

THE NORTH CAROLINA STATE BAR

# JOURNAL

FALL  
2016



CROWDFUNDING



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STATE BAR  
**JOURNAL**

Fall 2016  
Volume 21, Number 3

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# Challenges

BY MARGARET M. HUNT

As my term as State Bar president comes to a close, I want to briefly discuss several issues—some of long standing and some arising more recently—that have the potential to significantly reshape our profession for the future. The following are some of those issues:

1. **Public's View of the Profession**—The public has a generally unfavorable view of the legal profession with a majority believing that lawyers primarily regulate the profession for their own protection and act in their own self-interest rather than in the interest of clients and the public. Unfortunately, the public fails to understand the essential role of lawyers in the preservation of the rule of law and the administration of justice, which has been entrusted to each new generation of lawyers since the beginning of our country. We advise and represent our clients, mitigate, challenge overreach by the government and other entities, and advocate for unpopular causes. We also offer ourselves for public office, serve on government boards and commissions, on non-profit and community boards where our skills and expertise are indispensable, and regularly provide legal services *pro bono* either through organizations or individually on an ad hoc basis. Our profession has been absolutely integral to the creation and the preservation of our form of government, to the development of a free market economy, and to a free and civil society. We have a great story to tell, but we left the playing field a long time ago, and others have written our story for us to the detriment of our profession and the public's perception of us.

The rule of law will survive only as long as the public has confidence in its administration. It is evident that the public is losing confidence, and I believe this misperception of our profession is one of the most significant problems we face. This lack of good will



toward our profession makes it much more difficult to garner support from the public and legislators for the passage of legislation necessary to properly regulate our profession and to regulate nonlawyer providers of legal services in order to protect the public.

2. **Internet Providers of Legal Services**—With the passage of House Bill 436 (the LegalZoom bill), many lawyers may think that the issue of internet providers has been resolved. While House Bill 436 provides a regulatory framework for internet providers of legal documents, issues are likely to arise from other internet providers who offer more than legal documents, such as AVVO which advertises fixed fee services provided by “experienced lawyers” with “satisfaction guaranteed” in such practice areas as criminal defense, family law, estate planning, bankruptcy, and real estate. In addition, some internet providers are advancing from providing legal documents to providing automated legal advice through the use of artificial intelligence applications. When nonlawyers use artificial intelligence technology to give legal advice based on a customer's individual facts, most lawyers consider that the unauthorized practice of law. How will that be regulated in the future?

3. **The Uniform Bar Examination**—The Uniform Bar Examination (UBE) has now been adopted by over 20 states. Each state that adopts the UBE selects its own passing score, may add a state specific test component, and will continue to conduct its own character and fitness vetting. The UBE results in a portable score and portable law license that can be transferred to other UBE jurisdictions if the applicant's character and fitness is successfully vetted. The American Bar Association's House of Delegates voted to support the Uniform Bar Examination, and

the North Carolina Board of Law Examiners is now studying the issue.

4. **Alternative Business Structures**—This subject is currently under study by the American Bar Association's Commission on the Future of Legal Services. One model under study allows nonlawyers to own equity interests in a law firm. Variations of this model would allow nonlawyer owners to actively participate in the operations of the law firm, and another alternative would prohibit the nonlawyer investor from any active role in the operations of the law firm. Another variation allows a percentage of ownership by a nonlawyer, anywhere from a minority interest to an unlimited share. Legislation that would permit nonlawyer ownership interests in North Carolina law firms was introduced in the General Assembly several years ago, but failed to pass.

Washington, DC, allows nonlawyers to own equity interests in law firms, and Washington State allows their licensed legal technicians to have an equity interest in law firms in that state.

Such an arrangement, in addition to obvious conflicts issues, could interfere with a lawyer's ability to adhere to some of our core values such as undivided loyalty to clients and giving clients our best independent legal judgment and advice.

5. **Legal Technicians**—Some states are studying whether to adopt a certification process that would permit nonlawyers to perform certain specific legal services now considered to be the practice of law. Washington State has adopted such a program and it is currently limited to certain clearly defined family law matters. This issue is also being studied by the Commission on the Future of Legal Services. Both certification or licensing of legal technicians and nonlawyer internet providers of legal documents are believed by some to make basic legal services more accessible to those who

CONTINUED ON PAGE 23

# The Micawber Principle

BY L. THOMAS LUNSFORD II

In managing the State Bar's finances, I am ever mindful of the economic philosophy of Wilkins Micawber, the impecunious landlord and mentor of David Copperfield, whom you will no doubt recall from tenth grade English. One of Charles Dickens' greatest comic creations, Mr. Micawber was evidently modeled upon the author's father, an incurable optimist whose knack for fiscal ruin led inevitably to debtor's prison. Micawber's personal economy was a curious admixture of faith and rueful calculation. On the income side of his personal equation, Micawber was merely sanguine. He trusted simply and perennially that, "something will turn up." Unfortunately, he was generally unfortunate. Where expenses were concerned, however, Mr. Micawber was actually wise, but slavishly imprudent. He understood the curse of insolvency, but couldn't resist it. Perhaps you will recall his definitive pronouncement on the subject:

*Annual income 20 pounds, annual expenditure 19 (pounds), 19 (shillings), and six (pence), result happiness. Annual income 20 pounds, annual expenditure 20 pounds ought and six, result misery.*

This quotation, known widely as the embodiment of the Micawber Principle, provides a bit of cheerful context for this essay concerning how the State Bar spends and why. Faithful readers of this column will recall that the matter of revenue was discussed the last time I appeared in these pages. As was then noted, our income streams are reasonably well understood, fairly reliable, and presently adequate. Although it is always nice when something unexpected "turns up," we, unlike Mr. Micawber, aren't having to count on that to make ends meet. We are, as it happens, more heedful of his advice and experience where expenditures are concerned.

