

# The Public Servant

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## The Chair's Comments



**On behalf of the Government & Public Sector Section Council,** I would like to extend our welcome as we embark on a new year certain to be full of challenges and opportunities for those who serve government and the public sector.

Simpson

Our section has approximately 360 members, including 38 new members and a robust student member representation. Our mission is to promote the role of government and public sector attorneys by fostering relationships, promoting public comment and debate, providing continuing education, reinforcing ethical behavior and by encouraging attorneys to enter the practice of law in the public sector. Our activities are geared toward promoting that mission and supporting our members in ways they find meaningful and valuable. If you have not already joined or renewed your membership, we encourage you to do so. If you are a member, we encourage you to invite someone with an interest in governmental/public sector issues to join us. Please contact me or any member of our council with ideas you may have to expand or enhance section resources or expand involvement. Several activities of our section are highlighted below.

## Private Lawyer Advising City Has Same Immunity from Suit as Public Employees

**By Jeff Gray**

**In the January 2012 edition of *The Public Servant*,** I reported on a case pending in the U.S. Supreme Court of major significance to private attorneys who represent local governments on a contract basis. The Public Servant, Government & Public Sector Section (Vol. 10, No.1, Jan. 2012). The court has ruled in an opinion siding on behalf of a private lawyer who advised a California town, saying he is entitled to the same qualified immunity as a public employee.

Chief Justice John G. Roberts Jr. authored the unanimous opinion **Filarsky v. Delia**, 10-1018. Roberts wrote that the common law rule did not draw a distinction between immunity for public servants and private individuals engaged in public service, and that rule should be carried forward in suits claiming constitutional violations under Section 1983 of the Civil Rights Act, he said.

The case involves an immunity claim by lawyer Steve Filarsky, who had been retained by the City of Rialto, California, to work on internal investigations of employees. Firefighter Nicholas Delia had sued Filarsky for an alleged Fourth

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## *The Public Servant*

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## The Chair's Comments

*Continued from the front page*

Based on the substantial efforts of past councils and our Pro Bono Committee and after opportunities for full section input, our council adopted a Resolution for *pro bono publico* services and submitted it to the North Carolina Bar Association (NCBA) Board of Governors for adoption. The Resolution, similar to a resolution adopted by the ABA in 2006, encourages government and public sector attorneys to provide pro bono legal services consistent with North Carolina Rule of Professional Conduct 6.1. It also encourages government and public sector employers to develop guidelines that address the employers' legitimate concerns and thus permit their staff attorneys to provide pro bono legal services while protecting their clients' interests. I am happy to report that the Board of Governors approved the Resolution at its fall meeting in Edenton. Our section looks forward to working with the NCBA in carrying out the Resolution's goals. A copy of the Resolution is available at [http://www.ncbar.org/media/28746229/govProBonoResolution\\_09-11-2012.pdf](http://www.ncbar.org/media/28746229/govProBonoResolution_09-11-2012.pdf).

Our council holds at least one meeting each year at law schools throughout the state. This provides an opportunity to meet in different locations and to meet law students and encourage their consideration of public sector law. This year our council law school meeting will be held at Wake Forest University School of Law on Nov. 13, 2012 followed by our first "Speed Networking" event with Wake Forest law students. Our annual section meeting will be held in connection with our CLE Program on May 16, 2012. Please mark your calendars now for that event.

Our newsletter, The Public Servant, is one of our most popular and relied upon resources. This year, in addition to this November edition, we plan three more issues. Please let me or our Editor Nicolette Fulton, know if you are interested in writing an article or have a topic you think would be of particular interest to members. Nicolette may be reached at [Nicolette.Fulton@raleighnc.gov](mailto:Nicolette.Fulton@raleighnc.gov).

Our annual CLE program is planned in connection with our annual meeting for May 16, 2013. If you have a topic in mind or would like to be a speaker, please let our CLE Chair Aimee Scotton, know at [ACScotton@co.randolph.nc.us](mailto:ACScotton@co.randolph.nc.us).

I look forward to working for you this year and thank you for permitting me to serve as chair of this large and vibrant section. We invite and encourage you to share in the work and success of our section. ●

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# Immunity

*Continued from front page*

Amendment violation in a probe to determine whether Delia was abusing sick leave. A private investigator had observed Delia purchasing building supplies while on leave, but the firefighter claimed he had not used them. (As an interesting side-note, Filarsky ordered him to produce the unused materials for inspection, and the firefighter complied by placing them on his lawn.)

