

# LAMEY LAW FIRM

ATTORNEYS AND COUNSELORS AT LAW

*JOHN D. LAMEY III*

OF COUNSEL: *BEAU D. MCGRAW*

600 INWOOD AVE. N., STE. 200  
SUITE 200  
OAKDALE, MINNESOTA 55128

TELEPHONE: 651.209.3550  
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October 5, 2004

United States Bankruptcy Court  
District of Minnesota  
300 South 4<sup>th</sup> Street  
Minneapolis, MN 55402

**RE: Expedited Motion  
In re Dwight Smith  
Case No. 04-35269 DDO**

Dear Clerk:

Enclosed for filing are the necessary motion papers for the expedited motion to be heard on October 6, 2004 at 11:00 a.m. in St. Paul.

Very truly yours,

*/e/ John D. Lamey III*

John D. Lamey III, Esq.

Cc: Dwight Smith

**UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MINNESOTA**

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Case No. **04-35269 DDO**

In re:

Dwight Andrew Smith  
Debtor.

**NOTICE OF EXPEDITED MOTION AND  
VERIFIED MOTION**

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Debtor in the above captioned action respectfully moves the Court as follows:

1. That the Court will hold a hearing on the within motion on the 6th day of October, 2004 at 11:00 a.m. or as soon thereafter as counsel may be heard in Courtroom 228B, 316 No. Robert Street, St. Paul, Minnesota.
2. Any response to this motion must be filed as soon as possible due to the fact that this is an expedited motion hearing. **UNLESS A RESPONSE OPPOSING THE MOTION IS TIMELY FILED, THE COURT MAY GRANT THE MOTION WITHOUT A HEARING.**
3. This court has jurisdiction over this motion pursuant to 28 U.S.C. § 1334, 11 U.S.C. §§ 541 and 542. This proceeding is a core proceeding.
4. That on September 9, 2004 the debtor filed a petition under Chapter 7 of Title 11 of the United States Code and the case is now pending in this court.
5. This motion arises under 11 U.S.C. §§ 362 and 366, Bankruptcy Rules 9013 and 9014, and Local Rules 9006-1 & 9013-2.
6. At the time of filing the bankruptcy, Debtor was delinquent on his energy bill with Xcel Energy to the tune of approximately \$1200.00.
7. That on September 9, 2004, counsel notified Xcel of the Debtor's Chapter 7 bankruptcy (see attached Exhibit A).

8. That on September 9, 2004, Kathy from Xcel notified counsel that they believed that debtor's fiancé was living with debtor, and thus Xcel could turn off the power due to this fact. Counsel wrote a letter to Xcel stating that debtor's fiancé does not live with debtor, and moreover, the fiancé is not obligated on the current energy bill at debtor's residence. (see attached Exhibit B).
9. That on or around September 22, 2004, Kathy called counsel and stated that she talked to Debtor's landlord and learned that Debtor's fiancé was on the lease agreement. Debtor stated that fiancé does not live with him and that she is on the lease agreement as a co-signer.
10. That on September 27, 2004, Xcel Energy turned off the Debtor's power at his residence.
11. That on October 1, 2004, counsel provided Xcel with recent bills for debtor's fiancé to show that she does not live with Debtor. Xcel responded that the address is to Ms. Saffle's parent's house so it was not conclusive evidence as to her residence.
12. That on or around September 28, 2004 and September 30, 2004, debtor contacted Xcel and offered to deposit \$500.00 by way of credit card over the phone (debtor's brother's credit card) and make \$200.00 weekly payments in order to turn his power back on. Xcel denied this offer and stated that they need the entire past due amount before turning on the power.
13. Debtor requests relief with respect to the above-captioned proceeding and request that the Court impose punitive sanctions against Xcel, including attorneys fees, costs and disbursements. Debtor contend that Xcel violated 11 USC §§ 362 & 366 by discriminating and retaliating against debtor pursuant to §362, and violated § 366 by turning off the power before the allowed time period of 20 days.