Indeed, we have embraced his prescription for happiness wholeheartedly in the State Bar's operational budget for 2016, projecting a surplus of nearly \$140,000.

My purpose herein is to describe the spending decisions that collectively ought to enable us to balance the budget this year—and to avoid prison and the necessity of starting over in Australia, like Mr. Micawber. In

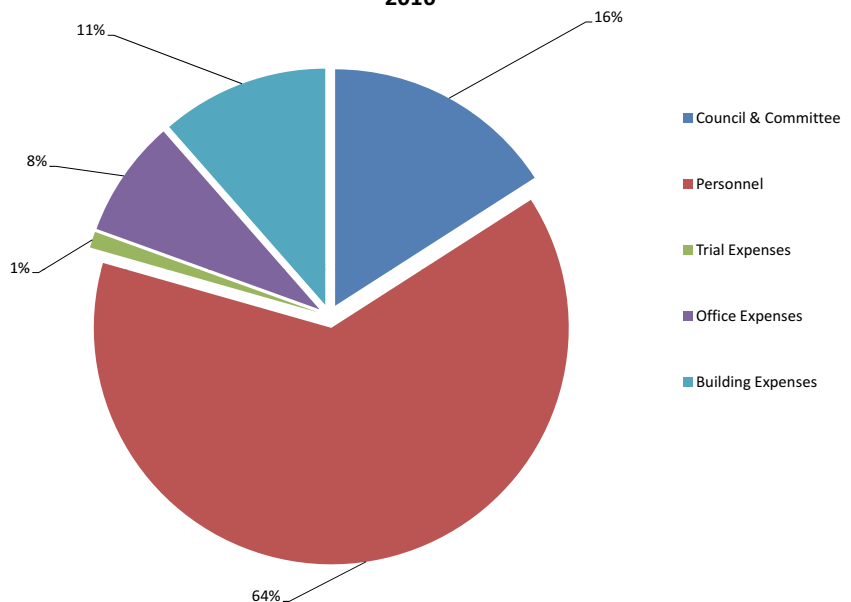
the service of these noble objectives, I am again offering for your enlightenment a couple of multi-colored pie-charts. Like most pastries of the sort, the first categorically depicts the relative amounts of spending that are required to administer the agency. For ease of understanding, a great many related accounts are being combined under broad headings like "personnel expenses," "building expenses" and "office expenses." For those of you

who are inclined to "drill down" into the figurative crust, I will also try to create vivid "word pictures" concerning our outlays for especially intriguing line items like "salaries" and "utilities." The second pie chart presents some of the same information in a somewhat different way. It displays our relative costs for particular undertakings such as the disciplinary program, the ethics program, and the Lawyer Assistance Program. Admittedly, this is a lot to take in, and reader discretion is advised.

The operational budget for 2016 contemplates expenditures totaling \$9,183,977. Of that amount, more than 63% (\$5,835,347 to be exact) has been appropriated to pay "personnel expenses." Most of that money is, not surprisingly, devoted to the payment of "salaries."<sup>1</sup> This year the amount budgeted for that line item totals \$4,447,205, a figure that incorporates an across the board increase in compensation for our dedicated employees of about 2%. Benefits, including health insurance, dental insurance, life insurance, FICA, parking, coffee, and participation in a



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defined contribution pension plan, are expected to cost the State Bar an additional \$1,258,667, more or less. It is rather difficult to predict with total confidence how much and how quickly the staff and its compensation are likely to grow over the next few years. We do know that the need for additional personnel increases as a function of membership growth, which has been rising at around 2.5% a year. If recent experience is any guide, it seems clear that more and more people are going to be required to investigate and prosecute disciplinary cases that are becoming ever more complex, numerous, and protracted. In contrast, we hope to need fewer administrative workers. As we are able to leverage digital technologies more effectively to eliminate paper transactions, we ought to be in a position to do more with the same or fewer people. The savings from foregone coffee alone should be quite hefty.

The next largest slice of administrative pie is less filling but tastes great. I am referring, of course, to the wedge encaptioned “council and committee expenses.” That category, which embraces a fairly wide variety of accounts, is expected to total \$1,459,324 in 2016, or about 16% of our budgeted expense. As you may be aware, the council is the State Bar’s governing board. It is composed of 68 members: 61 lawyers elected from the 45 judicial districts, three public members appointed by the governor, and four officers elected by the councilors. Although most business school textbooks would caution against governance by three score and eight, the council, which acts mainly through its various committees, has proven over time to be rather nimble, wise, and effective. It is also expensive to operate. The council meets quarterly for at least three days at a time, most often in Raleigh. Because its volunteer members are drawn from all over the state, there is considerable cost associated with their participation, about \$320,000 in the current year. It is believed that these expenses should remain fairly predictable and stable going forward—unless the General Assembly creates more judicial districts. Since every district is entitled by law to its own councilor, the size of our board increases automatically whenever the legislature decides to create a new prosecutorial district, and is theoretically unlimited.<sup>2</sup>

Also gathered under this heading are the costs of sending our officers and senior staff to professional meetings inside and outside of

North Carolina. Although the dollars involved are not large, it is worth noting that in recent years, the cost of intrastate travel has risen sharply, largely because our presidents have been remarkably energetic in making themselves available in-person whenever and wherever lawyers have been gathering. Since two of the last three presidents have been based in Kitty Hawk and Brevard, their faithfulness and ubiquity have been both impressive and costly. Thank goodness we reimburse only for food, lodging, and mileage.<sup>3</sup> We also support several delegates to the American Bar Association’s House of Delegates, and we annually sponsor four district bar meetings in four widely dispersed areas. All told, the cost of taking our act and our people on the road is expected to exceed \$110,000 this year.

