agreement is not changed, are outside the scope of this memo. Clearly the attorney will advise the client about the relatively quick availability of contempt proceedings if an agreement is incorporated and becomes a court order. Whether an order for specific performance of an unincorporated agreement will be available will probably depend on the provisions of the agreement and the surrounding factual circumstances. See Williford at 613. See also Marks for a good discussion of the pros and cons of incorporation.

In general separation agreements can cover four different areas: (i) equitable distribution, i.e., division of the assets of the marital estate and, to the extent they are subject to distribution, division of debts, (ii) parenting schedule or so-called custody, (iii) child support, and (iv) post-separation support and alimony. The remainder of this memo is divided into four corresponding sections.

**Equitable Distribution**

In general, the equitable distribution aspects of a separation agreement are unaffected by their incorporation into a court order. On the one hand, if the separation is left as a private contract, a court has no power to modify it. Harris at 688. See also cases cited at Reynolds, §14.35c(i). On the other hand, if the property division aspects of an agreement are incorporated, they still are not subject to modification. Kiger v. Kiger, 258 N.C. 126, 129, 128 S.E.2d 235, 237 (1962); Bunn v. Bunn, 262 N.C. 67, 70, 136 S.E.2d 240, 243 (1964) ("[A]n agreement for the division of property rights and an order for the payment of alimony may be included as separable provisions in a consent judgment. In such event the division of property would be beyond the power of the court to change."). See also cases cited at Reynolds §14.59c. Under the principle that a person "may sell his house for as little as a peppercorn," the courts will not revisit a private equitable distribution agreement to investigate whether it was fair. This author understands that also to mean that the court will not revisit an agreement to test whether it tracks what the equitable distribution result might have been in contested litigation. Professor Reynolds writes: ":[F]ew, if any, appellate cases in North Carolina have permitted a party to avoid the contract on the ground that its terms were unfair." Reynolds, §14.11. Note, however, that incorporation does have one
major effect, not on modification but on enforcement. If and when the equitable distribution provisions of an agreement are incorporated, they can be enforced only by proceedings appropriate to enforcement of an order, e.g., a motion for contempt or a motion in the cause. See Cavenaugh and the other cases cited with it supra.

Conclusion: With respect to the likelihood of their being later modified by a court, incorporation or not is irrelevant to equitable distribution provisions of an agreement. A court will not later modify a contract between parties with regard to property without their consent.

Parenting Schedule, a.k.a. Custody
The first thing that client parents must understand is that, once a family is no longer intact, i.e., whenever two legal parents are no longer living together, the State asserts for itself the ultimate authority to determine what caregiving and parenting arrangement best serves the interests of children. Kiger at 129; see also Reynolds, §14.16a. No parenting arrangement is immutable, whether the result of a private, unincorporated separation agreement or the result of an incorporated agreement or the result of an order issued after adversarial litigation. No parent should assume that her parenting schedule is "written in stone" and safe from ever being changed, regardless of which of the three above categories applies. However, there are significant differences between unincorporated agreements and incorporated agreements.

An unincorporated agreement has the disadvantage that it is difficult to enforce. If one parent violates it, the other parent's only effective response, if she is unwilling simply to capitulate to the change, is to bring a custody action. An attempt to enforce the agreement under a theory of contract law will be treated by the court as a custody action and will apply the law as discussed below, just as if the unhappy parent had brought a custody action. Clients may be surprised to learn that law enforcement generally will not involve itself in violations of an unincorporated agreement, neither to enforce the agreement nor to treat its violation as kidnapping.

Thus, a parenting arrangement in an unincorporated agreement can be changed over the objections of one parent only by the other parent's filing a custody action. In that custody action, the court is not bound by the private agreement. Instead, the court will determine the parenting arrangement that serves the best interests of the child. In particular, the court will not inquire, as in the context of changing court-ordered arrangements, whether there has been a significant change of circumstances affecting the welfare of the child or children. Regan v. Smith, 131 N.C. App. 851, 853-54, 509 S.E.2d 452, 454 (1998). See also the cases and discussion in Reynolds, §14.16c. Because that question is not asked, unincorporated agreements can be regarded as more tenuous than incorporated agreements. Even if an agreement has been in place for years and is functioning well and nothing has changed in the circumstances, an unhappy parent has a right to a day in court to challenge whether the arrangement is in the best interests of the child or children. Id.

As part of its essentially de novo determination of best interests, the court will accept the parents' agreement as evidence of what the parents believed to be the best interests of the children or children at the time. This is consistent with the general rule that the courts will assume that

By contrast, if a parenting agreement has been incorporated into a court order and has either been characterized as permanent or has become permanent by the passage of time, then it can be changed upon motion of a dissatisfied parent only if that parent can show a substantial change of circumstances affecting the welfare of the child(ren). Clark v. Clark, 294 N.C. 554, 575, 243 S.E.2d 129, 141 (1978).

Conclusion: If a client parent wants confidence that a parenting schedule will not later be upset by the other parent, incorporation of the parenting schedule part of any agreement is advisable, but even incorporation gives no guarantee.

**Child Support**

As with the parenting schedule, supra, client parents must understand that no private agreement will bind the court absolutely, and the court and the State always have the authority to provide for the needs and the best interests of the child. E.g., Kiger at 129.

However, the court is required to accord a presumption of reasonableness and adequacy to an unincorporated child support agreement. The court will issue an order, making the child support amount of the agreement its ordered amount, unless the presumption is overcome by a preponderance of the evidence. Pataky v. Pataky, 160 N.C. App. 289, 301-02, 585 S.E.2d 404, 412-13 (2003). Logically the presumption would be that the amount was adequate and reasonable at the time it was made and therefore under the circumstances under which it was made. Proof by a preponderance of the evidence that the circumstances had changed would therefore defeat the presumption. Where the presumption is defeated, the N.C. Guidelines become presumptive.

In a challenge to an existing child support order that is more than three years old, a simple showing that the new Guidelines amount would differ by more than 15 percent from the current order suffices to raise a presumption of a change of circumstances. N.C. Child Support Guidelines. That "easy out" to show change would presumably not be available to the dissatisfied parent alleging a change in circumstances and trying to defeat an unincorporated agreement, since comparing the agreement's support figure to a new figure calculated under the Guidelines would be an obvious attempt to "end run" the deference due to the unincorporated agreement.

One should note that, if the presumption is overcome and the amount of child support is changed, the effective date of the new amount cannot be earlier than the filing of the action seeking the change, absent a showing of an emergency. Carson v. Carson, No. COA08-1462 (N.C. App., Aug. 18, 2009).

The effect is that an unincorporated child support agreement is more likely to be enforced by a
court than an unincorporated custody agreement. The former enjoys a presumption that must be
overcome by a preponderance of the evidence. The latter is simply evidentiary.
If by contrast a child support part of an agreement is incorporated, then it can be changed only by
a parent who can show a substantial change of circumstances, a higher hurdle than some client
parents realize. Inter alia, an increase in the income of the obligor parent is not per se a change
affecting the welfare and needs of the child. Thomas v. Thomas, 134 N.C. App. 591, 594, 518
S.E.2d 513, 515 (1999) ("It is well established that an increase in child support is improper if
based solely upon the ground that the support payor's income has increased."); but see Reynolds'
criticism of Thomas, Reynolds §10.54a. But, after the lapse of three or more years after the
issuance of an order, if the incomes of one or both parents have changed such that the N.C.
Guidelines amount would differ by more than 15 percent of the prior ordered amount, then a
presumption is raised that circumstances have changed, allowing for a new child support amount
A pitfall of which to be aware is that provisions in a private agreement providing for automatic
adjustment in the child support amount, e.g., reflecting changes in the cost of living or bonuses
received by the obligor, become unenforceable if the agreement is incorporated. Wilson v.
Wilson, No. COA10-1517 (N.C. App., Aug. 16, 2011). A contract action, seeking to enforce a
sliding scale child support provision in an unincorporated agreement, ought to be enforceable as
("enforcing contractual obligation for support past majority"). However, since support of a minor
child would be involved, a court under the theory of Kiger might insist on interpreting the action
not as one for contract enforcement but as one for child support, in which case the court would
not have the power to issue an order that included sliding scale provisions. Wilson. If the court
agreed to regard the matter as a contract law dispute, then specific performance could be sought
as a remedy under contract law, even if the agreement did not provide for specific performance
as a remedy. Martin; see also Falls v. Falls, 52 N.C. App. 203, 221, 278 S.E.2d 546, 558 (1981)
(commenting with approval on private child support agreements that include cost of living
increases).
By contrast with provisions for a sliding scale, provisions for education or other post-majority
support are not made unenforceable by their incorporation in an order. Reynolds, §14.7e(i),
citing inter alia White v. White, 289 N.C. 592, 223 S.E.2d 377 (1976). The logic is that post-
majority support provisions do not concern a "child" and therefore do not fall under the court's
authority to consider and modify as needed the provisions for a child's support. Post-majority
education clauses are simply contractual agreements by two parties with respect to an adult third
party beneficiary and are therefore enforceable but not subject to modification.
Conclusion: There are a variety of factors to be considered in deciding whether to incorporate
child support provisions, and the advisability or inadvisability of incorporation will depend on
the facts and the client's interests. If there is a sliding scale provision, incorporation will make
that provision unenforceable. If there is a provision for higher education or other post-majority
support, then that fact is no argument per se against incorporation. If the agreed amount differs
from the N.C. Guidelines amount, then it is probably in the interest of the financially benefited
parent to oppose incorporation. Non-incorporation means that even after three years, a party who
has become dissatisfied will find it difficult to persuade a court to change the child support amount from the provision in the agreement. Incorporation gives the parties almost certainly three years of stability, but after that a significant change in the income of the obligor will almost by itself be sufficient for the potentially benefited party to force a recalculation. Finally, many benefited parents want wage withholding to pay child support, and that generally is available only if the agreement is incorporated into an order, providing for wage withholding.

Alimony
Alimony provisions of an agreement present the trickiest of the four areas where one might or might not choose to seek incorporation.

If an agreement is not incorporated, then any alimony provision is final, and the dependent spouse may not later seek support in court nor modification. Kiger. Even a provision in the agreement for later court modification is ineffective. Danai v. Danai, No. COA03-1075 (N.C. App., 2004). If parties wish to leave open the possibility of later court modification of an alimony provision, they should both (i) explicitly make their agreement not integrated, so that the alimony provision is "true alimony," and then (ii) they must incorporate that agreement so as to make it a court order and therefore subject to later modification. See below for the significance of integration versus separability.