Filarsky claimed qualified immunity, but the San Francisco-based 9th U.S. Circuit Court of Appeals ruled against him. The Supreme Court disagreed with the 9th Circuit, saying Filarsky was entitled to the same immunity as Rialto employees.

“Because government employees will often be protected from suit by some form of immunity, those working alongside them could be left holding the bag—facing full liability for actions taken in conjunction with government employees who enjoy immunity

for the same activity,” Roberts wrote.

Roberts said public policy supported such immunity. He cited a need to perform government responsibilities “free from the distractions that can accompany even routine lawsuits” and the danger of discouraging talented people from accepting government work.

The ABA had filed an amicus brief in the case supporting qualified immunity, and many, many attorney groups around the nation, including this section, were watching the court awaiting a positive decision as has been rendered. ●

*Jeff Gray* is Of Counsel with Bailey & Dixon, LLP in Raleigh and practices administrative and regulatory law and government affairs.



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# Citizen Lawyer 2012 | Judge Frank Whitney

*By Adam Hocutt*



**Whitney**

After 16 years of service in the U.S. attorney's office, in 2006 President George W. Bush nominated Frank Whitney to the federal bench as an Article III Federal Judge for the United States District Court for the Western District of North Carolina. Ever since his first day on the bench, Judge Whitney has been revered for his hard work and dedication to our judicial system. His professionalism in the courtroom, however, is only one of the many reasons he exemplifies

what it means to be a "Citizen Lawyer."

In addition to Judge Whitney's service as a United States District Judge, he also serves as an Army Reserve Military Judge. According to the Regimental Historian and Archivist for the U.S. Army JAG Corps, Judge Whitney is the first Article III Federal Judge to also serve as an Article I Military Judge. Honoring his military commitment to our county, Judge Whitney was deployed to southwest Asia (specifically Kuwait, Iraq, and Afghanistan) from June 4 to Dec. 10, 2011. During his deployment, Judge Whitney presided over 25 courts martial in a combat theater. Even as support and resources to the area dwindled down, Judge Whitney continued to press ahead, conduct-

ing the last court martial in Iraq on Nov. 23, 2011.

Just as impressive as Judge Whitney's service overseas is his service at home. He is well known in Mecklenburg County and throughout the state for his commitment to community. Judge Whitney has spent considerable amounts of time volunteering on numerous nonprofit, political, and governmental boards. His activities include the Charlotte-Mecklenburg Historic Landmarks Commission, the Festival in the Park Board of Directors, the Historic Charlotte Board of Directors, and the Legal Services of Southern Piedmont Board of Directors. In addition, he is the former Chairman of the Mecklenburg County Republican Party.

Judge Whitney's service both at home and abroad demonstrates his eagerness to go above and beyond the call of duty. Although his personal sacrifices have been great, he cherishes the opportunity to make a difference at every available opportunity. Like a true "Citizen Lawyer," Judge Whitney views service to his fellow man as a cherished responsibility that he is honored to fulfill. ●

*Adam Hocutt* is an attorney at Dozier, Miller, Pollard & Murphy, LLP in Charlotte.

# Citizen Lawyer 2012 | Dumont Clarke

*By Locke Beatty*



**Clarke**

*"Family has more of an influence on you than I think you realize."*

Considering the amount of time Dumont Clarke has invested in improving the Mecklenburg County community for others, through his work on the County Board of Commissioners and in other roles, it is unsurprising that he is quick to deflect credit for his decision to take

on these challenges to others as well.

Clarke, who grew up on a dairy farm near Asheville, traces his family's commitment to public service back to his grandfathers, who both dedicated significant time to causes geared toward improving the lives of the farmers and rural churches in the area.

Education is a focus of Clarke's work with the County Board, and he attributes this passion to his father, who served as the chairman of the school board for their home county. Clarke's father eventually expanded the geographic reach of his public service when he was elected to the U.S. Congress – topping out his freshman class of congressmen at 67 years old. In addition to serving on the Board of Commissioners, Clarke also has served as board chairman of the Council for Children (now known as the Council of Children's Rights). For

both the Council and the County Board, Clarke can remember a distinct moment when the prospect of becoming involved went from a passing notion to a resolute internal commitment. In each instance, it occurred during a conversation with a trusted friend. Reflecting on these two conversations, Clarke is reminded of one of his father's sayings: "You just never know when an opportunity will come into your life." Clarke interprets this phrase to mean that while you don't get to choose the time when a chance to make an impact will present itself, you do choose whether or not you will seize it.