But wait, that’s not all. Several odd accounts are lumped in with “council and committee expenses” because they don’t seem to fit anywhere else. The most significant item is the cost of supporting the Lawyer Assistance Program (LAP), \$744,376 to be precise. As everyone should know by now, the LAP through its highly trained staff and legions of dedicated volunteers, identifies lawyers who are impaired by substance abuse and mental illness and assists them in getting treatment. The LAP Board, like the State Bar’s other quasi-independent boards, is regarded as a standing committee of the council. Unlike the other boards, however, it is without its own source of revenue and is necessarily carried as an expense account in the State Bar’s budget. The size of the appropriation, which is inclusive of all costs associated with the undertaking, is indicative of the importance of the program, the risk to the public associated with impairment, and the Bar’s commitment to helping suffering lawyers. Like the size of the council and the number of miles our presidents drive in support of the Bar, the justifiable cost of running the LAP might very well be unlimited. The demand for its services is, after all, seemingly inexhaustible. Nevertheless, it appears to me that the State Bar’s financial support for the program is at an appropriate level, and is unlikely to increase dramatically in the near term.

Although the State Bar’s Office of Counsel is one of North Carolina’s best law firms, we are still finding it necessary to spend serious money on private attorneys. In 2016 we have budgeted \$200,000 for that purpose, money which is also accounted for under the rubric of “council and committee expenses.” That is

actually less than half of what we spent on outside counsel in 2015, a year in which we contended mightily with the LegalZoom corporation concerning the application of the Sherman Act. The fact that we are finding it necessary to hire private counsel is no knock on our own lawyers. They are all extremely capable and are well-led by our general counsel, Katherine Jean. It is indicative mainly of the fact that the State Bar’s primary regulatory responsibility—the enforcement of our profession’s high ethical standards—requires the time and energy of virtually all of our in-house lawyers almost all of the time. This circumstance, in combination with the reality that anti-trust law is an arcane area of practice best left to specialists, has warranted our retention of particularly qualified outside counsel.

The amount budgeted for legal services this year looks to be sufficient, based upon the fees we have incurred through the first six months. It is, however, impossible to say with confidence what our costs for such services will be going forward. Indeed, this category of expense is probably the biggest wild card in our entire financial deck. The agency has become in recent years a “target of opportunity” for a great many disputatious folks. Fulfillment of the State Bar’s regulatory mission, especially its statutory obligation to enforce the laws prohibiting unauthorized practice, seems likely to engender much future controversy and litigation. While the agency can call upon the attorney general for highly qualified assistance under certain circumstances, and may have the contractual right to the provision of defense pursuant to its insurance policies in other situations, it is to our own treasury that we must often look for the resources necessary to ensure that the State Bar—and the people of North Carolina—are well represented.

Although we can’t say for sure what it’s going to cost next year to defend the State Bar in court, we do know exactly how much it’s going to take to stave off foreclosure. Aside from salaries, our biggest fixed cost is the service of our mortgage debt. And it’s most of what we expect to spend in 2016 for “building expenses.” Appropriations for the accounts grouped under that broad heading—things like housekeeping, building maintenance, and utilities—total \$1,048,966. Of that amount, \$827,766 will be used to pay the mortgage. It’s a big chunk, to be sure, but is at least a known quantity, fixed until the loan must be renegotiated in 2021. The other categories of

“building expense” are fairly mundane, reasonably well understood, and not worth discussing. A couple of the accounts though—“LEED certification” and “building security”—do bear mentioning.

The State Bar’s still new building was designed to be energy efficient and “green.” To memorialize our good citizenship in that regard, we resolved to seek LEED<sup>4</sup> certification of the endeavor. We initially dreamed of “platinum” recognition, that being the “gold standard” of sustainability. Regrettably, some three years after the building’s completion and our receipt of the coveted “certificate of occupancy” from the City of Raleigh, our metallurgical aspirations were found to be unsustainable, and we were obliged to settle for the “silver” award, which is from what I can tell, the “bronze standard” for green or “greenish” buildings. Anyway, our budget for 2016 includes \$15,200 for LEED certification. The good news is that we have actually spent only \$6,907 of that amount. The better news is that we are now done with paying for LEED certification and can bask henceforth and forever<sup>5</sup> in the warm afterglow of our third-place finish. Maybe we didn’t win, but we did get on the podium, and no one can take that away from us.

We also expect to spend a fair amount of money this year on enhanced security for our building and the people who use it. The sum of \$12,500 has been earmarked for that purpose. Most of the funds will be used to hire armed guards for duty at public disciplinary proceedings conducted by the Disciplinary Hearing Commission. We don’t routinely make such arrangements, but seem to be needing the sobering presence of sworn peace officers more and more often lately as erratic behavior among complainants and respondents increases. In any event, we have eschewed, for the time being at least, the sort of intensive security measures that are now commonplace at courthouses throughout the state, wanting the public to feel welcome to visit our public building whenever they wish. We have chosen, instead, to heighten our security on an ad hoc basis when circumstances seem to warrant extraordinary measures. Query whether it is better to incline toward hospitality or risk aversion in our position? I’m not sure I know the answer to that question, but one thing is clear. It’s expensive, and maybe impossible, to purchase real safety in our business. And I’m not sure we can afford it.

I suspect that some of you are beginning to wonder whether this brutal exercise in fiscal transparency will ever be over. Perhaps you’ve studied the first pie chart and now realize that there are still two major categories of expense yet to be discussed. If you find this distressing, you are probably not alone. I believe it was Briscoe Darling, a philosopher of some considerable reputation on the old *Andy Griffith Show*, who having been memorably overserved by Aunt Bea declared that, “three cuts of pie is my high-water mark.” If there are those of you who can’t bear another scrap of information, now would be a good time to stop reading. After all, what can I say about “office expenses” that hasn’t already been said better by lots of other people? My advice—just put the magazine down and back away from it slowly. No one will think less of you. But, if you think you can handle it, I believe you’ll be glad if you “stay the course.”

