



THE DOCKET

News of the National Conference of Appellate Court Clerks

Montana Adventures

By Ed Smith (MT)

I hope you are making your plans to attend our 37th annual meeting of the NCACC this August 7-13, 2010 at Grouse Mountain Lodge, in Whitefish, Montana. A great program has been designed by Cynthia Rapp and the program committee for our professional development. Along with the exceptional program, a host of adventures awaits you in breathtaking northwestern Montana. The Montana Adventure Company, located in the lobby of Grouse Mountain, has a full compliment of activities available for your enjoyment at www.grousemountainlodge.com. They can make all the arrangements for whatever your heart desires!



We are so fortunate to have Whitefish Lake adjacent to the Lodge and a host of activities, such as biking, kayaking, and lovely stretches of walking are available for your enjoyment.

For those who want to fish our blue ribbon trout rivers and streams, I suggest you take a look at the Flathead River; or, if you want to venture further out, you can go up to the Kootenai River in Lincoln County. The Bob Marshall Wilderness area is south from Whitefish for those who want the ultimate experience!

We have ten championship golf courses in the area, including the beautiful Eagle Bend course down in Big Fork. Check out all the courses at www.golfmontana.net. And speaking of Big Fork, you will not want to miss taking a drive down around Flathead Lake, the largest freshwater lake west of the Mississippi, to this lovely little community. The cherry orchards await your sampling!!

On Saturday, August 7, we have lined up some fun with river rafting, and for those that also want a horseback ride, you can do both. That's called our saddle and paddle tour! For our spouses, families, and guests, we can also arrange for floating activities during the week when the rest of us are attending our educational program.

Monday evening the NCACC will be the guests of Thomson Reuters at Whitefish Mountain Resort Summit House Restaurant with live music. For those of you who have some time, there are some really interesting activities that are located at what we old timers call Big Mountain such as a walk in the trees, where you are literally suspended 30-70 feet above the forest floor for a breathtaking experience. Alpine zip lines and the alpine slides are awaiting you for an adventure!

We are also really excited about our Glacier Park Red Bus Tour (the Jammers!) of Going to the Sun Highway on Wednesday afternoon and the optional walk to Hidden Lake with our hosts LexisNexis. One of the great aspects of traveling to the Glacier region will be your ability to participate in some first class hiking. Because of the location of Whitefish to the park, there are some wonderful day hikes to exhilarate you. To find more information about the park, go to www.nps.gov/glac/.

As a reminder to all of you, if you choose to go to Waterton National Park, you will need to bring your passport to enter Canada. The Canadian side of the park is spectacular; so, if you

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THE DOCKET

News of the National Conference of Appellate Court Clerks

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HELP KEEP US INFORMED!!



To Remit NCACC Membership Dues:

National Center of State Courts
300 Newport Avenue
Williamsburg, VA 23185



THE PRESIDENT'S PAGE

Susan Clary (KY)

A "Call to Do More with Less."

I sit in my office, following our Court's day long session of planning for impending budget cuts, reflecting as you do on the challenges that lay ahead for our nation's court systems. Our Budget Director terms it the "New Normal," dealing with budget short-falls, furloughs, layoffs and increasing public scrutiny. We all face similar crisis and change in our court systems; working together with our colleagues in the NCACC is more essential now than ever before. Ingenuity and the exchange of ideas promote the smart use of our limited resources. This organization is so valuable because it allows us to share relevant information that helps all of us work more efficiently and effectively for our state court systems. Juleann Hornyak, Clerk of the Illinois Supreme Court and NCACC member since 1981, said it more eloquently as we spoke today, she is thankful for thirty years of professional support from NCACC.

"How to Do More with Less" will be a theme of our Annual Meeting in Whitefish, Montana, August 8-13, 2010. Our Program Committee, headed by Chair, Cynthia Rapp, has drawn upon your suggestions and scheduled speakers to address record retention, dealing with the press, lessons learned from e-filing, new clerk training, web accessibility, tech terms, succession planning, and going green. Sessions will also include court technology and our vendor showcases; relevant educational programs to help you work more efficiently and effectively.

Please contact our Scholarship Committee Chair, Terry Lord, regarding scholarship monies available for the Montana conference. We want you to join us in Montana.