Reviewing Clarke's record of service, one is left to wonder whether he has ever elected to pass on one of these opportunities: six terms on the County Board, former chair of the Council for Children, board member of The North Carolina Arboretum, and a driving force behind Fit City Challenge, an initiative with the Mecklenburg County Department of Health.

Just as Clarke has inherited a commitment to public service from those who came before him, he has also passed it down to his two daughters, one a high school history teacher and the other an intelligence officer with the U.S. Navy. ●

*Locke Beatty* is an attorney at McGuireWoods in Charlotte.

# In “Bona Fide Farm Purpose, Agrotourism, or Locally Grown”: You May Not Know How to Define It, But You Will Know It When You See It

*By Terry M. Taylor*

During the 2011 Session of the General Assembly, legislation was passed allowing “Bona Fide Farm Operators” located within the extraterritorial jurisdiction (ETJ) to be exempt from zoning regulation by city governments.<sup>1</sup> County governments were already unable to zone Bona Fide Farm Operators, pursuant to N.C.G.S. Section 153A-340(b). In 2006, Session Law 2006-529 amended the definition of “Bona Fide Purpose,” as set forth in N.C.G.S. Section 153-340(b)(2), to include all forms of agriculture recognized in North Carolina, including agritourism. N.C.G.S. Section 106-581.1.

The big question now swirling around city halls and county government buildings across North Carolina is “What non-agricultural activity now qualifies as ‘Agritourism’ and is therefore exempt from zoning regulation?” The answer is certainly not clear and is being debated in many circles. Looking carefully at N.C.G.S. Section 99E-30(1), it states that anything that is “carried out on a farm or ranch” and “allows members of the general public...to review or enjoy rural activities” constitutes agritourism. It is interesting to note that this Statute generally describes the types of activities that define agritourism as including “farming, ranching, historic, cultural, harvest-your-own activities or natural activities and attractions.” If one were to read this definition as strictly construing the activities, then the list limits the qualification of activities to those that fit within the categories above listed. However, what is really meant or would qualify under the above activities has no boundaries at this time. Cultural activities could include anything from pig pickings to paint ball and “natural activities” is a similarly vague category. “Agritourism in North Carolina” Land Use Law Quarterly, Zoning Planning & Land Use Section (Vol. 7, No.3, April 2012).

In 2006 and 2009, the North Carolina Department of Agriculture and Consumer Services issued opinion letters to provide some guidance on the matter of a definition of agritourism, finding that hunting clubs, shooting ranges, and similar activities may constitute agritourism if on a farm because such activities are traditional rural activities.<sup>2</sup> In 2011, this definition of agritourism became important to Harnett County when the Harnett County Zoning Administrator found that a shooting range being operated on Drake Landing Hunting Preserve was agritourism, and therefore exempt from county land use regulations. This matter is now under appeal. The Department of Agriculture has since issued another letter stating that the determination where a particular activity is agritourism “must be based on a number of factors” and is best left to the counties for such a

determination.<sup>3</sup>

As counties and cities are becoming more cash strapped and looking at other options for revenue, this issue may have even more critical outcomes. A recent article by Chris McLaughlin of the School of Government has also created quite a stir. In the article, McLaughlin states that “the estimated property tax revenue North Carolina’s one hundred Counties defer each year under the state’s present-use value (PUV) property tax exclusion program for farms and other favored properties is now reaching over \$200 million.” “Property Tax Breaks for Farms in N.C.: A Development Tool in Need of Reform?” *Community and Economic Development in North Carolina and Beyond* (UNC School of Government, May 8, 2012). As is so eloquently described in the Article by using the word “defer”, this really means “lose” because most deferred PUV taxes are never collected. In some counties this PUV tax revenue can equal a 10 percent reduction in total county revenue from all real property, and this is no small matter. North Carolina municipalities also lose revenue on PUV property. If the PUV property tax exclusion program is limited or adjusted in any way, the true definition of a Bona Fide Farm Purpose may become more important, and not just for land use decision purposes.

Recently, a new safe harbor provision has been added to N.C.G.S. Section 153A-340(b)(2) in which property owners can qualify for a Bona Fide Farm Purposes exemption from land use regulations by submitting a farm sales tax certificate issued by the North Carolina Department of Revenue, a copy of the Schedule F from the farm owner or operators most recent federal income tax return, a Farm Identification Number issued by the US Department of Agriculture, or a copy of the property tax listing showing the property is eligible for Participation in the PUV Program pursuant to N.C.G.S. Section 105-277.3. If a tightening of the PUV statutory definitions is made, then the same, similar or additional information will be required to qualify for PUV tax Bona Fide Farm Purposes exemption as well.