WHEREFORE, Debtor by his undersigned attorney, moves the Court for an Order granting the following relief:

- A. Finding that Xcel has violated 11 U.S.C. § 362 & 366;
- B. Finding that the violation of 11 U.S.C. § 362 & 366 caused financial injury and inconvenience to the Debtor;
- C. Finding that the conduct of Xcel was willful, purposeful and deliberate;
- D. Mandating that Xcel immediately restore power to Debtor's residence;
- E. Mandating that Xcel compensate the Debtors the sum of \$900.00 representing the attorneys fees incurred to bring said Motion and entering Judgment in favor of the Debtor and as against Xcel for said amount;
- F. Imposing sanctions as against Xcel in favor of the Debtors in an amount three (3) times

the amount of the Debtors' attorneys fees herein or \$2700.00 and granting Judgment against Xcel for said amount;

- G. Awarding judgment in favor of the Debtors and as against Xcel Energy in the aggregate amount of \$3600.00;
- H. Imposing sanctions against Xcel of \$500.00 per day for each day that Xcel Energy is not in compliance with this Order;
- I. Mandating that Xcel Energy pay all sanction amounts to the Debtors attorney not later than fourteen (14) days following the entry of the Court's Order;
- J. For such other and further relief as the Court deems just and equitable.

**LAMEY LAW FIRM, P.A.**

*/e/ John D. Lamey III*

**Dated:** October 5, 2004

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John D. Lamey III, I.D. #0312009  
Attorney for Plaintiff  
600 Inwood Avenue North, Suite 200  
Oakdale, MN 55128  
Telephone: 651.209.3200  
Fax: 651.209.0550

[This space left intentionally blank, verification to follow]



UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MINNESOTA

Case No. 04-35269 DDO

In re:

Dwight Andrew Smith  
Debtor.

AFFIDAVIT OF JOHN D. LAMEY III,  
ESQ.

STATE OF MINNESOTA        )  
  )ss.  
COUNTY OF WASHINGTON    )

John D. Lamey III, being first duly sworn on the oath states:

1. That your Affiant is an attorney in good standing and duly licensed to practice law in the State of Minnesota and the Federal Court, District of Minnesota That your Affiant was retained by Mr. Smith to represent him in the above-captioned matter.
2. In order to notify Xcel Energy, I sent a faxed letter to Kathy at Xcel notifying her of said motion. Jim Altman, attorney, later contacted my office and requested that the Motion be faxed to his attention. On information and belief, Mr. Altman received said motion by facsimile.
3. I have had several conversations with a person named Kathy who works for Xcel. The facts set forth in the Verified Motion and Memorandum of law are based on the conversations I've had with Kathy, and these facts are true and correct based upon my notes and memory of said conversations.
4. Attached as Exhibit 1, 2, & 3, are true and correct copy of a letters I faxed to Kathy at Xcel Energy.

Dated: October 5, 2004

  
John D. Lamey III, Esq.

Subscribed and sworn before me on  
this 5<sup>th</sup> day of October, 2004.

NOTARY SEAL

  
Notary Public



# **EXHIBIT 1**

# LAMEY LAW FIRM, P.A.

ATTORNEYS AND COUNSELORS AT LAW

JOHN D. LAMEY III

600 INWOOD AVE. N., STE. 200  
OAKDALE, MINNESOTA 55128

**FILE**

OF COUNSEL: BEAU D. MCGRAW

TELEPHONE: 651.209.3550  
TELECOPIER: 651.209.0550

WWW.LAMEYLAW.COM

---

September 9, 2004

VIA FACSIMILIE ONLY (612) 630-4731

Xcel Energy  
Attn: Kathy

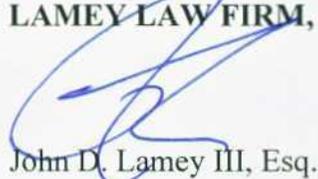
**RE: DWIGHT SMITH BANKRUPTCY FILING  
CASE NO. 04-35269**

Dear Kathy:

Please be advised that Mr. Smith has filed a bankruptcy petition today (*see attached*). Please be advised that you are not to disable Mr. Smith's power pursuant to the automatic stay.

If you have any questions, please give me a call.

Very truly yours,  
LAMEY LAW FIRM, P.A.



John D. Lamey III, Esq.