If the agreement is incorporated, then the threshold and surprising question is whether incorporation of alimony provisions of an agreement into a court order will be viewed by the court as incorporation of a "true alimony" provision, making the provision into court ordered alimony, with everything which that implies. If the agreement provides for payments to a spouse of either a lump amount or of payments over time, either a constant amount or a changing amount, and even if this payment or these payments are characterized as "alimony" or "spousal support," if they are part of an integrated agreement, regulating the financial relationship between the parties, then they are not "true alimony." Underwood v. Underwood, No. 447PA09-2 (N.C., Aug. 26, 2011); Marks.

Whether or not the agreement is an integrated agreement may not be clear. If the agreement is silent on the issue, then the presumption is against integration and for "true alimony." Rowe v. Rowe, 305 N.C. 177, 184, 287 S.E.2d 840, 844 (1982). However, the presumption against integration can be overcome, in which case the payments are not "true alimony." See Allison v. Allison, 51 NC App. 622, 277 S.E.2d 551 (1981), for a discussion of construing agreements to determine whether they are integrated or provide for "true alimony." See also Martin (supporting presumption of independence) and Underwood. One should note that language in the agreement that the payments are "not modifiable" is not binding on the court. If the court finds that the provisions for the payment(s) are separable and are "true alimony," then they are modifiable regardless of agreement language to the contrary. Acosta v. Clark, 70 N.C. App. 111, 115, 318 S.E.2d 551, 554 (1984). Similarly, a recitation that the alimony provisions are part of a reciprocal agreement also addressing equitable distribution may be disregarded by the court, and the alimony payments, despite the reciprocity recitation, may be "true alimony," hence modifiable. Underwood.
If the payments are not "true alimony," then the provisions for the payments become equivalent to provisions for equitable distribution in an incorporated agreement and will in general simply be enforced by the court under principles of contract law. Thus, they will in general not be subject to change, even given changes in circumstances that would allow or even require a court to change a "true alimony" order. Also, the payments will not be subject to such rules as that payments must cease upon cohabitation or remarriage of the recipient. The payments will, however, be enforceable by the contempt powers of the court as are any other provisions of a court order. Cf. Martin. See also Jones for discussion of enforcement of a separation agreement versus modification of an order.

If the agreement is incorporated, and if its provisions for alimony are separable so as to be "true alimony," then (i) the alimony provisions are restricted in the same way as any alimony provisions ordered by a court after an adversarial hearing, e.g., they will not be enforced after remarriage, Walters; Potts v. Tutterow, 114 N.C. App. 360, 442 S.E.2d 90 (1994); (ii) the alimony provisions are modifiable, but only if there has been a change in circumstances, Cunningham v. Cunningham, 345 N.C. 430, 480 S.E.2d 403 (1997); and (iii) as noted above contractual attempts to immunize the provisions from modification will be ignored. In contrast to the rule with regard to child support, see Wilson supra, an incorporated alimony provision that includes a formula for modification appears not to be per se unenforceable, even if it is "true alimony." See Cunningham at 439. If one spouse seeks modification, the question whether the one spouse is dependent and the other supporting need not be relitigated; it is already the law of the case. Cunningham at 435. Alimony will be modifiable only if there is a change of circumstances, Miller v. Miller, No. COA07-1032 (N.C. App., Aug. 19, 2008); Frey v. Best, No. COA07-703 (N.C. App., April 15, 2008) (obligee's income increase not per se a change of circumstances). Cessation of child support may be, but is not always, a factor in deciding whether there has been a change of circumstances that would allow a change in alimony. Harris v. Harris, No. COA07-228 (N.C. App., Feb. 5, 2008)

Conclusion: An unincorporated alimony provision is immutable. The parties are bound by it. Even if the alimony provision is part of an incorporated agreement, it may still be immutable, if it is not "true alimony," i.e., if the alimony agreement is part of an integrated agreement, presumably integrated with equitable distribution terms. Only if (i) the alimony provisions are incorporated into a court order and (ii) are separable so as to be "true alimony" are they then modifiable. Whether they are separable will be decided by the Court based on the entire document, and the mere recitation of words such as "alimony" or "reciprocal" will not determine the issue. If the provisions are for "true alimony," then they will be modifiable consistent with North Carolina law on alimony, e.g., the payments will terminate upon remarriage, even if the agreement says they will not terminate. •

Samuel B. Johnson is a solo practitioner in family law in Greensboro, N.C. He received his J.D. from Yale in 1992 and has been practicing in North Carolina since 2006. He can be reached at johnson@samueljohnsonlaw.com.
NOW COMES the Plaintiff, by and through, _________________________, in the above entitled action, complaining of the Defendant, by alleging and saying the following:

1. **Jurisdictional Allegation:** That the Plaintiff is a citizen and resident of __________ and has been a citizen and resident of __________________ for a period of at least six (6) months preceding the filing of this action.

2. **Jurisdictional Allegation:** That the Defendant is a citizen and resident of ______________.

3. **Options – One Year Separation:**
   a. That the Plaintiff and Defendant were married to each other on or about __________________________ in __________, county of the state of __________ and separated on or about _________________ and have remained separate and apart and the parties have lived continuously separate and apart since said date.
   b. That the Plaintiff and Defendant were married to each other on or about __________________________ in __________, county of the state of
and separated on or about

and have lived continuously separate and apart from each other for a period of more than one year preceding the institution of this action.

4. **Options (Children) information required pursuant to N.C.G.S. sec. 50-209:**

a. That there were no children born to this union.

b. That there were ___ children born to this marriage, to wit:_______, born on __________________________. The social security numbers of the parties are ________________.

c. That there were children born to this union who have reached the age of majority.

5. **Optional Claim(s) (PSS, Alimony and Equitable Distribution):**

a. That there are no pending claims for post separation support, alimony or equitable distribution of property by either party and the Plaintiff understands that (he or she) is forever relinquishing any claim against the Defendant for post separation support, alimony or equitable distribution of property by obtaining the divorce prayed for herein.

i. **NOTE:** Proceed at your own risk!!!! The above statement is optional, therefore if your client is waiving his or her rights, this paragraph will cover you as this is a verified pleading; however, it may put the opposing party on alert and provoke them to file counterclaims that they would have no other wise had.
b. That the Plaintiff/Defendant has a pending claim for postseparation support and alimony/ equitable distribution in __________ County, North Carolina ____ CVD_____.

   i. NOTE: Please refer back to the CLE manuscript as to how long you have to file an action for these rights after the filing of the absolute divorce.

6. Optional Claim: Resumption of Maiden or Surname:

   a. That the Plaintiff desires to resume the use of her maiden name, _________.
   
   b. That the Plaintiff desires to resume the use of her given name and the surname of her prior predeceased husband so that her name shall be ________________.
   
   c. That the Plaintiff desires to resume the use of the surname ________________.

   i. NOTE: If by chance your client wishes to do this at a later date, you may provide them with AOC-SP-600.

7. Optional: Incorporation of Separation Agreement:

   a. That following the separation of the parties, the Plaintiff and Defendant entered into a written Separation Agreement dated __________, a copy of which is attached hereto as Exhibit “A” and per the consent of the parties shall be incorporated herein by reference and become an order of this court.

   i. NOTE: The parties do not have to incorporate the entire separation agreement.
WHEREFORE, the Plaintiff prays the Court:

1. That the Court accept this verified Complaint as an affidavit in support of the relief requested.

2. That the Court grant the Plaintiff an Absolute Divorce from the Defendant based upon one year's separation pursuant to N.C.G.S. 50-6.

OPTIONAL PARAGRAPHS FOUND BELOW

3. That the Plaintiff be allowed to resume the use of the (option stated above),

4. That the judgment be limited to granting an absolute divorce, and that all other issues pending or asserted between the parties be reserved for hearing at a later time.

5. That the Separation Agreement and Property Settlement entered into by the parties on _________, and attached hereto as Exhibit A, be approved and adopted by the court, and incorporated into the judgment by reference so as to make its provisions enforceable and modifiable as a court order.

6. That the Court grant such further and other relief as it may deem necessary, just and proper.

This the _____ day of ______________________, 20_____.

Name of Firm

____________________________________
Attorney’s Contact Information
VERIFICATION

______________________________, being first duly sworn, deposes and says that s/he is the Plaintiff in the above-mentioned action, that s/he has read the foregoing Complaint for Absolute Divorce and that the same is true of her/is own knowledge except as to those matters and things therein stated upon information and belief and as to those matters and things, s/he believes it to be true.

This the _____ day of ________________________, 20____.

____________________________________
NAME OF YOUR CLIENT

STATE OF NORTH CAROLNA
COUNTY OF _______________
Sworn to and subscribed before me
this _______ day of ________________, 20____.

____________________________________
Notary Public

My Commission Expires:_______________
CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served the foregoing pleading upon all other parties to this cause in the following manner to the following person(s):

CONTACT INFORMATION OF DEFENDANT

Hand delivering a copy hereof to the attorney for each said party addressed as follows:

Depositing a copy hereof, certified mail, in the United States Mail, return receipt requested, addressed to the party to be served, and delivering to the addressee as follows:

Depositing a copy hereof, postage prepaid, in the United States Mail, addressed to the attorney for each said party as follows:

Depositing a copy hereof, postage prepaid, in the United States Mail, addressed to the Sheriff’s Department for service on each of the said parties as follows:

Depositing a copy hereof with a nationally recognized overnight courier service, for overnight delivery, addressed to the attorney for each said party as follows:

A copy hereof to the attorney via facsimile at ______________ for each said party as follows:

A copy hereof to the attorney via electronic mail at ______________ for each said party as follows:

This the ___________ day of _______________, 20______.

Name of Firm

________________________________________
Your contact information
STATE OF NORTH CAROLINA
IN THE GENERAL COURT OF JUSTICE
DISTRICT COURT DIVISION
COUNTY OF_____________ FILE NUMBER: ______ CVD ______

Plaintiff,

v.

Defendant.

NOW COMES the Plaintiff, by and through the undersigned attorney, and moves the Court under Rule 56 of the North Carolina Rules of Civil Procedure for Summary Judgment on the claim for Absolute Divorce pursuant to North Carolina General Statute sec. 50-6 on the grounds that the verified Complaint and all other documents of record show that there is no genuine issue of material fact and that the Plaintiff is entitled to judgment as a matter of law.