The debate about the definitions of Bona Fide Farm Purpose and agritourism become more important as agritourism is promoted as an economic development strategy, and farms become direct marketers to farmers markets, restaurants and straight to the consumer sales. Straight to the consumer sales are increasing at a rapid rate. These include companies such as Lettuce Carry, a new online grocery store based in Pineville, which offers next day door step delivery with

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# Bona Fide Farm Purpose

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no extra charge for minimum orders. Mobile farmers market sales are also increasing where orders from local farmers are placed online and the consumer may pick-up their order weekly on the way home or at out-station locations.

County Extension Directors, as a part of the North Carolina Agriculture, are beginning to promote and serve as coaches for the bringing new farmers to the table perspective and initiating new small farm approaches. One example is Foothills Fresh, as a marketing campaign for locally produced fruits, vegetables, meats, agritourism and other farm products in an eight-county region in the southwest Piedmont of North Carolina (Alexander, Burke, Caldwell, Catawba, Cleveland, Gaston, Iredell and Lincoln Counties). The program is administered by Cooperative Extension and is aimed at helping local agricultural enthusiasts grow and market fresh food to local residents. Movements such as Piedmont Grown in Orange County and Know Your Farms in Mecklenburg County are grassroots organizations also promoting these kinds of efforts.

As consumers become savvier about ordering fresh and local food products, questions about Bona Fide Farm Purposes and agritourism are likely to continue to come to the forefront. This raises another question, what is “local”? The North Carolina Sustainable Local Food Advisory Council considers any food grown inside the State to be “local”. That could mean a Murphy seafood lover’s “local” fish could be trucked 547 miles from Wanchese, and an apple somebody munches in Kitty Hawk might have come from Robbinsville, 543 miles away. But “buying local food makes more sense,” says Brenda Larson, North Carolina Cooperative Extension’s horticulture specialist in Lee

County. According to Larson, “you know where your food’s coming from. It’s healthier, of better quality, preserves farmland and supports local community and farmers.” Today’s burgeoning local-food industry is rooted in a collaborative effort to build more locally based, self-reliant food economies. See, “Cash Crop: Local Food Movement/Sowing the Seeds of Change” Business North Carolina (May 2012).

The issues currently under debate underscore that “the devil is in the details”, or should we say “definitions.” In the months to come, these definitions will be under review by various stakeholders including governmental policy makers, governmental staff and citizens engaged in promoting local farming and healthy eating efforts. •

## **End Notes**

1. S.L. 2011-34 and S.L. 2011-363.
2. Letter from David S. McLeod, Assistant Commissioner of the North Carolina Department of Agriculture and Consumer Services, to Sarilyn H. Leary, Harnett County Legal Services Department. (Nov. 20, 2009)
3. Letter from Steven W. Troxler, Commissioner of North Carolina Department of Agriculture and Consumer Services, to Mr. and Mrs. Dan Andrews. (Oct. 17, 2006)
4. Letter from David S. McLeod, Assistant Commissioner of the North Carolina Department of Agriculture and Consumer Services, to Jennifer J. Slusser, Esq., Harnett County Legal Services Department. (Feb. 1, 2012)

**Terry M. Taylor** is a partner in the law firm of Young, Morphis, Bach & Taylor, LLP in Hickory, North Carolina. Ms. Taylor is a graduate of Wake Forest University School of Law and is a Certified Specialist by the North Carolina State Bar Board of Legal Specialization in Real Property Law-Residential, Business, Commercial and Industrial Transactions.

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# A Peek at the Desk (and Computer) of an Appellate Practice Specialist

*By Beth Brooks Scherer*

Let's face it. Appellate work can be tedious at times. Are my margins correct? What's the correct font size for footnotes? How do I format and use the appellate appendix required by N.C. R. App. P. 28(d)? Do I have all the required elements in my brief? Am I getting so bogged down in these technical details that I am not adequately focusing on the substance of my appellate brief?

However, details do matter to our appellate courts. They matter so much that from the mid-2000s to 2008, the North Carolina Court of Appeals would often dismiss an appeal for relatively minor infractions of the Rules of Appellate Procedure. While the Supreme Court in 2008 placed restrictions on when an appeal could be dismissed for non-jurisdictional rules violations, **Dogwood v. White Oak**, 362 N.C. 191, 657 S.E.2d 361 (2008), an arsenal of other sanctions remains ready to fire.