Speaking of “office expenses,” I am bound to confess that we expect to spend \$738,340 on the items grouped under that heading this year. That’s a lot of paper clips—and postage, and software licenses, and printing, and internet service, etc. Actually, there are 18 discrete line items constituting what are collectively described as office expenses in the State Bar’s operational budget. Not wanting to discourage the few of you who have continued reading this essay against medical advice, I am choosing to discuss only a couple: “audit” and “website.”

The State Bar is a state agency subject to review by the state auditor. We are audited annually by an independent accounting firm approved by the state auditor. This year our fiscal policies required us to change auditors. We budgeted \$25,100 for the audit, but expect to pay somewhat more for the service owing mainly to the auditors’ conclusion that generally accepted accounting standards require that the financial statements of the State Bar Council be consolidated with those of its several quasi-independent boards.<sup>6</sup> Heretofore, each board was subject to its own discrete audit and had its own entirely segregated financial statements. Although I resisted the change at first, believing that readers of the consolidated statements might wrongly assume that I could now pay the State Bar’s mortgage with money belonging to the Client Security Fund, I was apparently mistaken. The consolidated statements do make sense and are useful. The same information is

still presented, but in a slightly different form with enhanced annotation. Unfortunately, the move to consolidation and the resolution of several other bean-counting issues pushed back the delivery of the audit from April to July. That being the case, the audit summary typically published in this issue of the *Journal* will appear next time. So stay tuned.

This year’s budget also includes an appropriation of \$40,000 for the renovation of our website, a place on the internet that at one time was a source of pride, but which had become prejudicial, at least as far as our image was concerned. At any rate, the old website has now been swept into the dustbin of cyberhistory in favor of a more attractive display that is well-conceived, user-friendly, and designed to accommodate portable devices as well as outmoded machines that are dependent upon wires. The project is coming in within budget and is regarded as a nonrecurrent expense, in much the same way as a 17-year locust is conceived to be a nonrecurrent insect. It’s likely to recur, but not in the next few years. I hope you’ll like it.

Which brings us inevitably to those costs that are presented together under the caption of “trial expenses.” You might think, given the State Bar’s Javert-like pursuit of those among us who are manifestly dishonorable, that we would be spending a huge amount on the prosecution of disciplinary cases. And we do, if you count the salaries of all the investigators, and the public liaisons, and the paralegals, and the administrative assistants, and the lawyers who constitute the Office of Counsel. But, if you just look at incidental expenses such as “court reporting” and “witness costs,” they don’t add up to all that much. In fact, the whole enterprise, aside from labor costs, should require only about \$100,000 this year. I would like you to think that this sort of economy is the direct result of my own legendary frugality but, in the words of Richard Nixon,<sup>7</sup> “that would be wrong.” The real reason is that we (you) benefit from an incredible amount of work that is donated by the 20 people (12 lawyers and 8 nonlawyers) who compose the Disciplinary Hearing Commission and adjudicate the many disciplinary cases that are tried each year before that administrative tribunal. Disciplinary cases, which used to take a day to try, or two at the most, are now routinely scheduled for at least two days. Quite a few take much longer and require multiple trips to Raleigh for preliminary proceedings and trial. One

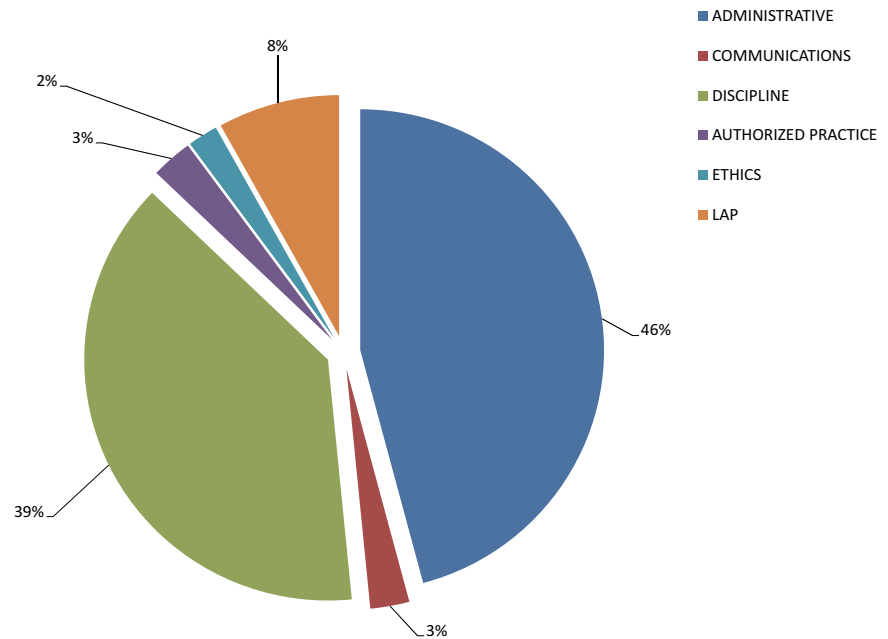


case in 2014 took fully 14 days to try. As was noted previously in regard to the random perambulations of the State Bar's president around the state each year, if we had to pay these people for the actual value of their time, we probably couldn't afford it. As it is, we pay them the insultingly small stipend of \$15 per day (plus expenses) for their service, and skate by on an annual appropriation for the DHC of \$30,000. What a deal!

The second pie chart presents the same expenditures in a slightly different way. It reflects a bit of unaudited cost accounting for the programs that are funded out of the State Bar's operational budget, after segregating costs for activities that are purely administrative, such as maintaining the building, administering the membership database, cooking the books, and managing human resources. And no attempt has been made to assign any portion of the agency's general overhead to the programs. Please note that several programs for which the State Bar is well known (specialization, paralegal certification, IOLTA, etc.) are not referenced in the diagram because they have their own independent sources of revenue and are self-sufficient. Their finances will probably be the subject of my article in the next issue of the *Journal*.