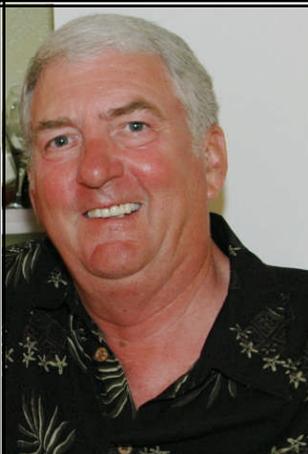
Not only is the NCACC our only source for relevant education, it provides us with opportunities to share ideas and to discuss common problems and solutions. Our host in Montana, Ed Smith, has chosen the beautiful Grouse Mountain Lodge as the site of our Annual Meeting. Ed has planned activities that include a tour of famed Glacier National Park on the celebration of its hundredth birthday and optional rafting trips on Saturday. Make your plans to join your NCACC family in Montana in August.

It is a privilege and honor to serve you as President. See you in Montana.

Scholarship Money Is Available

For those of you who might be short of funding to attend the Annual Conference at Whitefish, Montana in August, you are encouraged to seek assistance from the Scholarship Committee. Funds are available to assist you. Please take advantage of this opportunity to see old friends, to make new ones, and have a wonderful time in some of the most beautiful scenery in the world. We would love to see you there.

Please contact Terry Lord at Terence.Lord@courts.mo.gov or 816.889.3600.



Facts, Fiction, & Foolishness

Leslie Steen (AR)

With the conference in Whitefish approaching, it is time for most of us to make travel plans. If you plan to drive, you might want to be very careful in selecting a traveling companion. Sometimes even your spouse cannot be trusted. For instance:

A police officer pulls over a speeding car. The officer says, "I clocked you at 80 miles per hour, sir."

The driver says, "Gee officer, I had it on cruise control at 60; perhaps your radar gun needs calibrating."

Not looking up from her knitting the wife says, "Now don't be silly, dear - - you know this car doesn't have cruise control." As the officer writes out the ticket, the driver looks over at his wife and growls, "Can't you keep your mouth shut for once?!?!"

The wife smiles demurely and says, "Well dear you should be thankful your radar detector went off when it did or your speed would have been higher."

As the officer writes out the **second ticket** for the *illegal* radar detector unit, the man glowers at his wife and says through clenched teeth, "Woman, can't you keep your mouth shut!?"

The officer frowns and says, "And, I notice that you're not wearing your seat belt sir. That's an automatic \$75 fine . . ." The driver says, "Yeah, well you see officer, I had it on, but I took it OFF when you pulled me over so I could get my license out of my back pocket."

The wife says, "Now, dear, you know very well that you didn't have your seat belt on. You never wear your seat belt when you are driving."

As the police officer is writing out the **third ticket** the driver turns to his wife and barks, "Why don't you please shut up?!?!"

The officer looks over at the woman and asks, "Does your husband always talk to you this way, ma'am?"

"Only when he's been drinking," was the reply.



Some people just react better in these types of situations than others. When choosing a traveling companion, you may want to take a woman like this.

A woman gets pulled over for speeding.

Woman: Is there a problem officer?

Officer: Ma'am you were speeding. Can I see your license, please?

Woman: I'd give it to you but I don't have one.

Officer: Don't have one?

Woman: Lost it, four years ago for drunk driving.

Officer: I see . . . can I see your vehicle registration papers please.

(Continued on page 5)

(Facts, Fiction, and Foolishness continued from page 4)

Woman: I can't do that.

Officer: Why not?

Woman: I stole this car.

Officer: Stole it?

Woman: Yes, and I killed and hacked up the owner.

Officer: You what?!?!

Woman: His body parts are in plastic bags and in the trunk if you want to see.

The officer looks at the woman and slowly backs away to his car and calls for back up. Within five minutes five police cars circle the car. A senior officer slowly approaches the car, clasping his half drawn gun.

Officer 2: Ma'm would you step out of your vehicle please!?! The woman steps out.

Woman: Is there a problem sir?

Officer 2: One of my officers told me you have a stolen car and murdered the owner.

Woman: Murdered the owner?

Officer 2: Yes, could you please open the trunk of your car, please. The woman opens the trunk revealing nothing but an empty trunk.

Officer 2: Is this your car, ma'am?

Woman: Yes, here are the registration papers. The officer is stunned.

Officer 2: My officer also tells me you have no driver's license. The woman digs into her purse and hands her license to the officer. The officer examines the license and looks puzzled.