Moreover, few people seek to knowingly submit a substandard record or brief to an appellate court. An appellate brief may be the only chance an advocate gets to persuade the court of the merits of a client's claim. In addition, an attorney's effectiveness as an appellate advocate is often influenced by how organized and persuasive his or her brief and oral argument are—tasks which can be made more difficult when the record on appeal has been hastily thrown together without any thought as to how that record will be used in the appellate process.

The good news is that there is no need to painstakingly comb through the Appellate Rules and Appendix to figure out all the details every time an appeal comes your way. At the fingertips of many seasoned appellate experts are several (and often free) resources that can help you avoid common pitfalls of appellate advocacy. Those resources include three new appellate advocacy publications released in the past year.

## **Appellate Rules Style Manual.**

A free publication created by the North Carolina Bar Association's Appellate Rules Committee. If you have no idea what this resource is, you should download it ASAP. The manual is hands-down, the best "practical" resource for formatting your submissions to North Carolina's appellate courts. In addition to examples of common appellate documents, the manual also contains useful tips about how the Rules of Appellate Procedure are applied in practice and how to keep the appellate judges deciding your appeal happy. This manual is improved and updated annually (usually during the summer), so be sure you have the latest version, which can be located at the N.C. Bar Association Appellate Rules Committee's webpage ([www.ncbar.org](http://www.ncbar.org)) or on the "Rules and Practice Guides" page of the North Carolina Appellate Practice Blog ([www.ncapb.com](http://www.ncapb.com)).

## **Oral Argument Guides for Counsel for Cases Argued in the North Carolina Court of Appeals and the Supreme Court of North Carolina.**

Brand new 2012 resources released by the Appellate Rules Committee, these guides are designed to help counsel prepare for oral argument and to answer questions about tradition and protocol before North Carolina's appellate courts. (For example, "At which counsel table do I sit when I am orally arguing a case?"). In creating content for the guides, the Appellate Rules Committee sought guidance from North Carolina's appellate judges and justices regarding the most common mistakes that practitioners make during oral argument.

## **Oral Argument Comparison Chart.**

Also newly released by the Appellate Rules Committee, this chart highlights the similarities and differences between oral arguments before the North Carolina Court of Appeals, the Supreme Court of North Carolina, and the United States Court of Appeals for the Fourth Circuit.

## **North Carolina Court of Appeals Legal Standards Database.**

Prepared and adopted by the Court of Appeals for the first time in June 2012, this 65-page PDF document "is intended to provide illustrations of the wide variety of standards of review, legal tests, and general statements of law employed at the N.C. Court of Appeals." The Legal Standards Database is well-organized and collects quotes from the leading North Carolina appellate decisions by topic. In the document, you can find information about the appellate process, civil and criminal pre-trial and trial issues, and substantive areas of law such as family law and zoning law. Moreover, while standards of review can and do change (and therefore, attorneys should always conduct their own independent research), the Legal Standards Database will often provide a great starting point for assessing the likelihood of success on an appeal based on the standard of review.

## **North Carolina Appellate Rules and Procedures Checklist.**

A resource designed by the appellate practice team of Smith Moore Leatherwood to assist attorneys and their legal assistants in tracking appellate deadlines, tasks, and fees. The checklist also provides corresponding cross-references to the North Carolina Rules of Appellate Procedure and Appendices.

## **The Bluebook ([www.legalbluebook.com](http://www.legalbluebook.com)).**

Buried in an appendix to the Appellate Rules is a requirement that citations to legal authority "should be made according to the most recent edition of A Uniform System of Citation," otherwise known as the "Bluebook." In a recent Court of Appeals' opinion, the court

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# Appellate Practice Specialist

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noted that a brief had provided “47 footnotes of citation, not a single one [] in proper Bluebook format,” and that many of the citations did not provide pinpoint citations. The court then suggested that counsel might “benefit from obtaining a copy of the Bluebook for reference in the future.” Before you find yourself at the other end of a statement like this, invest in a copy of the “Bluebook.” The Bluebook can be obtained in either a bound or online format.

## **North Carolina Appellate Practice Blog ([www.ncapb.com](http://www.ncapb.com)).**

This blog, which is dedicated to issues of North Carolina appellate practice and procedure, has a “Rules and Practice Guides” page which contains links to all of the above resources, the appellate rules, and several other practical guides. The blog also has a page dedicated to free and paid legal research websites. Finally, the blog includes regular postings highlighting new and emerging appellate pitfalls, including practical tips for avoiding or dealing with common appellate problems.