This the _____ day of ______________________, 20____.

Name of Firm

______________________________________________
Your contact information
CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served the foregoing motion upon all other parties to this cause in the following manner to the following person(s):

CONTACT INFORMATION OF DEFENDANT

Hand delivering a copy hereof to the attorney for each said party addressed as follows:

Depositing a copy hereof, certified mail, in the United States Mail, return receipt requested, addressed to the party to be served, and delivering to the addressee as follows:

Depositing a copy hereof, postage prepaid, in the United States Mail, addressed to the attorney for each said party as follows:

Depositing a copy hereof, postage prepaid, in the United States Mail, addressed to the Sheriff’s Department for service on each of the said parties as follows:

Depositing a copy hereof with a nationally recognized overnight courier service, for overnight delivery, addressed to the attorney for each said party as follows:

A copy hereof to the attorney via facsimile at _____________ for each said party as follows:

A copy hereof to the attorney via electronic mail at _____________ for each said party as follows:

This the __________ day of ______________, 20______.

_________________________________
Your contact information
THIS CAUSE coming on to be heard before the undersigned District Court Judge presiding in ________ County, North Carolina, without a jury, upon the Plaintiff's motion for summary judgment for application of absolute divorce, and the Court, upon reviewing the record and hearing the evidence, finds the following facts:

1. That the Plaintiff has been a citizen and resident of North Carolina for more than six months preceding the filing of this action.

2. That the Plaintiff has filed in this action a verified Complaint which the court accepts as a verified pleading in support of the Plaintiff’s Motion for Absolute Divorce Summary Judgment which was served but not filed contemporaneously with the Complaint.

3. That the Defendant was served by (address method of service); with a copy of the Summons and Complaint in this action more than ten (10) days before this hearing in accordance with the provisions of N.C. Gen. Stat. sec. 1A-1, Rule 56.

4. That the Defendant was notified that unless an Answer or other responsive pleading which denied the material allegations of the Plaintiff’s Complaint was filed within thirty (30) days following service of the Complaint, the Plaintiff
would move the court to enter a judgment of absolute divorce without further notice or hearing.

5. That no responsive pleading has been filed which denies the material allegations of the Plaintiff’s Complaint.

6. That the Plaintiff and Defendant were married on ---as alleged in the Complaint.

7. That the Plaintiff and Defendant were separated on---as alleged in the Complaint.

8. That the Plaintiff and Defendant have lived continuously separate and apart from each other for more than one year next preceding the institution of this action.

______________________________OPTIONAL FINDINGS OF FACT______________________________

9. * Address the chosen option as it relates to children.

10. *Address the chosen option as it relates to PSS, Alimony and Equitable Distribution.

11. *Address the resumption of the maiden name or surname if applicable.

12. *Address the option of the incorporation of the Separation Agreement if applicable.

WHEREFORE, based upon the foregoing Findings of Facts the Court concludes as a matter of law that the Plaintiff is entitled to a summary judgment for an absolute divorce under N.C.G.S. § 50-6.

NOW THEREFORE, it is ORDERED, ADJUDGED and DECREED as follows:
1. That the bonds of matrimony heretofore existing between the Plaintiff and the Defendant are dissolved and the Plaintiff is granted an absolute divorce from the Defendant.

2. *Restatement of paragraphs 10 through 12 above, if applicable.

3. That the Plaintiff’s attorney, ---------is hereby released as the attorney of record.

   This the _____ day of ______________________, 20____.

_________________________________________________

HONORABLE DISTRICT COURT JUDGE PRESIDING
CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served the foregoing motion upon all other parties to this cause in the following manner to the following person(s):

CONTACT INFORMATION OF DEFENDANT

Hand delivering a copy hereof to the attorney for each said party addressed as follows:

Depositing a copy hereof, certified mail, in the United States Mail, return receipt requested, addressed to the party to be served, and delivering to the addressee as follows:

Depositing a copy hereof, postage prepaid, in the United States Mail, addressed to the attorney for each said party as follows:

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Depositing a copy hereof with a nationally recognized overnight courier service, for overnight delivery, addressed to the attorney for each said party as follows:

A copy hereof to the attorney via facsimile at _____________ for each said party as follows:

A copy hereof to the attorney via electronic mail at _____________ for each said party as follows:

This the __________ day of _______________, 20______.
APPENDIX No. 11

CPR 296

July 15, 1981

"Acceptance of Service and Waiver" Form

INQUIRY:
Attorney A practices domestic relations law in Wake County. The Clerk of the Domestic Courtroom for Wake County District Court has available a document entitled "Acceptance of Service and Waiver" which is frequently used for uncontested divorces. The form states that the defendant, or defendant's attorney, accepts service of the summons and acknowledges receipt of a copy or the summons and a copy of the complaint. The form further states that the defendant waives service by an officer and further waives the right to file an answer or any other pleadings, the right to be notified of the time and place of the trial of the action, and waives the right to trial by jury, and further agrees that the court may proceed immediately with the trial of the action in question.

In view of CPR's 121 and 125, may Attorney A representing a plaintiff in a divorce or other action ethically prepare this form and make it available to a defendant? May he do so only at the request of the defendant? May he allow his client, the plaintiff, to provide such a form to the defendant?

OPINION:
No. Attorney A may not send to or directly make available to a defendant the "Acceptance of Service and Waiver" form. To provide the form waiving the right to answer and to be notified of the date of trial has the same effect as providing an answer for the defendant. See CPR's 121 and 125. Similarly, Attorney A may not allow his client, the plaintiff, to provide such a form to the defendant. See CPR 125. Of course, Attorney A may send to defendant a form solely for acceptance of service. See CPR 121, Question 1.
APPENDIX No. 12

North Carolina DMV Form
Free Legal Research for North Carolina Attorneys: 
Search Engines, Research Websites, Government 
Resources, and Fastcase 

Lauren Collins 
and 
Adrienne DeWitt
Ten Free Legal Research Websites

Findlaw for Legal Professionals  http://lp.findlaw.com/
Justia  http://www.justia.com/
NCCU Law Library  http://law.nccu.edu/library/
Legal Information Institute  http://www.law.cornell.edu/
Hieros Gamos  http://www.hg.org/
Law Library of Congress  http://www.loc.gov/law/
Washburn University’s WashLaw  http://www.washlaw.edu/
Public Library of Law  http://www.plol.org/Pages/Search.aspx
Internet Legal Research Group  http://www.ilrg.com/

Federal, State, and Municipal Legal Research Websites

FDSys  http://www.gpo.gov/fdsys/
Thomas  http://www.gpo.gov/fdsys/
Municode  http://www.municode.com/
North Carolina General Assembly  http://www.ncleg.net/
Regulations.gov  http://www.regulations.gov/
FREE LEGAL ONLINE RESOURCES FOR NORTH CAROLINA ATTORNEYS
Continuing Legal Education – June 7, 2013

Ten Search Engine Alternatives to Google (Plus 1 More Site)

Dogpile (Metasearch)  http://www.dogpile.com/
iBoogie (Cluster Search)  http://iboogie.com/
Duck Duck Go!  https://duckduckgo.com/
Bing  http://www.bing.com/
Internet Archive  http://archive.org/index.php
Webopedia  http://www.webopedia.com/
Ask.com  http://us.ask.com/
Yippy  http://yippy.com/
Mahalo  http://www.mahalo.com
Yahoo  http://www.yahoo.com/
Refdesk.com  http://refdesk.com/
**How Do I?**

1| Locate a document by citation?
Type in the volume number, reporter abbreviation and first page number of the case.

For example, to pull up *Grutter v. Bollinger*, 539 U.S. 306 (2003), type 539 U.S. 306 into the search box.

(This works in both Quick Caselaw Search and Advanced Caselaw Search).

2| Locate a case by party name?
Try performing a keyword search using the following format: party 1 w/15 party 2.

For example, to pull up *Grutter v. Bollinger*, 539 U.S. 306 (2003), type Grutter w/15 Bollinger into the search box.

(This also works in both Quick Caselaw Search and Advanced Caselaw Search).

3| Locate a document by keyword?
To pull up a document by keyword, use Advanced Caselaw Search and formulate your search query using one or more of the 5 Boolean operators.

**Tip:** Start with a broad search and then use Fastcase’s sorting and filtering tools to find the document you are looking for. If you are not sure where to start, a natural language search may help point you in the right direction.

4| Print a document?
To print the document that you are viewing, start by clicking the Print/Save link at top right hand side of the screen.

When you get to the Print Document window, make your formatting selections and click Print/Save again.

The document will begin downloading to your computer.

Once the document has downloaded, you can open and print the document using the appropriate software program (e.g. MS Word, Adobe Acrobat, Word Perfect).

5| Batch-print multiple cases?
Start by adding cases to your print queue, either by clicking on the Add to My Print Queue link when you are viewing a case or by clicking the Print Queue icon from the results page.

Then select View Print Queue from the Print menu. On the next screen, review the cases on the list, make your formatting selections and click Print/Save again to begin downloading the document to your computer.

6| Browse statutes in Outline View?
Start by selecting Search Statutes from the Search menu and then select the statute you want to research from the list by clicking on the name. On the next page, click the Outline View tab.

7| Sort search results?
To sort your search results, click on any column heading on the Results page. For example, clicking on Decision Date will sort your results in chronological order.

8| Filter cases by jurisdiction?
To filter your cases by jurisdiction, click the down arrow on the Jurisdiction Filter at the top left side of the screen, and select the jurisdiction you want from the drop down menu.

9| Generate a list of later citing cases?
To generate a list of cases that cite the case you are viewing, click the hyperlinked number under the Authority Check heading on the top left hand side of the screen.

An Authority Check Report with a list of later-citing cases will open in a new tab or window in your browser.

10| Find more information about Fastcase?
This one is easy—visit us online at www.fastcase.com anytime, or call 1-866-773-2782 from 8a-8p EST, M-F.
DWI FOR BEGINNERS
(OR A REFRESHER FOR THOSE WHO AREN’T)

Jeffrey R. Edwards
Clinical Assistant Professor

NCCU School of Law
CLE
June 7, 2013
Jeffrey R. Edwards is an Assistant Clinical Professor at North Carolina Central University School of Law, where he teaches Appellate Advocacy and supervises the Criminal Prosecution Clinic. Before joining the faculty, he spent nine years as an Assistant Attorney General with the North Carolina Department of Justice in the Crime Control and Motor Vehicles Section. There, he served as counsel for the Division of Motor Vehicles and the North Carolina Highway Patrol, focusing on motor vehicle and DWI law. Prior to that, he served for two years as a clerk for the Hon. Linda M. McGee at the North Carolina Court of Appeals.