Whether you view that forecast as a promise or a threat is neither here nor there. Our immediate concern is the council's use of its own sources of revenue, principally membership dues. As should be readily apparent from the second chart, the State Bar's largest financial commitment programmatically is to the disciplinary program. Approximately 39% of the budget, around \$3,500,000, goes to support the intake, processing, investigation, consideration, and prosecution of grievances. That figure includes the activities of the Attorney/Client Assistance Program, whereby efforts are made to help citizens in regard to complaints that may not be cognizable under the Rules of Professional Conduct, but warrant our effort to provide referrals and other assistance. It also includes the State Bar's Fee Dispute Resolution Program. The size of our investment in the disciplinary program seems entirely appropriate since the enforcement of high standards of professional conduct for the protection of the public is the State Bar's highest priority. Indeed, we are fairly price inelastic where the operation of the disciplinary program is concerned. We are bound to find the money to do what is necessary to run the pro-

### THE NORTH CAROLINA STATE BAR PROGRAMMATIC EXPENSES 2016



gram effectively, even if we must compromise our support of other important activities. Fortunately, we continue to be able to afford to do what we must as well as what we should. It is hoped that will always be the case.

Mention has already been made of the size of our financial commitment to assisting lawyers impaired by substance abuse and mental illness. I believe that the stakes are sufficiently high for all concerned that we are fully justified in dedicating nearly 8% of our budget to the effort. Of course, it's difficult to quantify our success in terms of lives saved, families preserved, and feasancess (mis, mal, and non) averted. But despite the strict confidentiality surrounding the program, we know from numerous unsolicited testimonials that the work is fruitful and essential.

Three other important regulatory programs are represented on the chart by smaller slices of similar size. Our effort to suppress the unauthorized practice of law consumes about 3% of the budget. This percentage does not include the cost of litigating matters with UPL issues, although perhaps it should. It is, alas, very difficult to predict our involvement in such cases and the cost of any such participation. For those reasons, the cost of litigating UPL matters is included, along the entire appropriation for "legal services," in the vast undifferentiated half of the pie related to administration of the agency.

About 2% of the budget is required to

fund the ethics program. It goes mostly for the salaries of the lawyers who answer the ethics hotline, respond to email inquiries, and counsel the Ethics Committee. The committee is huge. It meets quarterly in conjunction with the council, and is generally recognized as the profession's last great debating society. Fortunately, as far as the budget is concerned, talk is cheap.

Finally, we must account for our rather comprehensive communications effort. About 3% of our expenditures are intended to "get the word out." In addition to the salary of our extremely talented editor and webmaster, Jennifer Duncan, we also pay the cost of printing and distributing the fine quarterly publication you are enjoying, the cost of producing the incomparable *Lawyers Handbook*, and the cost of maintaining and operating our website. It is possible that our expenses will decrease in the foreseeable future, depending on whether the council ultimately decides to convert the *Journal* to a completely digital publication. It costs about \$140,000 a year to provide every member with a hard copy. A decision to go digital would be very economical. But would it be as communicative?

Which brings us back around to Wilkins Micawber and his insight regarding the firm linkage between solvency and delight. As

CONTINUED ON PAGE 23

# Crowdfunding for Raising Capital has Arrived

THOMAS LEE HAZEN

The federal and state (“blue sky”) securities laws are based on the premise that companies offering securities to the public should provide adequate disclosure. Absent an exemption, companies offering securities to the public must comply with the registration and disclosure requirements of the Securities Act of 1933. The required disclosures necessarily impose costs on companies raising capital through public offerings.

Traditionally, exempt transactions have been premised on sales of securities not involving public offerings and made to sophisticated and/or wealthy investors. This means that start-up companies’ stock is not available to ordinary investors. Small businesses made a push to enact exemptions to make their securities available to members of the public, provided that the amount of any purchaser’s investment is limited. Congress and many states responded with a registration exemption for crowdfunding offerings.

Crowdfunding is the fundraising analog to crowdsourcing, which refers to mass collaboration efforts through large numbers of people, generally using social media or the Internet. Websites such as Kickstarter have been used to fund various projects including financing films and other forms of art, as well as for charitable solicitations. These and

similar fundraising endeavors are known as crowdfunding. The Internet thus provides a platform for using crowdfunding to reach large numbers of people. The solicitation of funds as gifts or donations is a substantially unregulated activity. Crowdfunding to raise capital for a business, however, is highly regulated.

Capital raising through crowdfunding has existed outside the United States for several years, but has not been viable in the US until now because it would have required registration under the Securities Act of 1933. However, in 2012 Congress enacted the JOBS Act<sup>1</sup> that, among other things, added a provision—Section 4(a)(6)—to the 1933 Act.<sup>2</sup> In addition, a growing number of states enacted exemptions for crowdfunding from their blue sky laws.<sup>3</sup> As this article went to press, a bill to create a North Carolina crowd-



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funding exemption was before the Senate.

Section 4(a)(6) provides an exemption for crowdfunding offerings up to \$1 million per year and is conditioned on disclosure to investors. The new exemption also requires registration of the offering platform known as a crowdfunding portal.

In addition to limiting the total amount of the offering to \$1 million in any 12-month period, the federal crowdfunding exemption limits the amount of money that a company may raise from any investor. With respect to investors having an annual income or net worth below \$100,000, a company may not sell securities to any



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investor exceeding the greater of either \$2,000 or 5% of the investor's annual income or net worth within a 12-month period. For investors over the \$100,000 annual income or net worth threshold, the 12-month investment is capped at 10% of the investor's annual income or net worth, but may not exceed \$100,000 over the 12-month period.