## **Campbell University School of Law’s Library.**

Sometimes your entire argument hinges on the interpretation of one appellate opinion. In those instances, you may want to explore what led to the court’s opinion and the appellate briefs and records which preceded that opinion are a good place to start. While most new appellate records and briefs can be found on the North Carolina appellate courts’ E-filing website ([www.ncappellatecourts.org](http://www.ncappellatecourts.org)), Campbell’s law library has a large collection of older briefs and records. If you give them sufficient time to pull those briefs and records, Campbell’s law librarians will allow you to review those filings, and if necessary copy them for a small fee.

## **Board Certified Appellate Practice Specialists ([www.nclawsspecialists.gov](http://www.nclawsspecialists.gov)).**

Stumped by an issue of appellate practice and procedure? No time to prepare an appeal? Feel like your case could benefit from consultation with someone who regularly practices before North Carolina’s appellate courts? Uninterested in delving into the resources referenced here? Well, you are in luck. In 2011, the North Carolina State Bar certified its first class of appellate practice specialists. Certification by the State Bar is designed to help consumers and trial counsel identify appellate practice attorneys who have experience and skill in practicing before our appellate courts. Many appellate practice specialists are willing to work with trial counsel and to help them navigate the appellate rules.

On a final note, do not forget that appeals are governed by the North Carolina Rules of Appellate Procedure and its appendices. While these resources mentioned above will often help you find and navigate the appropriate Appellate Rules, sometimes there is no substitute for pulling the rules and appendices out, and reviewing them yourself. ●

**Beth Brooks Scherer** is an attorney with Smith Moore Leatherwood LLP in Raleigh who exclusively focuses on appellate practice. In 2011, she was certified by the North Carolina State Bar as an Appellate Practice specialist. She currently serves as chair of the North Carolina Bar Association Appellate Rules Committee, is Vice Chair of the North Carolina State Bar Appellate Practice Specialization Committee, and is a regular contributor to the North Carolina Appellate Practice Blog.

*Ms. Scherer wishes to thank her colleague, Matt Leerberg, for his continual assistance in locating new appellate resources and for his frequent updates to the North Carolina Appellate Practice Blog’s resources page.*

“One’s mind, once stretched by a new idea, never regains its original dimensions.”

*Oliver Wendell Holmes*

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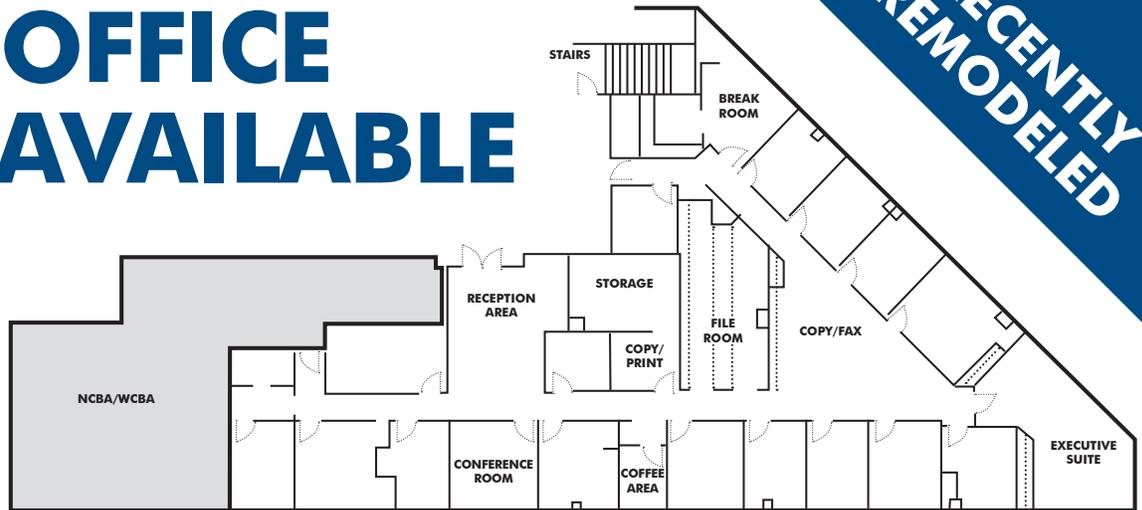
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*Thank you for joining us!*

Is there something you would like to see in the next issue? Let us know! .....



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