Officer: Thank you, ma'am. My officer also told me you didn't have a license, you stole that car, and you murdered and hacked up the owner.

Woman: I'll bet that liar told you I was speeding, too.

We hope you make careful decisions before you start your journey and we look forward to seeing you safe and sound in the Big Sky Country.



BYLAWS

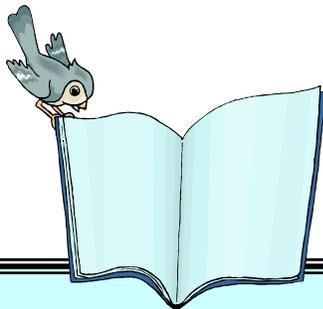
Amendment

Two proposed amendments relating to Article III (4) have been reviewed and approved for presentation to the membership at the annual meeting in August, 2010 by the By-Laws Committee: Norm Herring (DC), Chair, Dan Shearouse (SC), Joe Lane (CA), Ronald Carpenter (WA), and Ed Hosken (VA).

The first proposed amendment modifies the annual dues by increasing the dues to \$250 per year. I am informed by the Executive Committee the increase is due to economic reasons, the fact that the dues have not been changed for many years and that our organization has some, if not the lowest, dues of any organization that the Center for State Courts tracks.

The second amendment changes the timing for payment of dues to make dues due on January 1 of each year and delinquent on July 1 of each year. The dues for 2010 would still be due on the anniversary date of the member. The reason provided by the Executive Committee is that the varying due dates dependant on the anniversary date of the member is very hard to track for accounting purposes and making all dues due on the same date allows a more uniform system of billing.

4. Membership Dues. Memberships are renewable by payment of annual dues. The annual dues shall be ~~\$100.00~~ **\$250.00** for regular members, \$25.00 for retired and associate members and \$100.00 for sustaining members. ~~Dues are payable each year on the anniversary of the date on which the individual member joined the Conference. The anniversary date of all members who joined the Conference prior to August 1, 2001 is deemed to be July 1. Dues that are payable for calendar year 2010 shall be due on the anniversary date on which the individual member joined the Conference. Beginning in 2011 Dues shall be payable on January 1 and become delinquent on July 1 of the year in which the dues are payable.~~ Dues for those who join the Conference for the first time after an annual meeting shall be payable with the membership application. A membership that has lapsed for non-payment of dues July 1 of the current year may be reinstated without affecting a member's eligibility for office under Section 3 of this Article, if the delinquent dues are paid prior to the expiration of one year from the due date or the annual business meeting, whichever first occurs. On its own motion or on the application of a member, the Executive Committee may waive the payment of dues for good cause shown.



Memory Book for Diana Pratt-Wyatt

Patti Guin, who was a long time friend of Diana's, is preparing a memory book to present to Diana's family.

If you would like to make a contribution of your favorite memory of Diana, please send it to Patti_Guin@lawd.uscourts.gov. Patti would like to start compiling the book in May and would like the contributions by the end of April.

Educational Preview

Cynthia Rapp (DC)

The Program Committee is pleased to present the educational program for the Montana meeting. You will notice that the format has changed a bit from years past. My apologies to those who hate change. This year we will start with a one hour educational program on Tribal Courts on Sunday afternoon, this is a result of a suggestion made at the critique breakfast last year. (See someone does listen to your suggestions.)

Our Tech/Vendor day will be on Tuesday this year. The morning programs will focus on internet issues: ADA compliance and privacy rights. We will have one vendor showcase in the morning and then the remainder after lunch. The ethics hours will be split between two different sessions. One session will feature ethical scenarios based on real life issues. For any of you interested in showing off your acting skills this is your opportunity. Please contact me at cjrapp@supremecourt.gov if you are interested in participating in the scenarios on Wednesday.

We are very excited to have Lyle Denniston as our Dwight D. Opperman Speaker. Lyle is in his 62nd year as a journalist; over 52 of those years have been spent covering the U.S. Supreme Court. He has covered one of every four Justices ever to sit on the Court. He is currently covering the Court for an Internet-based clearing house of information about the Supreme Court's work — the Web log known as "SCOTUSblog."

Our last day of programming will begin with the ever popular "What's Bugging You?" Please feel free to send me topics in advance for this program as well as for the Roundtable discussions.