Professor Edwards received his J.D. in 1994 from Campbell University School of Law, where he was a member of the law review, made the honors list, and was awarded the A.C. and Aileene Green scholarship. In 1990 he received his B.A. *magna cum laude* from the University of North Carolina at Charlotte, majoring in History with a minor in Political Science. Professor Edwards currently serves as a member of the Law Related Education Committee and the Appellate Section of the North Carolina Bar Association.
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      2. .08 or greater blood alcohol level
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   E. Timing to coincide with a refusal revocation

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   B. Applying for limited driving privilege

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   B. For how long?
   C. How do I get it?

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   B. Certificate of Completion and other prerequisites for restoration
OUTLINE WITH DISCUSSION AND RESOURCES

INTRODUCTION:

Driving While Impaired is complicated. One charge can involve the following statutes:

- G.S. 20-138.1 – offense elements
- G.S. 20-139.1 – chemical analysis
- G.S. 20-16.2 - administering chemical test
- G.S. 20-16.5 – 30-day civil revocation
- G.S. 20-179 – sentencing
- G.S. 20-179.3 – limited driving privileges
- G.S. 20-17 – revocation of drivers license
- G.S. 20-19 – length of drivers license revocation
- G.S. 20-17.8 - ignition interlock requirement
- G.S. 20-17.6 – restoration of license after revocation
- G.S. 20-38.1 – 20-38.7 – Arrest, testing, and trial procedures

Plus, definition statutes and other additional statutes if the charge involves a person holding a commercial drivers license, or if the person was underage at the time of the offense, or if the vehicle involved is subject to forfeiture. Also, administrative code procedures for administering chemical analysis.

I. N.C. Gen Stat. 20-138.1

Elements of the offense and definitions of “operate,” “motor vehicle,” “street or highway,” and “impaired.” Also, discussion of “.08” per se offense.

In North Carolina, driving while impaired (DWI) is defined as: **driving** any **vehicle** upon any **highway/street/public vehicular area** in this State while either **under the influence of an impairing substance** or having an alcohol concentration of **.08 at any relevant time after**
**driving.** (Also, with any amount of a Schedule I substance or its metabolite in blood or urine, but this charge is relatively rare.) G.S. § 20-138.1(a)

Whether the person is legally entitled to use the impairing substance, be it alcohol or another drug, is not a defense to the charge. G.S. § 20-138.1(b).

A person “drives” a vehicle if they are “in actual physical control of a vehicle which is in motion or which has the engine running.” G.S. §20-4.01(25). Note that a motor vehicle with the engine running does not have to be in motion, and that a vehicle in motion does not have to have an engine running, or even an engine at all.

A vehicle is “every device in, upon, or by which any person or property is or may be transported or drawn upon a highway” It does not include human powered devices, except for bicycles, and does not include horses, devices designed for the transport of those with mobility impairment, and segways(!). G.S. §20-4.01(49), G.S. §20-138.1(e).

For purposes of motor vehicle law, the terms highway and street are synonymous. They are defined as “[t]he entire width between property or right-of-way lines of every way or place of whatever nature, when any part thereof is open to the use of the public as a matter of right for the purpose of vehicular traffic,” G.S. § 20-4.01 (13), and also includes sidewalks. See *State v. Perry*, 230 N.C. 361, 53 S.E.2d 288 (1949) (sidewalk is a street/highway).

**Public vehicular areas** include driveways, streets, alleys, parking lots for businesses, schools, hospitals, etc., if they are open to the public at any time, even though the business is closed. They also include private residential subdivision roads if used by vehicular traffic or lead into the subdivision. Beach areas open for traffic/motor vehicle use are also public vehicular areas. G.S. § 20-4.01(32).

For a case discussing “operating” and “public vehicular area,” see *State v. Mabe*, 85 N.C. App. 500, 355 S.E.2d 186 (1987)(defendant seated behind the wheel of car parked on handicapped ramp of hotel with the motor running sufficient to show operation in a public vehicular area).

**Impairment** is either having consumed a sufficient quantity of an impairing substance so as to impair one’s mental and/or physical faculties, or chemical analysis showing a blood alcohol level of .08 or more. (The chemical analysis alone is sufficient to prove impairment for purposes of conviction under the per se .08 or more prong of the offense.) See, e.g., *State v. Harrington*, 78 N.C. App. 39, 336 S.E.2d 852 (1985)(impairment is a single offense with two different methods of proof).

II. Challenging the Initial Stop and Probable Cause
A defendant’s best chance to avoid conviction of the charge is to either challenge the stop or challenge whether the officer had probable cause to arrest.

The stop must be constitutional and/or comply with G.S. 20-16.3A (checkpoints/roadblocks) if applicable. (In cases of a wreck or where the defendant has stopped voluntarily, there will not be a stop.)

The officer must have reasonable suspicion for the stop. As long as the officer has a reasonable suspicion/probable cause to believe the defendant has committed some offense, the stop is valid even if it is only pretextual. See Whren v. United States, 517 U.S. 806, 135 L.Ed. 2d 89 (1996); State v. Hamilton, 125 N.C. 396, 481 S.E.2d 98 (1997).

In determining if there was a basis for the stop, look first for any evidence that defendant committed some other offense, such as speeding, seat belt violation, etc. If so, the stop is valid. If not, look at driving indicia, such as swerving in lane, etc., that the officer used as a basis for reasonable suspicion to make the stop. (Weaving within the lane alone is usually not enough. However, weaving plus some other factor, or excessive weaving is enough.)

Probable Cause for the arrest is based on driving, plus physical condition and the results of any field sobriety/alcosensor tests. (This same evidence will also be used for sufficiency of evidence to convict.)

The process and procedure for motions in DWI trials is different than other trials in criminal district court. Motions to dismiss or suppress must be made before trial, except at the end of the evidence or if previously unknown facts are discovered at trial. Motions not made before trial, unless specifically allowed by law to be filed at trial, must be summarily denied. The State must have reasonable time to prepare for motion. Testimony on motion hearings must be under oath and the judge must make written findings of fact and conclusions of law. If the judge “preliminarily indicates” the defendant prevails, the judge may not enter order until the State either appeals to superior court or decides not to appeal. Appeals to superior court are de novo. The defendant may not appeal the denial of motion before trial, but may raise the motion on appeal de novo to superior court upon conviction. G.S. § 20-38.6.; G.S. § 20-38.7.

III. What Happens After the Arrest

In most instances, unless the defendant is taken to a hospital, after arrest he will be taken for chemical analysis, usually a breath test on an intoximeter. The defendant must be given his chemical analysis rights, both orally and in writing. At that point,
the chemical analyst begins a fifteen minute observation period to make sure the
defendant does not eat, drink, or do anything else to affect the test results. During
this time, the defendant has the right to call a witness or attorney for advice or to view
the test. The test may be delayed up to thirty minutes after the advisal of rights for a
witness to arrive. At the end of the observation/thirty minute waiting period, the
defendant will be requested to submit to test of his breath. There must be two
sequential samples within .02 to be admissible. If the defendant refuses to provide a
sample or sequential sample, or willfully fails to follow the instructions of the
chemical analyst, he will be marked as having refused. Alcohol levels obtained or the
fact defendant refused can be used as evidence of impairment at trial. The chemical
analyst then prepares an affidavit either showing the blood alcohol level or that

If the defendant refuses to provide a sample for chemical analysis, not only will
evidence of the refusal be used against him at trial, he will also have his drivers
license revoked for 12 months. This revocation is in addition to any other revocation
he may get based on a DWI conviction. If eligible, the person cannot obtain a limited
driving privilege for the first six months of the refusal revocation. G.S. § 20-16.2.

IV. The Thirty-Day Civil License Revocation

Upon completion of the testing or a refusal, the defendant is taken before a
magistrate. In addition to determining whether there was probable cause for the
arrest, setting terms for pre-trial release, etc., the magistrate also reviews the chemical
analysts affidavit. If based on the affidavit or the officer and/or analyst’s testimony
the magistrate determines the defendant had a blood alcohol level of .08 or more or
willfully refused chemical analysis, the magistrate will inform the defendant his
license is revoked for a period of (usually) thirty days. G.S. § 20-16.5.

The defendant can challenge the revocation within 10 days. The defendant may
request a hearing before a magistrate or a district court judge. The revocation
remains in effect pending the hearing. The magistrate/judge’s findings either
upholding or rescinding the revocation cannot be used in, or have any effect on, any
other criminal or civil proceedings (including the DWI trial for this charge.) G.S. §
20-16.5(g).

After 10 days, the defendant may apply for a limited driving privilege for the
remainder of the revocation, if eligible. G.S. § 20-16.5(p).

At the end of the revocation period, the defendant’s license remains revoked until he
pays the applicable restoration fee. G.S. § 20-16.5(j). See also, G.S. § 20-28(a1).
V. Going to Trial

In most DWI trials, there is usually no need to subpoena additional witnesses. The State will (or at least should) have the officer present. If the defendant intends to challenge the alcohol level or refusal, then it would be advisable to have the chemical analyst present.

The chemical analyst may testify by affidavit. The State must give 15 business days notice of its intent to use the affidavit rather than live testimony. If the defendant objects to the use of the affidavit, he must object at least 5 business days before trial. If the analyst is unable to appear, the case will be continued until the analyst can be present. The failure of the analyst to appear is not grounds for dismissal unless the failure to appear after being ordered to do so is willful. G.S. § 20-139.1(e1), (e2).


DWI has its own sentencing chart. The offense levels range from A-1, the highest level, to Level 5, which is the lowest level offense. In determining the sentence level, the court must determine whether there are any grossly aggravating, aggravating, or mitigating factors. If there are any grossly aggravating factors, then the defendant must be sentenced at a Level 2 or higher. If there are two grossly aggravating factors, or the grossly aggravating factor of having a minor or disabled person in the vehicle at the time of the offense, the defendant is a Level 1. Three or more grossly aggravating factors equals a Level A-1. The punishment increases as the levels go up. See Sentencing Chart attached.

If there are no grossly aggravating factors, then the court must weigh any aggravating and mitigating factors present. Depending on the factors and how the judge weighs them, the defendant can be sentenced as a Level 3, Level 4, or Level 5. If the defendant is sentenced as a Level 3, 4, or 5, he will be eligible for a limited driving privilege, if otherwise eligible.