Cc: Dwight Smith

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**United States Bankruptcy Court  
District of Minnesota**



**Notice of Electronic Filing ('NEF') for Case: 04-35269**

**Notice of case open for document: Complete Chapter 7**

Document Submitted by: **John Lamey A567**  
Email Address: **jlamey@lameylaw.com**  
Date/Time: **Thu Sep 9 09:06:52 2004**  
Judge: **O'BRIEN**  
Chapter: **7 Consumer**

**Case Opening was successful:**

**Debtor Name(s): SMITH, DWIGHT ANDREW;**

**Docket entry 1-1 was made as follows:**

**Voluntary Petition all schedules and statements. Electronically filed by John D Lamey on: Thu Sep 9 09:06:52 2004**

[View image file submitted with above document](#)

**Signature Declaration 2-1 was made as follows:**

**Declaration of Original Signature Re: [1-1] Electronic Voluntary Petition .**

[View Signature Declaration Page](#)

**There were 25 creditor records added**

**Docket entry 3-1 was made as follows:**

**Creditor list supplied by debtor.**

[View image file submitted with above document](#)

[Submit Another Document for this case](#)

[End Session/Home Page](#)

[View Docket](#)

## **EXHIBIT 2**

# LAMEY LAW FIRM, P.A.

ATTORNEYS AND COUNSELORS AT LAW

JOHN D. LAMEY III

600 INWOOD AVE. N., STE. 200  
OAKDALE, MINNESOTA 55128

**FILE**

WWW.LAMEYLAW.COM

OF COUNSEL: BEAU D. MCGRAW

TELEPHONE: 651.209.3550

TELECOPIER: 651.209.0550

September 9, 2004

VIA FACSIMILIE ONLY (612) 630-4731

Xcel Energy  
Attn: Kathy

**RE: DWIGHT SMITH BANKRUPTCY FILING  
CASE NO. 04-35269**

Dear Kathy:

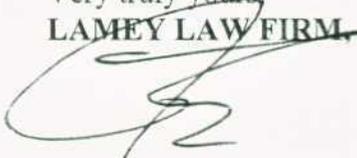
I spoke with my client and learned the following:

His fiancé, Shelly, is not living with Mr. Smith's at his apartment. Rather, Shelly has her own residence. Moreover, my client called Xcel's Customer Service and confirmed that Shelly was on a prior account with Mr. Smith. The old account (2004079503) was the "joint account". Shelly is no longer on the new account (2009217969). In the event you need verification, please call Catrice at 800-895-4999, ext 4962.

I trust this information is satisfactory to avoid you taking action against my client. As we discussed, my client is forded protection under the Federal Bankruptcy Laws from adverse action.

I trust that this matter is now resolved.

Very truly yours,  
LAMEY LAW FIRM, P.A.



John D. Lamey III, Esq.

Cc: Dwight Smith

# **EXHIBIT 3**

# LAMEY LAW FIRM, P.A.

ATTORNEYS AND COUNSELORS AT LAW

JOHN D. LAMEY III

600 INWOOD AVE. N., STE. 200  
OAKDALE, MINNESOTA 55128

OF COUNSEL: BEAU D. MCGRAW

TELEPHONE: 651.209.3550  
TELECOPIER: 651.209.0550

WWW.LAMEYLAW.COM

---

October 1, 2004

VIA FACSIMILIE ONLY (612) 630-4731

Xcel Energy  
Attn: Kathy

**RE: DWIGHT SMITH BANKRUPTCY FILING  
CASE NO. 04-35269**

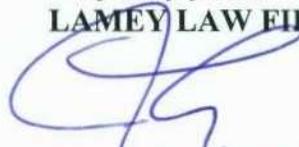
Dear Kathy:

Attached is a very recent bill for Shelly Saffle (September 9, 2004) from Health East-Woodwinds, and a recent correspondence from the IRS (September 22, 2004). As you can see, all of these bills list that Ms. Saffle's current address is: 18320 Euclid Court, Farmington, MN 55042.

I hope that this evidence is sufficient proof to show that Ms. Saffle resides in a different residence. I trust that you will now turn on Mr. Smith's power.

Please give me a call if you would like to discuss this matter.