(President's Page continued from page 1)

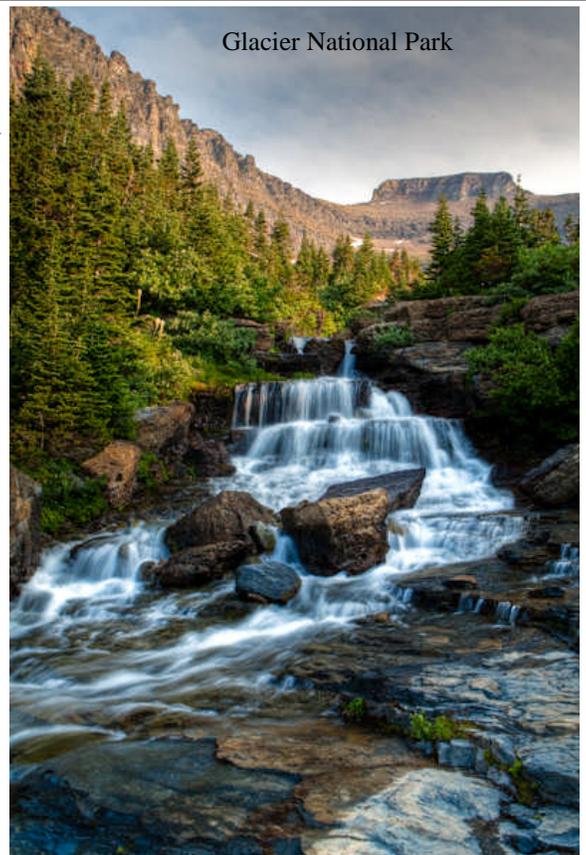
have the time, you might also consider that option.

Registration packets will be sent out shortly and they will contain a helpful guide to the Flathead Valley and a National Geographic map of the Northern Rockies.

As you can see, Montana is calling to you, your family, and guests. Please come, and make your reservations early so we can make your attendance as special as the people and the places of the Big Sky Country.



Waterton Lakes National Park borders Glacier National Park in Montana to the south, together making up the Waterton-Glacier International Peace Park, the first of its kind in the world. A place like no other, the uniqueness of Waterton Park is a blend of unusual geology, mild climate, rare wild flowers, and an abundance of wildlife. It is a scene which has remained unchanged for centuries.



Glacier National Park

National Conference of Appellate Court Clerks
 37th Annual Meeting Schedule • August 7-13, 2010 • Whitefish, MT
 Education Schedule

Saturday, August 7, 2010

3:00 p.m. – 5:00 p.m.	Registration	Foyer: Continental Divide Conference Center
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Sunday, August 8, 2010 (1 Session)

10:00 a.m. – 12:00 p.m.	Registration	Lobby
1:00 p.m. – 1:30 p.m.	Welcome Meeting For New Members & First Time Attendees	South Glacier Room
1:00 p.m. – 1:30 p.m.	Orientation for Families	Nordic & Alpine Rooms
1:30 p.m. – 3:00 p.m.	Roll Call of the States & Business Meeting (Part I)	East Divide Room
3:15 p.m. – 4:15 p.m.	Relationship between State Courts and Tribal Courts: An inside view on how we got to where we are. Professor. Raymond Cross <i>University of Montana Law School</i>	East Divide Room

Monday, August 9, 2010 (5 Sessions)