In looking at the attached sentencing chart, you will see that obtaining a substance abuse assessment before trial is a mitigating factor. If you intend to plead your client guilty, or he is likely to be convicted at trial, it is a good idea to obtain the substance abuse assessment ahead of time (along with evidence of 60 days of continuous abstinence.) Not only could it help lower the level of sentencing, it is must be done before obtaining a limited driving privilege. See G.S. § 20-179(e)(6a); G.S. § 20-179.3(b)(1)(e).
As with any criminal conviction in district court, you can appeal the judgment to superior court for a trial de novo. The associated license revocation is stayed pending the appeal. G.S. § 20-16(b).

If the client also has a potential refusal revocation, you may want to work it so that the refusal and DWI revocations run concurrently. For the refusal, DMV will send the client a revocation letter stating the 12 month revocation will be effective 10 days from the date of the letter. You must have the client be on the lookout for this letter. To challenge the refusal (and stay the revocation) you must request a hearing in writing before the effective date of the revocation. G.S. § 20-16.2(d). If the revocation is upheld after a hearing before a DMV hearing officer, the defendant may petition for a hearing on the record in superior court. G.S. § 20-16.2(e). (You should file for a temporary restraining order against DMV to prevent the revocation going into effect before the hearing.)

Between appeals to superior court and hearings at DMV, you should be able to line up the revocations to run at the same time. Otherwise, your client may be revoked for longer than 12 months.

VII. Revocation and Limited Driving Privileges

Although not a part of the punishment for the criminal offense of DWI, a defendant’s drivers license will be immediately revoked upon conviction, with no action or order of the court needed for it to take effect. See Harrell v. Scheidt, 243 N.C. 735, 92 S.E.2d 182 (1956). The length of the revocation, either one year, four years, or permanently, is determined by the number of prior DWI convictions and when they occurred. See G.S. § 20-19(c1), (d), (e).

Whether the person is eligible for limited driving privileges is governed by G.S. § 20-179.3(b). If eligible, it is recommended to have the application for the privilege prepared before the trial so it can be presented to the judge immediately upon entry of judgment. If not done at trial, the application must be filed with the clerk and cannot be heard until a reasonable time after the clerk files a copy of the application with the district attorney. G.S. § 20-179.3(c),(d). The privilege, if given, will be limited to certain hours and for certain activities. For some activities, such as driving for work related purposes during non-standard work hours, the applicant must supply documentation showing the necessity to drive during that time. See, e.g., G.S. § 20-179.3(g1). If the blood alcohol level is .15 or higher, the privilege is not effective until 45 days after conviction, and must have ignition interlock. G.S. § 20-179.3(c1)
VIII. Ignition Interlock

Depending on blood alcohol level (.15 and up), some people will be required to have an ignition interlock system installed on their vehicle when their license is restored. G.S. § 20-17.8. If they obtain a limited driving privilege, they must also get an ignition interlock installed. G.S. § 20-179.3(g5). The person will receive credit for any time an ignition interlock was installed pursuant to a limited driving privilege towards the length of time required upon restoration. G.S. § 20-17.8(d). Therefore, you want to have the ignition interlock installed at the time you obtain a limited privilege. If you have it on with the privilege for 12 months, then the 12 month requirement of G.S. 20-17.8(c)(1) would already be met and the restored license would not require an ignition interlock.

For approved ignition interlock vendors and locations, contact DMV.

IX. License Restoration After Revocation

If the client has prior DWI convictions resulting in a four year or permanent revocation, the client can apply to DMV for an early conditional restoration of their license, either after two years or three years. If the person can sufficiently prove they meet the eligibility requirements, a conditional restoration may be given with additional conditions similar to a limited driving privilege. See G.S. § 20-19(d), (e). Any conditional restoration granted may be revoked for violation of the conditions.

At the end of the applicable revocation period, the client must pay the restoration fee required by G.S. § 20-7(i1) and obtain the certificate of completion required by G.S. § 20-17(b) & (c). Failure to submit a certificate of completion results in the revocation period being extended, and no limited driving privilege is allowed. G.S. § 20-17.6(b) 7 (e).

The certificate of completion is issued by the Department of Health and Human Services. To be eligible, the person must have had a substance abuse assessment and completed the recommended treatment. G.S. § 20-17.6(c).
### DWI sentencing (G.S. 20-179) for offenses committed 12/1/2011 or later

<table>
<thead>
<tr>
<th>Level</th>
<th>Factors</th>
<th>Minimum Sentence</th>
<th>Maximum Sentence</th>
<th>If Suspended,¹ Special Probation Requiring:</th>
<th>Maximum Fine</th>
</tr>
</thead>
<tbody>
<tr>
<td>A1</td>
<td>3 GAFs</td>
<td>12 months</td>
<td>36 months</td>
<td>Active term of at least 120 days and 120 days of CAM</td>
<td>$10,000</td>
</tr>
<tr>
<td>1</td>
<td>2+ GAFs or 1 minor/disabled GAF</td>
<td>30 days</td>
<td>24 months</td>
<td>Active term of at least 30 days</td>
<td>$4,000</td>
</tr>
<tr>
<td>2</td>
<td>1 GAF</td>
<td>7 days</td>
<td>12 months</td>
<td>Active term of at least 7 days</td>
<td>$2,000</td>
</tr>
<tr>
<td>3</td>
<td>Agg. &gt; Mitigating</td>
<td>72 hours</td>
<td>6 months</td>
<td>Active term of at least 72 hours — And/or at least 72 hours community service</td>
<td>$1,000</td>
</tr>
<tr>
<td>4</td>
<td>Agg. = Mitigating</td>
<td>48 hours</td>
<td>120 days</td>
<td>48 hours active— And/or 48 hours community service</td>
<td>$500</td>
</tr>
<tr>
<td>5</td>
<td>Mitig. &gt; Agg.</td>
<td>24 hours</td>
<td>60 days</td>
<td>24 hours active— And/or 24 hours community service</td>
<td>$200</td>
</tr>
</tbody>
</table>

¹ For any suspended sentence, defendant must obtain a substance abuse assessment and the education or treatment required by G.S. 20-17.6 for the restoration of a driver’s license and as a condition of probation.
**Grossly Aggravating Factors (GAFs)** *(if 1 GAF (other than GAF #4) Level 2; if 2 GAFs or GAF #4, Level 1; if 3 or more GAFs, Level A1):

1. A prior conviction for an offense involving impaired driving if:
   a. The conviction occurred within seven years before the date of the offense for which the defendant is being sentenced; or
   b. The conviction occurs after the date of the offense for which the defendant is presently being sentenced, but prior to or contemporaneously with the present sentencing; or
   c. The conviction occurred in district court; the case was appealed to superior court; the appeal has been withdrawn or the case has been remanded back to district court; and a new sentencing hearing has not been held pursuant to G.S. 20-38.7.

   *Each prior conviction is a separate grossly aggravating factor.*

2. DWLR at the time of the offense under G.S. 20-28, and the revocation was an impaired driving revocation under G.S. 20-28.2(a).

3. Serious injury to another person caused by the defendant's impaired driving at the time of the offense.

4. Driving by the defendant at time of offense with any of the following persons in vehicle: child under age of 18, person with mental development of child under 18, or person with physical disability preventing unaided exit from vehicle.

**Aggravating Factors to Be Weighed:**

1. Gross impairment of the defendant's faculties while driving or an alcohol concentration of 0.15 or more within a relevant time after the driving.
2. Especially reckless or dangerous driving.
3. Negligent driving that led to a reportable accident.
4. DWLR.
5. Two or more prior convictions of a motor vehicle offense not involving impaired driving for which at least three points are assigned under G.S. 20-16 or for which the convicted person's license is subject to revocation, within five years of the date of the offense.
6. Conviction under G.S. 20-141.5 of speeding to elude.
7. Conviction under G.S. 20-141 of speeding at least 30 mph over limit.
9. Any other factor that aggravates the seriousness of the offense.

*Except for (5a) and (5b), conduct must occur during same transaction as impaired driving offense.*

**Mitigating Factors to Be Weighed:**

1. Slight impairment of the defendant's faculties resulting solely from alcohol, and an alcohol concentration that did not exceed 0.09 at any relevant time after the driving.
2. Slight impairment of the defendant's faculties, resulting solely from alcohol, with no chemical analysis having been available to the defendant.
3. Safe and lawful driving (except for the impairment).
4. A safe driving record (no convictions within 5 years for four-point motor vehicle offenses or for motor vehicle offenses for which the person's license is subject to revocation).
5. Impairment of the defendant's faculties caused primarily by a lawfully prescribed drug for an existing medical condition, and the amount of the drug taken was within the prescribed dosage.
6. Voluntary submission for assessment after charge and, if recommended, voluntary participation in the recommended treatment.
7. Completion of a substance abuse assessment, compliance with its recommendations, and simultaneously maintaining 60 days of continuous abstinence from alcohol consumption as proven by a continuous alcohol monitoring system of a type approved by Dep't of Correction.
8. Any other factor that mitigates the seriousness of the offense.

*Except for factors in (4), (6), (6a) and (7), the conduct must occur in the same transaction as the impaired driving offense.*

**Level Placement:**

- **A>M, Level 3; A=M, Level 4; M>A, Level 5**
Ethics: The Effect of Social Media and Technology on the Rules of Professional Responsibility

Patricia Dickerson,
Shonnese Stanback
and
Gerald Walden
Modern Communications Technology and the Duty of Confidentiality (1 of 2)

Opinion rules that when using a cellular or cordless telephone or any other unsecure method of communication, a lawyer must take steps to minimize the risk that confidential information may be disclosed.

Inquiry #1:

Communications by means of cellular and cordless telephones are broadcast over the public airwaves rather than telephone lines. For this reason, a conversation over a cordless or cellular phone may be easily intercepted.

A cordless telephone uses AM or FM radio signals to transmit a communication from the handset to the base unit. This signal can be easily intercepted by a standard AM radio. Cordless telephones are, therefore, particularly susceptible to both intentional and unintentional interception. Although less susceptible to unintentional interception, a communication by a cellular telephone can be intentionally intercepted by means of a sophisticated scanner specifically designed for the purpose or by a regular radio scanner, which is available at most electronics stores, that has been modified.

What is a lawyer's ethical responsibility when using a cellular or cordless telephone to communicate client information that is intended to be confidential?