The federal crowdfunding exemption is conditioned on providing investors with certain disclosures that must also be filed with the SEC. The required disclosures include the offering's purpose, the targeted amount to be raised, the deadline for reaching such amount, and the offering price. Significantly, risks to investors also must be disclosed as well as any additional information as the SEC may prescribe. The crowdfunding exemption expressly requires information about the company, its officers, directors, and major shareholders in addition to a description of the company's business, business plan, capital structure, and financial condition. Audited financial statements are required for offerings over \$500,000 and for any other thresholds that may be imposed by SEC rulemaking. The only advertising per-

mitted is advertising that directs interested investors to the funding portal or broker handling the offering. The company may not compensate promoters of the offering unless the compensation is disclosed. The exemption also imposes reporting obligations beyond the offering. For companies not subject to the Securities Exchange Act's periodic reporting requirements, crowdfunding companies must file annual reports and provide investors with reports detailing results of operations and financial statements annually. The JOBS Act further directs the SEC to exempt—conditionally or unconditionally—companies relying on the crowdfunding exemption from the 1934 Act's registration and periodic reporting obligations.

The intermediary for a crowdfunding offering must be registered with the SEC either as a broker-dealer, or under the new registration category as a crowdfunding portal. In addition to SEC registration, the SEC is directed to adopt rules requiring the broker or funding portal to provide disclosures to investors relating to risks and investor education materials. These rules require the broker or funding portal to take steps to ensure that investors review the disclosures, answer vari-

ous questions, and affirm that they understand the risk of loss. The broker or registered funding portal will also be required to investigate the background of regulatory compliance by the company's officers, directors, and major shareholders. The broker or funding portal must make certain information available to investors and the SEC at least 21 days in advance of the offering. The broker or funding portal must also follow SEC rules designed to assure that purchasers have not exceeded the investment cap for all crowdfunding offerings by any issuer during a 12-month period. The exemption further requires the broker or funding portal to be sure that the offering proceeds are turned over to the issuer only when the target offering amount is reached.

The JOBS Act also addressed the role of the states in crowdfunding regulation. State blue sky law registration requirements for public offerings are preempted unless the issuer of the securities has its principal place of business in the state, or more than 50% of the crowdfunding offering's proceeds are purchasers residing in the state. Thus, it is possible that two states could simultaneously impose their registration requirements if one

## The North Carolina PACES Act

After several attempts, a much-awaited state crowdfunding bill is set to become law in the coming weeks when Governor Pat McCrory is expected to sign the North Carolina PACES Act. PACES, which expands to “Providing Access to Capital for Entrepreneurs and Small Business,” comfortably sailed through the General Assembly in June, winning nearly unanimous support in both chambers.

The PACES Act will allow businesses in the state to raise up to \$2 million in capital from Main Street investors by issuing securities in transactions likely conducted online through registered websites. For North Carolina investors, the new legislation permits average investors to harness the so-called “wisdom of the crowds” to invest in promising state ventures.

NC Secretary of State Elaine F. Marshall, whose office is tasked with administering and enforcing the law, called the legislation a win-win for investors and small businesses.

“All over our state, many new and small businesses find it difficult to access financial capital to start their venture, or to fund expanding their operations,” Marshall said. “A new form of capital formation has emerged in the marketplace in recent years—crowdfunding—that allows companies to openly solicit and sell to main-street investors, through the internet and elsewhere, and this legislation will permit small investors to invest this way in North Carolina.”

“In an era where access to capital is extremely challenging, crowdfunding has the potential to be an innovative new way to infuse much-needed financial capital into these sectors,” said Marshall. Importantly, the legislation includes the right mix of investor protections and limits, she said. “As we enter these new uncharted financial regulatory waters, we must remain vigilant in our efforts to protect investors and the public from scams and fraud.”

The PACES Act grants the Securities Division of the Secretary of State’s Office abbreviated rule making authority related to

the legislation. After the rules are in place, investors and small businesses can connect on capital raises similarly to the way that donors today sign up for a Kickstarter-type crowdfunding campaign. However, unlike donation-based crowdfunding sites, under the PACES Act, businesses can sell stock or issue debt to raise capital for their ventures. Unlike Kickstarter, however, investor funds are at risk.

The PACES Act creates a new exemption from registration for a securities offering as required by N.C.G.S. §78A-24. To qualify, issuers, i.e. businesses that sell securities, have to provide certain required disclosures about the business while highlighting the heavy risks of such offerings. Numerous studies have shown that early-stage businesses suffer a much higher failure rate than mature companies. Issuers have an obligation to provide potential investors with all of the material information necessary to make an informed investment decision.

Absent an exemption or federal preemption, state law requires all securities offerings to be registered prior to any offers being made to investors. Noncompliance can be disastrous for issuers. State and federal regulators can impose penalties, require funds to be returned to investors with interest and attorney fees, and can investigate complaints. If disclosures are misleading or materially deficient, investors can sue issuers and its promoters for fraud.

The NC Secretary of State’s Securities Division is the leading financial securities regulator and investor protection law enforcement agency in North Carolina. Anyone interested in making an investment should always first call 1-800-688-4507 to make sure the person offering the investment, and the investment itself, are properly registered. Visit the North Carolina Secretary of State, Securities Division, online at [sosnc.gov](http://sosnc.gov) for other helpful information on avoiding scams.

*Written by Kevin Harrington who is the director of the Securities Division at the NC Secretary of State’s Office.*

state is the company’s principal place of business and the other state is where more than half of the offering’s proceeds are raised. In addition, preemption extends to regulation of funding portals except for the state of the crowdfunding portal’s principal place of business. The funding portal’s principal place of business may regulate the portal, but not by imposing standards greater than those imposed by the SEC.