8:30 a.m. – 8:40 a.m.	Welcome & Announcements Susan Clary, <i>President NCACC</i> Ed Smith, <i>Host, NCACC 2010 – Whitefish</i> Hon. Mike McGrath, <i>Chief Justice Supreme Court of Montana</i>	East Divide Room
8:40 a.m. – 10:40 a.m.	Record Retention- Jim McMillan, <i>Principle Court Management Consultant National Center for State Courts</i> Ruth Fraley, <i>Retired Archivist New York State Courts</i>	East Divide Room
☕ Break: 10 Minutes		
10:30 a.m. – 11:50 p.m.	Full Court Press (a panel discussion) Lyle Denniston, <i>SCOTUS Blog</i> ; Angelita Plemmer, <i>Public Information Officer, Maryland Court of Appeals, Former Justice</i> Terry Trieweller, <i>Montana Supreme Court</i> ; Christie Cameron, <i>Clerk, North Carolina Supreme Court</i>	East Divide Room
🍴 Lunch on Your Own: 1 Hour 30 Minutes		
1:20 p.m. – 2:20 p.m.	The Past and Future of Covering the Supreme Court Lyle Denniston, <i>SCOTUS Blog</i>	East Divide Room
2:20 p.m. – 3:10 p.m.	Breakout Session I:	
1	New Clerk Training William Suter, <i>Clerk, Supreme Court of the U. S.</i> ; Deena Fawcett, <i>Clerk, California Court of Appeal, 3rd app. District</i> ; Norm Herring, <i>Clerk U.S. Court of Appeals for Veterans Claims</i> Nordic Room	Tech Terms: Do You Give a Tweet about Twitter Peter Haas, <i>Director of Technology Services, Supreme Court of Louisiana</i> South Glacier Room
3	Lessons Learned: E Filing Christie Cameron, <i>Clerk, North Carolina Supreme Court</i> ; Blake Hawthorne, <i>Supreme Court of Texas</i> ; Judy Pacheco, <i>Clerk, Wyoming Supreme Court</i> Alpine Room	
3:20 p.m. – 4:10 p.m.	Breakout Session II:	
1	Succession Planning Garland Pinkston, <i>Clerk, D.C. Court of Appeals</i> Nordic Room	Tech Terms: Do You Give a Tweet about Twitter Peter Haas, <i>Director of Technology Services, Supreme Court of Louisiana</i> South Glacier Room
3	Going Green Kevin Lane, <i>Assistant Clerk, California Court of Appeal Fourth Appellate District</i> Alpine Room	

Tuesday, August 10, 2010 (3 Sessions)

	7:30 a.m. – 8:30 a.m.	Roundtable Discussions	West Divide Room	
	8:30 a.m. – 9:30 a.m.	Is Your Web-Site ADA Compliant? Should it be? Brian Cramer <i>SRA International, Inc.</i>	East Divide Room	
	9:30 a.m. – 10:30 a.m.	Right to Know vs. the Right to Privacy Tim Stanley <i>President of Justia</i>	East Divide Room	
☞	Break: 15 Minutes			
Vendor Exposition (12:00 p.m. – 5:00 p.m.)	10:45 a.m. – 11:00 a.m.	Vendor Introductions & Opening of Vendor Expo Mike Richie		
	11:00 a.m. – 12:00 p.m.	Vendor Showcase Session I:		
		1 LT Court	2 TBA	
	1:15 p.m. – 2:00 p.m.	Vendor Showcase Session II: Lexis	2 TBA	
	2:00 p.m. – 2:50 p.m.	Vendor Showcase Session III:	1 West	2 TBA 3

Wednesday, August 11, 2010 (3 Sessions)

	8:00 a.m. – 9:30 a.m.	Dangerous or Just Crazy- How you can Improve Court Security Krista Giaccio, Inspector, <i>Supreme Court of the United States Police</i>	West Divide Room
☞	Break: 10 Minutes		
	9:40 a.m. – 11:10 a.m.	Ethical Scenarios Peter Kiefer, Regional Administrator, <i>Maricopa Superior Court</i> , Moderator	West Divide
	11:10 a.m. – 12:30 p.m.	Working With You is Killing Me Corrin Gee, <i>Education Attorney, Federal Judicial Center</i>	West Divide

Thursday, August 12, 2010 (4 Sessions)

	8:30 a.m. – 10:00 a.m.	What's Bugging You Susan Clary, President <i>NCACC</i>	West Divide Room
☞	Break: 10 Minutes		
	10:10 a.m. – 11:10 a.m.	A Question of Ethics Dean Irma Russell, <i>The University of Montana Law School</i>	
	11:15 a.m. – 1:00 p.m.	Annual Business Meeting/Executive Committee Meeting	West Divide Room
	1:00 p.m. – 5:00 p.m.	Conference Check-Out Please return binders, name pouches, evaluation forms, etc.	

Friday, August 13, 2010

☘	8:00 a.m. – 9:30 a.m.	Critique Breakfast	
	9:30 a.m. – 10:00 a.m.	Conference Check-Out Please return binders, name pouches, evaluation forms, etc.	

Officers and Executive Committee Nominations 2010 - 2011

The Nominating Committee proposes the following slate of Officers and Executive Committee members.