Opinion #1:

A lawyer has a professional obligation, pursuant to Rule 4 of the Rules of Professional Conduct, to protect and preserve the confidences of a client. This professional obligation extends to the use of communications technology. However, this obligation does not require that a lawyer use only infallibly secure methods of communication. Lawyers are not required to use paper shredders to dispose of waste paper so long as the responsible lawyer ascertains that procedures are in place which "effectively minimize the risks that confidential information might be disclosed." RPC 133. Similarly, a lawyer must take steps to minimize the risks that confidential information may be disclosed in a communication via a cellular or cordless telephone. First, the lawyer must use reasonable care to select a mode of communication that, in light of the exigencies of the existing circumstances, will best maintain any confidential information that might be conveyed in the communication. Second, if the lawyer knows or has reason to believe that the communication is over a telecommunication device that is susceptible to interception, the lawyer must advise the other parties to the communication of the risks of interception and the potential for confidentiality to be lost.
Inquiry #2:
What is a lawyer's ethical obligation when using electronic mail to communicate confidential client information?

Opinion #2:
Although electronic mail or "e-mail," is not conveyed over the public airwaves like communications by cordless or cellular telephones, many of the same concerns for client confidences apply to communications by e-mail. E-mail is susceptible to interception by anyone who has access to the computer network to which a lawyer "logs-on" and such communications are rarely protected from interception by anything more than a simple password. In using e-mail, or any other technological means of communication that is not secure, the same precautions must be taken to protect client confidentiality as are set forth in opinion #1 above.

Endnotes
2. Id.
Opinion rules that a lawyer may participate in a directory of lawyers on the Internet if the information about the lawyer in the directory is truthful.

Inquiry:

A private company is developing an Internet site to be known as the National Attorney Locator. The site will contain an electronic directory of lawyers. The directory will include listings for lawyers from across the United States. These listings can be searched by lawyers' geographic location and areas of legal practice. Each listing will include the name of the lawyer or law firm, the name of a contact person at the firm, firm address, phone number, fax number, e-mail address, and areas of practice. Lawyers must apply and pay a fee to be listed on the directory. The Internet site will have a hypertext section on "Choosing an Attorney" which includes a statement that the National Attorney Locator is not a referral service but an electronic directory.

May a lawyer participate in a directory of lawyers on the Internet?

Opinion:

Yes, provided the information contained in the lawyer's listing is truthful and not misleading. Rule 2.1. To avoid misleading a user of the directory from another jurisdiction, the listing should indicate the jurisdictions in which the lawyer is licensed to practice law and the geographic location of the lawyer's or law firm's principal office. See RPC 239. Rule 2.5 prohibits communications implying that a lawyer is a specialist in an area of practice unless the lawyer is certified as a specialist by the North Carolina State Bar or a certifying organization approved by the State Bar. However, a lawyer who is not a certified specialist may indicate areas of concentration or interest in a listing on the directory.
2000 Formal Ethics Opinion 3  
July 21, 2000  
Responding to Inquiries Posted on a Message Board on the Web (1 of 2)

Opinion rules a lawyer may respond to an inquiry posted on a web page message board provided there are certain disclosures.

Inquiry:

P Law Firm represents Company, a telecommunications switch manufacturing company. Company's website includes a web page that is designed to appeal to emerging service providers including local exchange carriers and Internet service providers. The website is accessible to anyone with Internet access.

The web page includes a link to a message board. Visitors to the message board are invited to post questions. The message board is not interactive. Responses to inquiries are not posted immediately. Company has asked professionals from several disciplines to monitor the message board regularly and to provide responses to the posted inquiries that are within their respective areas of expertise. Company asked P Law Firm to monitor the message board for inquiries concerning the telecommunications regulatory law. Company will pay P Law Firm a fee for monitoring the message board and providing responses to inquiries posted there.

Company's web page will identify P Law Firm as the law firm responding to inquiries relative to regulatory matters. P Law Firm will limit the scope of its responses to federal law. The following disclaimer will appear on the message board:

Members of the telecommunications practice of P Law Firm provide responses to regulatory questions posted to the Message Board. Responses are limited to matters of federal law and decisions of the Federal Communications Commission. Responses posted should not be considered as legal opinions or as providing conclusive answers to specific legal problems.

May lawyers with P Law Firm respond to inquiries on Company's message board?

Opinion:

Yes, it is not a violation of the Revised Rules of Professional Conduct for a lawyer to respond to inquiries posted on an Internet message board provided the lawyer clarifies the nature of the lawyer's relationship with the person or company making the inquiry and the limits of the information that the lawyer is providing.

Participation in a message board is not improper solicitation, prohibited by Rule 7.3(a), because there is no direct communication, by telephone or in-person, with the individuals or companies making the inquiries. Moreover, the lawyers with P Law Firm are not making the initial contact and they do not know that the inquirer is in need of legal services in a particular matter until the lawyers retrieve an inquiry from the message board. Therefore, the message board does not have to include an advertising disclaimer such as the one required by Rule 7.3(c) for targeted direct mail.
Limiting responses to inquiries involving federal law should avoid the unauthorized practice of law in jurisdictions where the P Law Firm lawyers are not licensed to practice law. It is assumed a lawyer with an active law license from any state may practice federal telecommunications law. However, to avoid the possibility of misleading a user of the message board, a lawyer responding to an inquiry should state the jurisdictions where he or she is licensed to practice law. See Rule 7.1(a) and RPC 241.

If, as the result of responding to an inquiry, a client-lawyer relationship is created between an inquirer to the message board and a lawyer with P Law Firm, the lawyers with the firm will be required to comply with the duties to a client set forth in the Revised Rules of Professional Conduct including maintaining client confidences and avoiding conflicts of interest. If the lawyers from P Law Firm do not want to create a client-lawyer relationship with a party using the message board, the message board and any subsequent communications with an inquirer must clearly and specifically state that no client-lawyer relationship is created by virtue of the communication. Even so, substantive law will determine whether a client-lawyer relationship is created. See Cmt. [3], 0.2 Scope, Revised Rules. As an example, a disclaimer might state the following:

Although a response is provided to the specific question, there may be other facts and law relevant to the issue. The questioner should not base any decision on the answer and specifically understands and agrees that no client-lawyer relationship has been established between a lawyer with P Law Firm and the inquirer.

As a precautionary step, visitors to the web page should be warned not to include any confidential or proprietary information in an inquiry posted on the web page.

Finally, if the lawyers responding to the inquiries posted on the message board are influenced or affected by the fact that P Law Firm represents Company and Company is paying P Law Firm to respond to the inquiries on the message board, the relationship between P Law Firm and Company must be disclosed to those using the message board to avoid misrepresentation. See generally Rule 7.1.
Opinion rules that the URL for a law firm website does not have to include words that identify the site as belonging to a law firm provided the URL is not otherwise misleading.

Inquiry:

2005 FEO 8 ruled that the URL for a law firm website is a trade name that must be registered with the State Bar, in compliance with Rule 7.5(a), and may not be misleading.

Lawyers have applied to the State Bar to register the following URLs for their law firm websites: "Asbestos-Mesothelioma.com" "DrugInjury.com" and "NCworkinjury.com". None of the URLs contain language sufficient to indicate to a user that the URL is for the website of a law firm. May a law firm use a URL that does not include words or language sufficient to identify it as the address of a website of a law firm?

Opinion:

Yes, provided the URL is not otherwise false or misleading and the homepage of the website clearly and unambiguously identifies the site as belonging to a lawyer or a law firm.

Rule 7.1 and Rule 7.5(a) prohibit lawyers and law firms from using trade names that are misleading. Nevertheless, the Rules of Professional Conduct are rules of reason and should be interpreted with reference to the purposes of legal representation. Rule 0.2, Scope, cmt. [1]. None of the URLs listed in the inquiry make false promises or misrepresentations about a lawyer or a lawyer's services. Although a person who is using the internet to research a medical condition, such as mesothelioma, or injuries caused by prescription medications or on the job, may be given one of these website addresses in a response to an internet browser search, if the user is not interested in legal advice relative to the medical condition or the injury, the user does not have to click on the URL or, having done so, may exit the website as soon as he or she determines that it does not contain the information being sought. At worst, the URLs may cause the user of the internet an extra click of the mouse and, at best, they may provide a user with helpful information about legal rights. Therefore, as long as a URL of a law firm is not otherwise misleading or false and the homepage of the website identifies the sponsoring law firm or lawyer, the URL does not have to contain language specifically identifying the website as one belonging to a law firm.
Opinion provides guidelines for the use of live chat support services on law firm websites.

Inquiry:

A law firm would like to utilize a live chat support service on its website. Typically, such a service requires the law firm to download a software program to the firm website. After the software is downloaded, a “button” is displayed on the website which reads something like “Click Here to Chat Live.” The button is often accompanied by a picture of a person with a headset. Once a visitor clicks on the button to request a live chat, the visitor will be able to have a typed out conversation in real-time with an agent identified as perhaps a “law firm staff member” or an “operator.” The agent will guide the visitor through a series of screening questions through the use of a script. Typically, the agent will learn about the facts of the potential case. The agent will also obtain contact information for the visitor. The agent then emails a transcript of the “chat” to the law firm. In some instances, the law firm pays only for the transcripts of “chats” in which the visitor provides a way for the law firm to contact him or her.

Depending on the software program purchased, in addition to the live chat “button” being displayed on the website, a pop-up window may also appear on the screen specifically asking visitors if they would like “live help.” The window may contain a picture of a person with a headset and reads something like, “Hi, you may just be browsing but we are here to answer your questions. Please click ‘yes’ for live help.” The pop-up window is software-generated. It is only after the visitor clicks on the button that the live agent is engaged.

In another form of the live chat support service, the “button” and pop-up window showing a picture of a person with a headset is displayed on the website and a voice says something like, “Hi, we are here to answer your questions. Please click ‘yes’ for live help.” These statements are presumably software-generated. It is only after the visitor clicks on the “yes” button that the live agent is engaged.

Is the utilization of these types of live chat support services a violation of the Rules of Professional Conduct?

Opinion:

No. Rule 7.3(a) provides that a lawyer shall not by “in-person, live telephone, or real-time electronic contact” solicit professional employment from a potential client unless the person contacted is a lawyer or has a family, close personal, or prior professional relationship with the lawyer. Instant messaging, chat rooms, and other similar types of conversational computer-accessed communication are considered to be real-time or interactive communication. The interactive typed conversation with a live agent provided by the live chat support service described above constitutes a real-time electronic contact.