Very truly yours,  
LAMEY LAW FIRM, P.A.



John D. Lamey III, Esq.

Cc: Dwight Smith

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FROM : Jackie Hicks

PHONE NO. : 651 739 6148

Oct. 02 2004 02:47AM P2

Woodwinds

NW 8947  
P.O. BOX 1450  
MINNEAPOLIS, MN 55485-8947

ADDRESS SERVICE REQUESTED

IF PAYING BY CREDIT CARD, FILL OUT BELOW.  
CHECK CARD USING FOR PAYMENT

MASTERCARD  VISA  VISA

CARD NUMBER \_\_\_\_\_ VIN # \_\_\_\_\_ AMOUNT \_\_\_\_\_

SIGNATURE \_\_\_\_\_ EXP. DATE \_\_\_\_\_

STATEMENT DATE **09/09/04** PAY THIS AMOUNT **247.91** [REDACTED]

SHOW AMOUNT PAID HERE \$ \_\_\_\_\_

ADDRESSEE

REMIT TO:

242  
SHELLY M SAFFLE  
19320 EUCLID CT  
FARMINGTON MN 55042

HEALTHEAST CARE SYSTEM  
NW 8947  
P.O. BOX 1450  
MINNEAPOLIS MN 55485-8947



If any direct deposit or above address is incorrect or insurance information has changed, and indicate change(s) on reverse side.

**STATEMENT**

PLEASE DETACH AND RETURN TOP PORTION WITH YOUR PAYMENT

ACCOUNT NUMBER		PATIENT	ADMISSION	DISCHARGE	STATEMENT
			07/04/04		09/09/04
DATE	REF NO.	DESCRIPTION	AMOUNT		

For insurance use only: HealthEast Federal Tax ID

- St. John's Hospital 41-1456897
- St. Joseph's Hospital 41-0693880
- Bethesda Rehabilitation Hospital 36-3517697
- Woodwinds Health Campus 41-1582761
- HealthEast Medical Laboratory 41-1521906
- HealthEast Surgery Center Maplewood 41-1414304

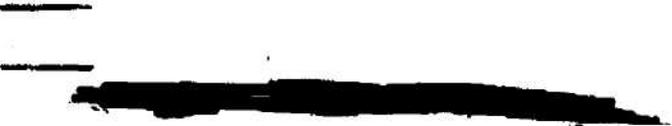
IF YOUR INSURANCE CARRIER DOES NOT REMIT PAYMENT WITHIN 30 DAYS FROM BILLING, THE BALANCE WILL BE DUE FROM YOU.

Please call **CUSTOMER BILLING SERVICE AT 651-232-1100** if questions about your Statement of Account

PAYMENT INFORMATION	
PREVIOUS BALANCE ▶	247.91
NEW CHARGES ▶	0.00
LESS PAYMENTS CREDITS ▶	0.00
ACCOUNT BALANCE ▶	247.91
ESTIMATED AMOUNT DUE FROM INSURANCE ▶	0.00
<b>PAY THIS AMOUNT ▶</b>	<b>247.91</b>



**IRS** Department of the Treasury  
Internal Revenue Service  
KCS  
KANSAS CITY MO 64999-0029



SHELLY M SAFFLE  
19320 EUCLID CT  
FARMINGTON MN 55042-5832578

The IRS address must appear in the window.  
8670655860

30BC9-VI

Letter Number: LTR2273C  
Letter Date : 2004-09-22  
Tax Period : 200112



86778649788

INTERNAL REVENUE SERVICE  
KCS  
KANSAS CITY MO 64999-0029  
[Barcode]

SHELLY M SAFFLE  
19320 EUCLID CT  
FARMINGTON MN 55042-5832578

477769770 CB

30 0 200312 000 000000000000

Department of the Treasury  
Internal Revenue Service

KCSC

KANSAS CITY MO 64999-0029

In reply refer to: 0670655860

Sep. 22, 2004 LTR 2273C

200112 30 000

Input Op: 0670655860 08072

BODC: WI

[REDACTED]

SHELLY M SAFFLE  
49320 EUCLID CT  
FARMINGTON MIN 55042-5832578

Social Security Number: [REDACTED]  
Form(s): 1040  
Tax Period(s): Dec. 31, 2001 Dec. 31, 2002 Dec. 31, 2003

Dear Taxpayer:

This is in response to our telephone conversation on Sep. 14, 2004.