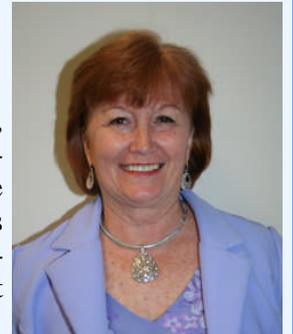
Rory Perry (WV) Vice-President



Rory Perry is the Clerk of the Supreme Court of Appeals of West Virginia. Appointed as Clerk in July 2000, Mr. Perry is the 14th person to serve as Clerk since the State was founded. As Clerk, he has introduced innovations such as the oral argument webcast, e-mail opinion summaries, and online availability of merits briefs. Before joining the Court, Mr. Perry was an appellate litigator in the West Virginia Attorney General's Office, where he was also involved in the state's tobacco litigation. He received an undergraduate degree from Marshall University, and his law degree from West Virginia University. He is married to Renee Margocee and has an adult son named Zane. He previously served as a member of the NCACC Executive Committee and was Program Chair for the Pittsburgh conference in 2008.

Sherry Williamson (TX) Secretary

Sherry Williamson was appointed as Clerk of the Eleventh Court of Appeals, Eastland, Texas, in 1995. Since starting her employment with the Court 34 years ago, she has worked in the positions of Deputy Clerk, Accountant, and Appellate Secretary. Sherry is currently serving on the Executive Committee, and has served as Chair of the Resolutions and Memorials Committee, as well as a committee member on the Convention Assistance, Nominating, Public Relations, Publications, Membership, Pictorial and Technology Committees of the NCACC over the past years. She has two children, Dusty and Deana.



Lisa Matz (TX) Executive Committee

Lisa Matz was appointed Clerk of the Fifth Court of Appeals in Dallas, Texas in 1996 after serving for seven years in various Deputy Clerk positions for the First Court of Appeals in Houston, Texas. Lisa graduated with a bachelor's degree in Criminal Justice and a minor in Business Administration from the University of Phoenix in 2010. Since becoming a member of NCACC in 1996, Lisa has served on numerous committees over the years and is currently the Awards Committee Chair. She is married to Charles Matz and they have two sons, Myles and John.



David Schanker (WI) Executive Committee



David Schanker was appointed Clerk of the Wisconsin Supreme Court and Court of Appeals in 2007 after serving for seven years as Chief Deputy Clerk of the Indiana Supreme Court, Court of Appeals, and Tax Court. Prior to his career in court administration, David graduated *cum laude* from the Indiana University School of Law in Bloomington, where he was Articles Editor for the Indiana Law Journal. His undergraduate degree is from New York University, and he holds a master degree from Columbia University.

David served as chair of the NCACC Public Relations Committee during 2009-2010. He was the primary author and editor of the White Paper on the status of appellate e-filing, published on the NCACC and the NCSC websites in February 2010, and to be excerpted in the NCSC's publication *Future Trends in State Courts 2010*. He is also the author of the Edgar-nominated novel *A Criminal Appeal*.

Kevin Smith (IN) Executive Committee

Kevin S. Smith was appointed by Chief Justice Randall T. Shepard in October 2004 to be the Administrator of the Indiana Supreme Court. In February 2006, the Chief Justice added the title and responsibilities of Clerk of the Indiana Supreme Court, Court of Appeals, and Tax Court to Mr. Smith's job description. Prior to his current government service, Mr. Smith practiced law for nearly six years as a litigation attorney in two of Indiana's largest law firms. Before entering private practice, Mr. Smith served as a law clerk to the Honorable Alice M. Batchelder, Judge of the United States Court of Appeals for the Sixth Circuit, and as a law clerk to Chief Justice Shepard. Mr. Smith received his J.D. *magna cum laude* from the Indiana University School of Law—Bloomington in 1996, and in 1992 graduated with high distinction from Indiana University—Bloomington's School of Business with a B.S. in Business Economics and Public Policy. Mr. Smith has presented several continuing legal education seminars, has published articles on Indiana appellate procedure in the *Indiana Law Review*, and writes a regular column in the Indiana State Bar Association Appellate Practice Section's newsletter, *The Appellate Advocate*. Mr. Smith is also the proud recipient of the NCACC's 2009 Trailblazer Award. Mr. Smith and his wife Maggie, who will celebrate their 15th wedding anniversary in 2010, have two small children.