It is important to note that the prohibition in Rule 7.3(a) applies only to lawyer-initiated contact. Rule 7.3 does not prohibit real-time electronic contact that is initiated by a potential client. In each of the instances described above, the website visitor has made the initial contact with the firm. The visitor has
chosen to visit the law firm’s website, indicating that they have some interest in the website’s content. It is appropriate at this juncture for the law firm to offer the website visitor live assistance.

In addition to the fact that the potential client has initiated the contact with the law firm, the circumstances surrounding this type of real-time electronic contact do not trigger the concerns necessitating the prohibition set out in Rule 7.3. Comment [1] to Rule 7.3 explains the policy considerations behind the prohibition:

There is a potential for abuse inherent in direct in-person, live telephone, or real-time electronic contact by a lawyer with a prospective client known to need legal services. These forms of contact between a lawyer and a prospective client subject the layperson to the private importuning of the trained advocate in a direct interpersonal encounter. The prospective client, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult fully to evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer’s presence and insistence upon being retained immediately. The situation is fraught with the possibility of undue influence, intimidation, and over-reaching.

The use of a live chat support service does not subject the website visitor to undue influence or intimidation. The visitor has the ability to ignore the live chat button or to indicate with a click that he or she does not wish to participate in a live chat session.

The Philadelphia Bar Association recently issued an opinion that allows certain real-time electronic communications, including communications through blogs, chat rooms, and other social media. Philadelphia Bar Ass’n Prof’l. Guidance Comm., Op. 2010-6 (2010). The opinion states that Rule 7.3 does not bar the use of social media for solicitation where a prospective client to whom the lawyer’s communication is directed has the ability “to ‘turn off’ the soliciting lawyer and respond or not as he or she sees fit.” The Philadelphia Bar Association opined that “with the increasing sophistication and ubiquity of social media, it has become readily apparent to everyone that they need not respond instantaneously to electronic overtures, and that everyone realizes that—like targeted mail—emails, blogs, and chat room comments can be readily ignored, or not, as the recipient wishes.”

Although the use of this type of technology is permissible, the practice is not without its risks, and a law firm utilizing this service must exercise certain precautions. The law firm must ensure that visitors who elect to participate in a live chat session are not misled to believe that they are conversing with a lawyer if such is not the case. While the use of the term “operator” seems appropriate for a nonlawyer, a designation such as “staff member,” or something similar, would require an affirmative disclaimer that a nonlawyer staff member is not an attorney. The law firm must ensure that the nonlawyer agent does not give any legal advice.

The law firm should be wary of creating an “inadvertent” lawyer-client relationship. In addition, the law firm should exercise care in obtaining information from potential clients and be mindful of the potential consequences/duties resulting from the electronic communications. Rule 1.18 provides that a person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client and that, even when no client-lawyer relationship ensues, a lawyer who
has had discussions with a prospective client may generally not use or reveal information learned in the consultation. Furthermore, Rule 1.18(c) prohibits a lawyer from representing a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter. Therefore, acquiring information from a prospective client via the live chat service could create a conflict of interest with a current client that would require withdrawal.
DIGEST: A lawyer may not attempt to gain access to a social networking website under false pretenses, either directly or through an agent.

RULES: 4.1, 5.3(b)(1), 8.4(a) & (c)

QUESTION: May a lawyer, either directly or through an agent, contact an unrepresented person through a social networking website and request permission to access her web page to obtain information for use in litigation?

OPINION

Lawyers increasingly have turned to social networking sites, such as Facebook, Twitter and YouTube, as potential sources of evidence for use in litigation. In light of the information regularly found on these sites, it is not difficult to envision a matrimonial matter in which allegations of infidelity may be substantiated in whole or part by postings on a Facebook wall. Nor is it hard to imagine a copyright infringement case that turns largely on the postings of certain allegedly pirated videos on YouTube. The potential availability of helpful evidence on these internet-based sources makes them an attractive new weapon in a lawyer's arsenal of formal and informal discovery devices. The prevalence of these and other social networking websites, and the potential benefits of accessing them to obtain evidence, present ethical challenges for attorneys navigating these virtual worlds.

In this opinion, we address the narrow question of whether a lawyer, acting either alone or through an agent such as a private investigator, may resort to trickery via the internet to gain access to an otherwise secure social networking page and the potentially helpful information it holds. In particular, we focus on an attorney's direct or indirect use of affirmatively “deceptive” behavior to "friend" potential witnesses. We do so in light of, among other things, the Court of Appeals’ oft-cited policy in favor of informal discovery. See, e.g., Niesig v. Team I, 76 N.Y.2d 363, 372, 559 N.Y.S.2d 493, 497 (1990) (“The Appellate Division’s blanket rule closes off avenues of informal discovery of information that may serve both the litigants and the entire justice system by uncovering relevant facts, thus promoting the expeditious resolution of disputes.”); Muriel, Siebert & Co. v. Intuit Inc., 8 N.Y.3d 506, 511, 836 N.Y.S.2d 527, 530 (2007) (“The importance of informal discovery underlies our holding here”). It would be inconsistent with this policy to flatly prohibit lawyers from engaging in any and all contact with users of social networking sites. Consistent with the policy, we conclude that an attorney or her agent may use her real name and profile to send a “friend request” to obtain information from an unrepresented person's social networking website without also disclosing the reasons for making the request. While there are ethical boundaries to such "friending," in our view they are not crossed when an attorney or investigator uses only truthful information to obtain access to a website, subject to compliance with all other ethical requirements. See, e.g., id., 8 N.Y.3d at 512, 836 N.Y.S.2d at 530 (“Counsel must still conform to all applicable ethical standards when conducting such [ex parte] interviews [with opposing party’s former employee].” (citations omitted)).
The potential ethical pitfalls associated with social networking sites arise in part from the informality of communications on the web. In that connection, in seeking access to an individual’s personal information, it may be easier to deceive an individual in the virtual world than in the real world. For example, if a stranger made an unsolicited face-to-face request to a potential witness for permission to enter the witness’s home, view the witness's photographs and video files, learn the witness's relationship status, religious views and date of birth, and review the witness’s personal diary, the witness almost certainly would slam the door shut and perhaps even call the police.

In contrast, in the “virtual” world, the same stranger is more likely to be able to gain admission to an individual’s personal webpage and have unfettered access to most, if not all, of the foregoing information. Using publicly-available information, an attorney or her investigator could easily create a false Facebook profile listing schools, hobbies, interests, or other background information likely to be of interest to a targeted witness. After creating the profile, the attorney or investigator could use it to make a “friend request” falsely portraying the attorney or investigator as the witness’s long lost classmate, prospective employer, or friend of a friend. Many casual social network users might accept such a “friend request” or even one less tailored to the background and interests of the witness. Similarly, an investigator could e-mail a YouTube account holder, falsely touting a recent digital posting of potential interest as a hook to ask to subscribe to the account holder’s “channel” and view all of her digital postings. By making the “friend request” or a request for access to a YouTube “channel,” the investigator could obtain instant access to everything the user has posted and will post in the future. In each of these instances, the “virtual” inquiries likely have a much greater chance of success than if the attorney or investigator made them in person and faced the prospect of follow-up questions regarding her identity and intentions. The protocol on-line, however, is more limited both in substance and in practice. Despite the common sense admonition not to “open the door” to strangers, social networking users often do just that with a click of the mouse.

Under the New York Rules of Professional Conduct (the “Rules”), an attorney and those in her employ are prohibited from engaging in this type of conduct. The applicable restrictions are found in Rules 4.1 and 8.4(c). The latter provides that “[a] lawyer or law firm shall not . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation.” N.Y. Prof'l Conduct R. 8.4(c) (2010). And Rule 4.1 states that “[i]n the course of representing a client, a lawyer shall not knowingly make a false statement of fact or law to a third person.” Id. 4.1. We believe these Rules are violated whenever an attorney “friends” an individual under false pretenses to obtain evidence from a social networking website.

For purposes of this analysis, it does not matter whether the lawyer employs an agent, such as an investigator, to engage in the ruse. As provided by Rule 8.4(a), “[a] lawyer or law firm shall not . . . violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another.” Id. 8.4(a). Consequently, absent some exception to the Rules, a lawyer’s investigator or other agent also may not use deception to obtain information from the user of a social networking website. See id. Rule 5.3(b)(1) (“A lawyer shall be responsible for conduct of a nonlawyer employed or retained by or associated with the lawyer that would be a violation of these Rules if engaged in by a lawyer, if . . . the lawyer orders or directs the specific conduct or, with knowledge of the specific conduct, ratifies it . . . “).
We are aware of ethics opinions that find that deception may be permissible in rare instances when it appears that no other option is available to obtain key evidence. See N.Y. County 737 (2007) (requiring, for use of dissemblance, that “the evidence sought is not reasonably and readily obtainable through other lawful means”); see also ABCNY Formal Op. 2003-02 (justifying limited use of undisclosed taping of telephone conversations to achieve a greater societal good where evidence would not otherwise be available if lawyer disclosed taping). Whatever the utility and ethical grounding of these limited exceptions — a question we do not address here — they are, at least in most situations, inapplicable to social networking websites. Because non-deceptive means of communication ordinarily are available to obtain information on a social networking page — through ordinary discovery of the targeted individual or of the social networking sites themselves — trickery cannot be justified as a necessary last resort.\[5\] For this reason we conclude that lawyers may not use or cause others to use deception in this context.

Rather than engage in “trickery,” lawyers can — and should — seek information maintained on social networking sites, such as Facebook, by availing themselves of informal discovery, such as the truthful “friending” of unrepresented parties, or by using formal discovery devices such as subpoenas directed to non-parties in possession of information maintained on an individual’s social networking page. Given the availability of these legitimate discovery methods, there is and can be no justification for permitting the use of deception to obtain the information from a witness on-line.\[6\]

Accordingly, a lawyer may not use deception to access information from a social networking webpage. Rather, a lawyer should rely on the informal and formal discovery procedures sanctioned by the ethical rules and case law to obtain relevant evidence.

\[1\] Social networks are internet-based communities that individuals use to communicate with each other and view and exchange information, including photographs, digital recordings and files. Users create a profile page with personal information that other users may access online. Users may establish the level of privacy they wish to employ and may limit those who view their profile page to “friends” — those who have specifically sent a computerized request to view their profile page which the user has accepted. Examples of currently popular social networks include Facebook, Twitter, MySpace and LinkedIn.


\[4\] The communications of a lawyer and her agents with parties known to be represented by counsel are governed by Rule 4.2, which prohibits such communications unless the prior consent of the party’s lawyer is obtained or the conduct is authorized by law. N.Y. Prof’l Conduct R. 4.2. The term “party” is generally interpreted broadly to include “represented witnesses, potential witnesses and others with an interest or right at stake, although they are not nominal parties.” N.Y. State 735 (2001). Cf. N.Y. State 843 (2010)\{lawyers may access
public pages of social networking websites maintained by any person, including represented parties).