Based on your payment proposal, we have established an installment plan for you for the tax periods shown above. Your payment is \$200.00, due on the 28th of each month, beginning on Oct. 28, 2004.

We'll apply any refunds we owe you to this liability until you pay the total amount you owe.

We charge a \$43.00 user fee to cover the cost of providing installment agreements. The fee will be deducted from your first payment. YOUR FIRST PAYMENT MUST BE AT LEAST \$43.00 TO COVER THE FEE, EVEN THOUGH YOUR REMAINING PAYMENTS MAY BE FOR LESS. Please write User Fee on the first payment so that the payment will be properly credited.

The total amount you owe includes interest and penalty for not paying your total tax when it was due. We'll continue to charge interest and penalty until you pay the total amount you owe. We'll apply your monthly payments first to the oldest tax, then penalty, and then to interest.

We've provided a general explanation of the possible penalties and/or interest included in the current balance due on your account. If you would like a specific explanation of how the amounts were computed on your account, please contact us at the toll-free number shown in this letter and we will send you a detailed computation.

\*\* Paying Late -- IRC Section 6651(d) \*\*

Initially, the penalty is 1/2% of the unpaid tax for each month

**UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MINNESOTA**

---

Case No. **04-35269 DDO**

In re:

Dwight Andrew Smith

**MEMORANDUM OF FACTS AND LAW**

Debtor.

---

**FACTS**

On September 9, 2004 the debtor filed a petition under Chapter 7 of Title 11 of the United States Code and the case is now pending in this court. At the time of filing the bankruptcy, Debtor was delinquent on his energy bill with Xcel Energy to the tune of approximately \$1200.00.

On September 9, 2004, counsel notified Xcel of the Debtor's Chapter 7 bankruptcy. The same day, Kathy from Xcel notified counsel that they believed that debtor's fiancé was living with debtor, and thus Xcel could turn off the power due to this fact. Counsel wrote a letter to Xcel stating that debtor's fiancé does not live with debtor, and moreover, the fiancé is not obligated on the current energy bill at debtor's residence. On or around September 22, 2004, Kathy called counsel and stated that she talked to Debtor's landlord and learned that Debtor's fiancé was on the lease agreement. Debtor stated that fiancé does not live with him and that she is on the lease agreement as a co-signer.

On September 27, 2004, Xcel Energy turned off the Debtor's power at his residence. On or around September 28, 2004 and September 30, 2004, Debtor contacted Xcel and offered to

deposit \$500.00 over the telephone (via Debtor's brother's credit card) and make \$200.00 weekly payments in order to turn his power back on. Xcel denied this offer and stated that they need the entire past due amount before turning on the power

On October 1, 2004, counsel provided Xcel with recent bills for Debtor's fiancé to show that she does not live with Debtor. Xcel responded that the address is to Ms. Saffle's parent's house so it was not conclusive evidence of her residence. Xcel still refuses to turn on the power to Debtor's residence.

### ARGUMENT

Among other things, a chapter 7 bankruptcy filing protects a debtor from "any act to collect, assess, or recover a claim against the debtor that arose before the commencement" of the bankruptcy filing. 11 U.S.C. §362(a)(6). Additionally, 11 U.S.C. §366 states:

(a) Except as provided in subsection (b) of this section, a utility may not alter, refuse, or discontinue service to, or discriminate against, the trustee or the debtor solely on the basis of the commencement of a case under this title or that a debt owed by the debtor to such utility for service rendered before the order for relief was not paid when due.

(b) Such utility may alter, refuse, or discontinue service if neither the trustee nor the debtor, within 20 days after the date of the order for relief, furnishes adequate assurance of payment, in the form of a deposit or other security, for service after such date. On request of a party in interest and after notice and a hearing, the court may order reasonable modification of the amount of the deposit or other security necessary to provide adequate assurance of payment.