In late October 2013 the SEC proposed its crowdfunding rules, which became effective on May 16, 2016.<sup>4</sup>

### Summary of Crowdfunding as Implemented by SEC Rulemaking

As noted above, the SEC’s crowdfunding rules became effective in May 2016. The rules are found in Regulation CF and are codified in 17 C.F.R. §§ 227.100 *et seq.* Among other things, the rules provide that crowdfunding offerings will not be integrated with other exempt offerings. It thus is likely that many companies will have crowdfunding and Regulation D offerings (or other exempt offerings) side by side.

Not all companies are eligible to rely on the crowdfunding exemption. Companies that are not eligible include non-US companies, companies that are Exchange Act reporting companies, certain investment companies, companies that are disqualified under the SEC disqualification rules, companies that have failed to comply with the annual reporting requirements under Regulation Crowdfunding during the two years immediately preceding the filing of the offering statement, and companies that have no specific business plan or have indicated their business plan is to engage in a merger or acquisition with an unidentified company or companies.

Resale restrictions apply to securities purchased pursuant to the crowdfunding exemption. There is a one year holding period for purchasers of securities in an offering pursuant to the crowdfunding exemption. In addition, holders of crowdfunding securities do not count toward the threshold that requires an issuer to register its securities with the commission under Section 12(g) of the Securities Exchange Act of 1934, provided the issuer is current in its annual crowdfunding reporting obligation, retains the services of a registered transfer agent, and has less than \$25 million in assets.

The SEC’s crowdfunding rules impose

disclosure requirements on companies relying on the exemption. This information must be filed with the SEC, and provided to investors and to the intermediary or portal facilitating the crowdfunding offering. The offering document disclosures must include:

- Information about officers and directors as well as owners of 20% or more of the issuer;
- A description of the issuer's business and the use of proceeds from the offering;
- The price to the public of the securities or the method for determining the price, the target offering amount, the deadline to reach the target offering amount, and whether the issuer will accept investments in excess of the target offering amount;
- Certain related-party transactions;
- A discussion of the issuer's financial condition; and
- Financial statements of the issuer that are, depending on the amount offered and sold during a 12-month period, accompanied by information from the issuer's tax returns, reviewed by an independent public accountant, or audited by an independent auditor. An issuer relying on these rules for the first time would be permitted to provide reviewed rather than audited financial statements, unless financial statements of the issuer are available that have been audited by an independent auditor.

In addition, while the offering is ongoing, the offering documents must be amended to reflect material developments and to update the company's progress in reaching the targeted amount of the offering. Following an offering exempt under the crowdfunding rules, the company must file an annual report with the SEC and also provide that report to investors.

In order to qualify for the crowdfunding exemption, the offering must be conducted solely through a crowdfunding portal registered with the SEC or an SEC-registered broker-dealer. Registered crowdfunding portals and broker-dealers conducting a crowdfunding offering must:

- Provide investors with educational materials;
- Take measures to reduce the risk of fraud;
- Make available information about the issuer and the offering;
- Provide communication channels to permit discussions about offerings on the

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platform; and

- Facilitate the offer and sale of crowd-funded securities.

The SEC rules prohibit funding portals from:

- Offering investment advice or making recommendations;
- Soliciting purchases, sales, or offers to buy securities offered or displayed on its platform;
- Compensating promoters and others for solicitations or based on the sale of securities; and
- Holding, possessing, or handling investor funds or securities.

The SEC rules provide a safe harbor under which funding portals can engage in certain activities consistent with these restrictions.

The foregoing disclosure requirements clearly have a cost. This cost is justified by the need to protect investors. However, at the same time it may prove that many crowdfunding offerings are not cost effective. ■

*Thomas Lee Hazen is the Cary C.*

*Boshamer Distinguished Professor of Law at The University of North Carolina at Chapel Hill. This article is in large part adapted from Thomas Lee Hazen, Treatise on the Law of Securities Regulation § 4:52 (7th ed. 2016) and Thomas Lee Hazen, Crowdfunding or Fraudfunding? Social Networks and the Securities Laws—Why any Specially Tailored Exemption Must Be Conditioned on Meaningful Disclosure, 90 N.C.L. Rev. 1735 (2012).*

**Endnotes**

1. See, e.g., Tania Kishore Jaleel, *Funding Ideas for Returns*, Business Standard, 2011 WLNR 8685196 (May 5, 2011) (discussing crowdfunding in India); Crowdcube, [crowdcube.com](http://crowdcube.com) (last visited Sept. 7, 2011) (capital raising crowdfunding cite in the UK).
2. Jumpstart Our Business Startups Act § 103, H.R. 3606, 112 Cong. 2d sess. (2012).
3. 15 U.S.C. § 77d(a)(6).
4. E.g., Code of Ala. § 8-6-11(14); Ga. Comp. R. & Regs. R. 590-4-2-.08; Ind. Code Ann. § 23-19-2-2(27); Tenn. Code Ann. § 48-1-103(a)(13); Wis. Stat. § 551.202.
5. See Crowdfunding, Sec. Act Rel. No. 33-9974, Sec. Exch. Act Rel. No. 24-76324, 2015 WL 7273273 (SEC Oct. 30, 2015).

# The District Court at 50

BY JAMES C. DRENNAN

This December the North Carolina District Court turns 50.<sup>1</sup> If one created a district court time capsule covering those fifty years, nearly every change that impacted the state would be in full view. The court's role would always be the same—applying the resources of the courts to the most difficult social problems facing the state, one case at a time; however, the way it approached that role would be quite different. Here are a few issues for comparison:

- An evolving view of gender equality;
- A changing definition of family;
- A concern about substance abuse and its impact on public safety;
- A concern about what to do with kids who are adrift;
- The browning and graying of North Carolina; and
- A recognition that private violence in a family is a public concern.