[5] Although a question of law beyond the scope of our reach, the Stored Communications Act, 18 U.S.C. § 2701(a)(1) et seq. and the Electronic Communications Privacy Act, 18 U.S.C. § 2510 et seq., among others, raise questions as to whether certain information is discoverable directly from third-party service providers such as Facebook. Counsel, of course, must ensure that her contemplated discovery comports with applicable law.

[6] While we recognize the importance of informal discovery, we believe a lawyer or her agent crosses an ethical line when she falsely identifies herself in a “friend request”. See, e.g., Niesig v. Team I, 76 N.Y.2d 363, 376, 559 N.Y.S.2d 493, 499 (1990) (permitting ex parte communications with certain employees); Muriel Siebert, 8 N.Y.3d at 511, 836 N.Y.S.2d at 530 (“The importance of informal discovery underlies our holding here that, so long as measures are taken to steer clear of privileged or confidential information, adversary counsel may conduct ex parte interviews of an opposing party’s former employee.”).
Many lawyers and other legal professionals use social networking websites to advertise their legal practice, connect with like-minded people, post “adorable” family photos, or locate long lost boyfriends—I mean friends. Some of the better-known sites include MySpace, Facebook, LinkedIn, and Twitter. (I am including Twitter in the list because it is well-known. In the interest of full disclosure I need to report that, to the best of my knowledge and recollection, I have never “tweeted,” “twooted,” or “twitted” anything.) Essentially, social networking sites allow users to create personal profiles and then interact with “friends” through “chatting” or “blogging.” While social networking sites can be useful, entertaining, and addictive, legal professionals need to be cognizant of potential ethical pitfalls attendant to revealing, and discovering, information on a social website.

Several opinions have recently been issued addressing the propriety of judges participating in social networking websites. For example, the North Carolina Judicial Standards Commission reprimanded a judge for “friending” a lawyer involved in a hearing before him and using Facebook to discuss the case with the lawyer. The judge also “googled” one of the parties and accessed the party’s website. See N.C. Judicial Standards Comm., Inquiry No. 08-234 (April 1, 2009). The commission found that the ex parte communications and the independent gathering of information indicated a disregard of the principles of judicial conduct and constituted conduct prejudicial to the administration of justice.

To prevent such occurrences, the Judicial Ethics Advisory Committee of the Florida Supreme Court issued an opinion prohibiting judges from adding lawyers who may appear before the judge as “friends” and vice versa. Fla. Judicial Ethics Advisory Comm., Op. 2009-20. The reason for the ban is to prevent the appearance to the public that “friended” lawyers might have a special influence over the judge. Kentucky, New York, and South Carolina have issued opinions allowing judges to participate in social networking websites, but advising judges to be extremely cautious that such participation does not otherwise result in violations of the rules governing judicial conduct. Ethics Committee of the Kentucky Judiciary, Formal Judicial Ethics Op. JE-119 (2010); NY State Advisory Committee on Judicial Ethics, Op. 08-176 (2009); SC Judicial Department Advisory Committee, Op. 17-2009 (2009).

It is not just judges who have to be wary of their online activity. The Philadelphia Bar Association's Professional Guidance Committee issued an opinion concerning a lawyer's proposed investigation of a witness's Facebook and MySpace pages. Phila. Bar Assoc. Prof'l. Guidance Comm., Opinion 2009-2 (March 2009). The lawyer wanted to ask a third party to use the Facebook and MySpace websites to send a "friend request" to the witness. The lawyer believed that the third party would be able to uncover information on the websites that could be used to impeach the witness. The committee concluded that the proposed method of obtaining information was deceptive and in violation of the Pennsylvania Rules of Professional Conduct.

Lawyers have also been cautioned as to their participation in online lawyer rating sites. The South Carolina Bar Association responded to an inquiry about a lawyer’s professional
responsibilities when a company launched a website that listed lawyers without the lawyers’ permission or involvement. SC Ethics Advisory Comm., Opinion 09-10 (2009). The company used information obtained from state courts and bar associations to create website entries for lawyers. For each lawyer listed, the website included a company “rating.” The website also included a feature for peer endorsements and client ratings. The South Carolina Bar Association held that if the lawyer participated in the listing by “claiming” or “updating” his listing, all comments made about him on the website were subject to the advertising requirements of the South Carolina Rules of Professional Conduct and the lawyer would have an ongoing duty to monitor the listing to keep all comments in conformity with the rules.

And in the category of “what were they thinking?” we have the following two scenarios involving lawyers online. In Texas, a lawyer asked for a continuance from a judge due to the death of her father, but was later sanctioned by the judge when it was discovered that the lawyer’s Facebook profile page detailed a week of drinking and partying. Also, the Florida State Bar fined a trial lawyer $1,250 for criticizing a judge on a blog. The lawyer questioned the judge’s mental stability and stated that she was unfit for her position. The lawyer also stated that the judge had an “ugly, condescending attitude” and was an “evil, unfair witch.” Ouch! The Florida Supreme Court upheld the sanction. 996 So. 2d 213 (2008).

Law students are not immune from scrutiny either. The Florida Board of Bar Examiners adopted a policy of reviewing applicants’ social networking sites as a part of its character and fitness investigations. Facebook review is limited to certain applicants such as those who need rehabilitation or who have admitted to past indiscretions.

Remember that if you are using a social networking or online rating website to market your law firm, you have to follow all of the advertising rules. See RPC 239. For example, in response to social networking profiles that ask users to list their “specialties,” you cannot state that you are a “specialist” in a particular field of law, except as allowed by Rule 7.4(b). In addition, you need to be careful not to violate Rule 7.3, the anti-solicitation rule, which regulates real-time communications with prospective clients. Interestingly, the Philadelphia Bar Association just issued an opinion that allows certain real-time electronic communications, including communications through blogs, chat rooms, and other social media. Philadelphia Bar Ass’n Prof’l Guidance Comm., Op. 2010-6 (2010). The opinion states that Rule 7.3 does not bar the use of social media for solicitation where a prospective client to whom the lawyer’s communication is directed has the ability to ignore the soliciting lawyer and respond or not as he or she sees fit.

In conclusion, don’t turn off your brain when you sign onto your favorite social networking website. Keep the ethics rules in mind and remember that what happens in Vegas doesn’t stay in Vegas if you post it on your website.

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Endnotes
1. Some social websites have a “chat” feature which allows users to instantly communicate with friends who are also online.
2. “Blogging” is the process of communicating with other people through the use of an online diary or “web log.”
Is It Okay for a Party or a Non-Lawyer Assistant to "Friend" an Unrepresented Witness?

The Philadelphia Bar Association’s Professional Guidance Committee addressed this exact question in Opinion 2009-02 (March 2009). To date, this appears to be the only ethics opinion on point. However, the ethical issues presented are not unique to the Pennsylvania Rules of Professional Conduct, and corollaries can be made to North Carolina’s Rules.

In this inquiry, an attorney asked whether it would be ok for a non-lawyer assistant to “friend” the witness, without revealing that he or she is affiliated with the lawyer or the true purpose of the friend request. Ultimately, this opinion concluded that conduct of this sort would violate several rules of professional conduct. Because the North Carolina Rules closely mirror the Pennsylvania Rules, the analysis given in the Pennsylvania Opinion is helpful in determining our obligations as North Carolina Attorneys.

Although violations of any ethical rule can land an attorney in hot water, the Pennsylvania Opinion discussed most thoroughly the violation of Rule 8.4 (Misconduct) and Rule 4.1 (Truthfulness in Statements to Others).

Rule 8.4 states that it is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another; ...

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation; ...

The Opinion states, “the Committee believes that the proposed course of conduct contemplated by the inquirer would violate Rule 8.4(c) because the planned communication by the third party with the witness is deceptive. It omits a highly material fact, namely, that the third party who asks to be allowed access to the witness’s pages is doing so only because he or she is intent on obtaining information and sharing it with a lawyer for use in a lawsuit to impeach the testimony of the witness.” (emphasis added)

It is interesting to note that the Opinion states that if the attorney asked the witness “forthrightly for access”, by letting them know who they were and why they wanted to “friend” the witness, than this would appear to be ethical. It is the intentional concealment of the purpose of the access to the witness’s profile that causes the ethical problem.

Rule 4.1 states that in the course of representing a client, a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person;...
By making a false statement of material fact to the witness, the attorney is also violating Rule 4.1. In addition, because the proposed conduct is being done via a third party, the legal assistant, than a violation of Rule 8.4(a) would occur as well.

So What’s the lesson here?

Whether you are an attorney, a paralegal under the direction of an attorney, or a party to a lawsuit, don’t friend an adverse party or witness on Facebook in an attempt to gather information on that person unless you have disclosed to them who you are and why you are “friending” them.

Mining Social Media for Information about Case Parties, Jurors or Witnesses

Given the analysis above, it would appear to be permissible to mine social media sites for information about other parties, Jurors, or witnesses – and even Judges and other lawyers. The Internet is a public domain, and so long as you are not attempting to obtain permission to access someone’s profile by misrepresenting who you are or why you want access to his or her profile, you are on safe ground from an ethical standpoint.

As an analogy, the Pennsylvania Opinion compares the practice of an investigator videotaping the public conduct of a plaintiff in a personal injury case to show that they are capable of performing physical acts that they would otherwise claim their injury prevents them from performing. The opinion states:

In the video situation, the videographer simply follows the subject and films him as he presents himself to the public. The videographer does not have to ask to enter a private area to make the video. If he did, then similar issues would be confronted, as for example, if the videographer took a hidden camera and gained access to the inside of a house to make a video by presenting himself as a utility worker.

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Website & Article Links:

NCSC: Social Media and the Courts Resource Guide:

Seduced: For Lawyers, the Appeal of Social Media Is Obvious. It’s Also Dangerous:
http://www.abajournal.com/magazine/article/seduced_for_lawyers_the_appeal_of_social_media_is_obvious_dangerous/