In this case, Xcel Energy has violated the plain language of the bankruptcy code. First, Xcel Energy's act of shutting off the Debtor's power and later trying to collect the pre-petition balance was in direct violation of §362(a)(6). Second, Xcel Energy turned off the power sooner than the 20 day period set forth in §366. Third, Xcel Energy refused to provide service after the Debtor provided adequate assurance by way of a \$500.00 deposit for towards future services.

Xcel Energy's argument is that they have a suspicion that the Debtor's fiancé is currently living at this address, thus their actions were not directed towards the Debtor, but rather towards the non-filing fiancé. The Debtor states that this is not the case and provided documentation that was disregarded by Xcel Energy. An evidentiary hearing may be necessary to prove that the fiancé does not reside with the debtor. Even assuming, for the sake of argument, that the fiancé does live with the debtor, Xcel's actions still violate the intent of §§362 & 366. First, the fiancé is a co-debtor on an account from a prior address. She is not on the current account which covers Debtor's current residence. When viewing the shut off vis-a-vis the Debtor's situation, the shut off is discriminatory against the Debtor, especially where the co-obligor is living elsewhere. Such a discriminatory effect violates the intent and scope of §§ 362 and 366.

#### **CONCLUSION**

In conclusion, the Debtor respectfully asks the Court to find that Xcel Energy violated Sections 362 and 366 of the bankruptcy code.

**LAMEY LAW FIRM, P.A.**

*/e/ John D. Lamey III*

**Dated:** October 5, 2004

---

John D. Lamey III, I.D. #0312009  
Attorney for Plaintiff  
600 Inwood Avenue North, Suite 200  
Oakdale, MN 55128  
Telephone: 651.209.3200  
Fax: 651.209.0550

**UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MINNESOTA**

---

Case No. **04-35269 DDO**

In re:

Dwight Andrew Smith

**PROPOSED ORDER**

Debtor.

---

Hearing on this matter was held before the undersigned upon the Debtor's Expedited Motion for Relief. Appearances were noted on the record.

Based upon the arguments of counsel, the memoranda and affidavits submitted and all of the records and documents available to this Court,

**THE COURT FINDS:**

1. Xcel Energy has violated 11 U.S.C. § 362 & 366.
2. Xcel Energy violated 11 U.S.C. § 362 & 366 that caused financial injury and inconvenience to the Debtor;
3. Xcel Energy's conduct was willful, purposeful and deliberate;

**ORDERED** that Xcel Energy:

1. Immediately restore power to Debtor's residence;
2. Compensate the Debtor in the amount of \$900.00 representing the attorneys fees incurred to bring said Motion and entering Judgment in favor of the Debtor and as against Xcel for said amount;
3. Pay sanctions in an amount three (3) times the amount of the Debtors' attorneys fees herein or \$2,700.00 and granting Judgment against Xcel for said amount;
4. Is sanctioned \$500.00 per day for each day that Xcel Energy is not in compliance with this Order;
5. For such other and further relief as the Court deems just and equitable.

**LET JUDGMENT BE ENTERED ACCORDINGLY.**

**BY THE COURT:**

Dated: this \_\_\_ day of \_\_\_\_\_, 2004.

---

Hon. Dennis D. O'Brien  
Chief Judge of Bankruptcy Court

**UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MINNESOTA**

---

Case No. **04-35269 DDO**

In re:

Dwight Andrew Smith

**UNSWORN AFFIDAVIT OF SERVICE**

Debtor.

---

I, John D. Lamey III, attorney with the LAMEY LAW FIRM, 600 Inwood Ave. N., Ste. 200, Oakdale, MN 55128, declare that on October 5, 2004, I served the Motion to the United States Bankruptcy Court, by electrically filing, and to each person or entity named below by facsimile (Xcel Energy) and hand delivery (Debtor) address to the following:

UNITED STATES BANKRUPTCY  
COURT (VIA ELECTRONIC FILING)

DWIGHT SMITH

XCEL ENERGY  
ATTN: JIM ALTMAN, ESQ.  
VIA FACSIMILE ONLY (612-215-4544)

And I declare, under penalty of perjury, that the foregoing is true and correct.

**Dated:** October 5, 2004

*/e/ John D. Lamey III*

\_\_\_\_\_  
John D. Lamey III, Esq.