Respectfully submitted, Christie Cameron (NC), Chair

Kenneth deBlanc (LA)

Sandra Skinner (MO)

Michael Yerly (CA)

Les Steen (AR)

Joseph Lane (CA)

Lawyer Ethics and Technology: Information Inadvertently Sent, Part I

By Daniel J. Crothers
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Introduction

Email, the internet and those twenty first century law office dinosaurs—facsimile machines, floppy disks and CDs—have dramatically increased the speed at which information moves between lawyers and law firms. These technologies increase law office efficiencies by speeding transmission and eliminating wasteful re-typing of documents. However, using the technologies comes with a concomitant increased risk that information can be misdirected.

This is the first of two articles about the lawyer’s obligations when confidential client information is inadvertently distributed to a third party. Part I highlights how information can be mistakenly sent and how the act itself might be avoided. Although elementary, also covered is the basis for the lawyer’s ethical obligation to control and safekeep the information in the first place. Part II will focus on the sending and the receiving lawyers’ ethical options once confidential information has been transmitted or received.

Safeguarding Client Confidences

Safeguarding confidential client information is one of a lawyer’s primary obligations. Rule 1.6 provides, “A lawyer shall not reveal information relating to the representation of the client unless the client consents.”¹ The rules of Professional Conduct make lawyers not only responsible for their actions, but also responsible for the conduct of those assisting the lawyer in delivery of legal services.²

Lawyers must operate and manage their law offices so that nonlawyers acting at the lawyers’ direction or under their control do not violate the lawyers’ duties to clients.³ The lawyer’s twin responsibilities are explained in the commentary to Rule 1.6:

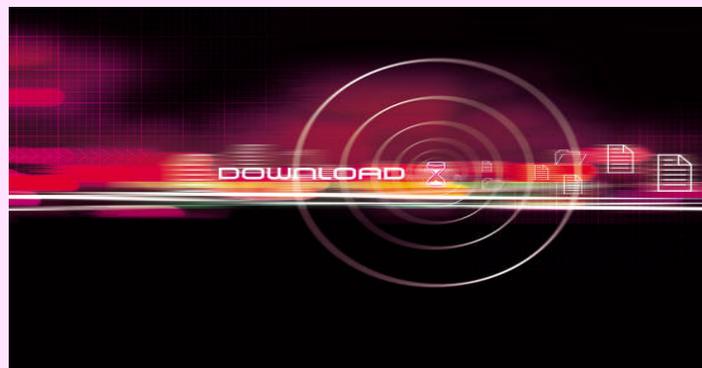
A lawyer must act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer’s supervision. See Rules 5.1, 5.3 and 8.4(a).⁴

¹ N.D.R. Prof. Conduct 1.6.

² N.D.R. Prof. Conduct 5.3.

³ Id.

⁴ N.D.R. Prof. Conduct 1.6 cmt. 16. Rule 5.1 relates to responsibilities of lawyers who are partners, managers and supervisors. Rule 5.3 relates to duties of lawyers who supervise nonlawyer office personnel. Rule 8.4 relates to “misconduct” and includes prohibiting lawyers from having others do what the lawyer is prohibited from doing.



The sending attorney's obligations are explained in a comment to Rule 1.6 of the North Dakota Rules of Professional Conduct:

When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give written consent to the use of a means of communication that would otherwise be prohibited by this Rule.⁵

The directives in Rule 1.6 are especially important when handling papers and electronic documents containing confidential client information because the nonlawyer office staff often is delegated the task of dealing with those materials.

A lawyer's failure to safekeep confidential client information can lead to disciplinary proceedings and appropriate sanctions,⁶ waiver of the attorney-client or attorney-work-product privileges⁷ and the lawyer's disqualification from the case.⁸ However, discretion and the code of judicial conduct prevent me from engaging in any further discussion about these potential remedies.⁹

How Disclosure Can Happen

The beast we now call "inadvertent disclosure" of confidential client information did not rear its head upon the advent of the electronic age. Previously, as now, confidences can be violated by the decidedly low tech action of mistakenly putting a letter in the wrong envelope and mailing it to opposing counsel¹⁰. However, the opportunity for harmful errors has increased with the speed at which information can be handled by fax, by email or by posting to the internet, probably due in part to the removal of some of the more deliberate steps like signing and folding a letter and addressing and stamping an envelope. The opportunity for inadvertent disclosure also increases through the exchange of electronic documents containing metadata. But that is a discussion for another time.

⁵ N.D.R. Prof. Conduct 1.6 cmt. 17.

⁶ Disciplinary Bd. v. Edwardson, 2002 ND 106, ¶ 21, 647 N.W.2d 126 ("In determining the appropriate sanction for violation of rules of professional conduct this Court is directed by the North Dakota Standards for Imposing Lawyer Sanctions.").

⁷ Farm Credit Bank of St. Paul v. Huether, 454 N.W.2d 710, 718-24 (N.D. 1990) (analytical framework explained but attorney-client privilege not waived under facts of case).

⁸ Continental Resources, Inc. v. Schmalenberger, 2003 ND 26, ¶ 11, 656 N.W.2d 730 (lawyer disqualified from representing adverse client because of former client's "right to be free from the risk of even inadvertent disclosure of confidential information").

⁹ See N.D. Code Jud. Conduct Canon 3.

¹⁰ Massachusetts Bar Ass'n Ethics Op. 99-4 (letter addressed to other side's client inadvertently mailed to lawyer).

(Lawyer Ethics and Technology, continued)

The Florida Bar recognized in an ethics opinion that “inadvertent disclosure might occur as part of a document production, a misdirected facsimile or electronic mail transmission, a ‘switched envelope’ mailing, or misunderstood distribution list instructions.”¹¹ This list provides a useful springboard for discussion.

Document production during discovery can lead to accidental disclosure in an infinite number of ways ranging from lack of attention when producing documents to handling an overwhelming volume of documents.¹² This concern is especially present when lawyers produce a client’s electronically stored information where preproduction review may be difficult or impossible.¹³ Entire books have been written on this topic, and the limited space here prevents further treatment other than to suggest that lawyers who are engaging in production of electronically stored information contract with knowledgeable personnel or otherwise sufficiently educate themselves on procedures necessary to adequately represent their client’s interests.¹⁴

More routine misdirection occurs when the wrong telephone number is used to send a fax or the wrong email address is used to send a message. In those cases, verifying the telephone number or email address often solves the problem. Misdirection by email also can occur when the sender has the right address, but attaches the wrong document. A simple way to avoid this problem is to establish an office procedure requiring double clicking on the attachment, thereby visually verifying that the attachment is indeed the correct document. This procedure also reintroduces a “deliberate step” in the process that gives the sender a chance to catch the mistake, preventing harm to the client.

Misunderstood distribution list instructions can plague all mediums of transmission, from letters to faxes to emails. The obvious cure is clear, sometimes written, communications between the lawyer and those sending the documents. The communications should include not only identification of the recipients, but also a clear designation of the documents to be sent and the mode of transmission.

This review of Rule 1.6 and of some of the common ways confidential information can mistakenly leave a law office provides a gateway to the next article: the options available to the sending and receiving lawyers when inadvertent transmission occurs.

¹¹ Florida Bar Ethics Op. 93-3 (1994). The Florida bar also noted that “[w]hether the disclosure was inadvertent, and whether inadvertent disclosure impliedly waives the attorney-client privilege or work product privilege, are questions of fact and law that are beyond the authorized scope of an ethics opinion.”

¹² See, e.g., Harp v. King, 835 A.2d 953, 968 (Conn. 2003) (“[T]he court rejected the strict approach to determining waiver in the context of inadvertent disclosure and adopted an approach that requires consideration of all relevant factors, ‘including the amount of documents involved and the degree of care taken to prevent inadvertent disclosure of privileged information.’”) (internal quotation omitted).

¹³ See, e.g., Bank of America Corp. v. SR Int’l Bus. Ins. Co., Ltd., No. 05-CVS-5564, 2006 WL 3093174, at *16 (N.C.Super. Nov. 1, 2006) (“ Inadvertent disclosure of privileged information is sometimes unavoidable because of the large amounts of information that are often involved in electronic discovery, and the time and cost required to screen this voluminous material for attorney work product and other privileged materials.”).

¹⁴ Examples of books on discovery of electronically stored information include Sharon D. Nelson, Bruce A. Olson and John W. Simek, The Electronic Evidence and Discovery Handbook: Forms, Checklists and Guidelines (2006); George L. Paul and Bruce H. Nearon, The Discovery Revolution: A Guide to the E-Discovery Amendments to the Federal Rules of Civil Procedure (2006); and Michele C.S. Lange, Electronic Evidence and Discovery: What Every Lawyer Should Know (2004). Rule 1.1 relates to competence and requires that “[a] lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”