This article is an overview of that 50 year history.

But first, some numbers to provide a perspective on the growth of the court, which is perhaps the most obvious change. In 1970<sup>2</sup> there were just over five million NC residents, 74,000 of whom were of Hispanic origin. There were 112 judges on the bench—three were females and two were African-American. There were 30 judicial districts, the largest of which (Mecklenburg County) had seven judges. There were six districts that had only two judges. In 1972 there were 117,000 civil cases and 811,000 criminal cases disposed of. Two-thirds of the traffic cases were disposed by a guilty plea and the offender never appeared in court.

In the nearly 50 years since 1970, 847 different people have held the office of district court judge. One district—the 26th (Mecklenburg)—has had 73 different judges during that time. The second district

(Tyrrell, Hyde, Washington, Martin, and Beaufort Counties) has had only had eight different judges over that same period.

Today, there are 270 judges currently serving the district court, in a state with over 10 million residents, 800,000 of whom are of Hispanic origin. Fifty-four percent of the judges are white males, 25% are white females, 7% are black males, and 12% are black females. There are now 44 districts. The largest district, still Mecklenburg, has 21 judges. The two smallest, 9A and 20A, have two judges. Caseloads have grown as well: In 2014-15, over two million criminal and traffic cases were filed. Like North Carolina as a whole, that growth is uneven. Urban areas have grown dramatically, while many rural court districts have stable caseloads. The percentage of traffic cases disposed of without a court appearance has dropped to around 30%.

So, much has changed, and much has stayed the same. First, let's go over the things that have changed.

Many of the judges who started the district court had served in some of the local courts that handled traffic and minor offenses. Some local courts had civil and criminal jurisdiction that involved more complex offenses, but they were the exception. In 1966, when the district court was rolled out in six districts, the superior court was the court of general jurisdiction and it handled almost every serious case, including family and juvenile matters. The district court had a hill to climb to build its reputation as a court worthy of inclusion in a new General Court of Justice (the formal name of the current court system). It was viewed by many as a replacement for a series of lesser courts, especially the ubiquitous recorder's court, with which nearly everyone was familiar. Governor Dan Moore's opinion, expressed below in an editorial, was common among state leaders of the time:

The district court judges will replace



judges of all courts lower than the superior courts. For example they will bear little resemblance to the recorder's court since they will hold a position of substantially increased power and responsibility... Election of mediocre or unqualified men would severely handicap our new system.<sup>3</sup>

There is no litmus test to verify whether Governor Moore's hopes were realized. But if one looks at the jurisdictional responsibilities assigned to the court, it is reasonable to infer that the General Assembly has confidence in the court. If they didn't, they would not have pushed as many complicated cases as they have into the court.

Another indicator of the growing understanding of the complexity of the role assigned to district judges was the passage in 1980 of a constitutional amendment to require that all judges be authorized to practice law. Lay judges, of which there were several elected to the district court in the 1970s, were grandfathered in office, but by the year 2000, all active judges were licensed attorneys.

## Civil Jurisdiction

From its inception, a defining fact about district court was its exclusive jurisdiction over domestic relations matters. These cases included divorce, alimony, child support,

and custody decisions. That jurisdiction has gotten much more complex since 1970. Here are some examples:

**Equitable Distribution.** Many of these domestic cases involve time-honored principles still applicable. King Solomon had a difficult child custody case, for example.<sup>4</sup> But other things do change, and one was a rethinking of how property should be divided when couples divorce. Traditionally, during a divorce, the property in the marriage belonged to the person holding the title. That often meant that all the property was in the male partner's name. That cultural phenomenon often worked to the female's detriment. A 1981<sup>5</sup> act of the General Assembly established an "Equitable Distribution" system, and changed all that by resorting to principles of equity instead of property title when marital property was distributed. It was a game changer. District courts began to hear cases involving tens of millions of dollars or controlling interests in major corporations, cases that required delving into complex corporate structures, pension systems, and emotional disputes over who should get the family china chest. Trials became more complicated, and those lasting several weeks were not unheard of. It was a court far removed from one that took guilty pleas in traffic court. And the trend has not let up.

**Domestic Violence.** At around the same time, new social trends began to filter into the court. Violence against one's significant other has been a problem for eons. But it was often not a problem that the justice system addressed. Cultural norms of family structure and gender roles kept the problems and the pain inside the family. As those walls began to break down and hostility inside the family came to be viewed as violence and not a family problem, the courts began to get involved. In 1979, a specific chapter of the General Statutes was added to provide detailed procedures for the courts to handle domestic violence issues.<sup>6</sup> Those laws include tight time limits for court action, mandatory cooling-off periods, specific and sometimes mandatory sanctions, and provisions for restraining orders. They involve people under great stress, and the potential for further violence is always present. The risk assessments judges make in shaping sanctions are difficult and imprecise. Many of the proceedings are *ex parte*, which always poses a special challenge for a judge in deciding a matter without hearing all sides of a dis-

pute. Many are also done by self-represented litigants. Forms designed for lay persons encourage that process, as mandated by the legislature. It is rare that the legislature gets into details like form design, but the fact that it did reflects the level of public interest in this type of case. It is now a rare session of the legislature that does not tweak the domestic violence law. It is the primary, but certainly not the only, example of the General Assembly recognizing the need for court involvement in a difficult social problem, and choosing the district court as the arm of the court to handle the problem.

**Juvenile Court.** A constant in society is that there will always be young people who are either endangered or unable to conform to society's norms, but the approaches taken to dealing with them have been anything but constant.

There are essentially two juvenile systems—one for children who have bad things done to them, and another for juveniles who do bad things to others. Juvenile court has become an increasingly complex area of North Carolina law, which has changed several times in the life of the district court. It is a big part of the work of the district court, and seems to get more complicated with every change.

While specialized juvenile courts were established first in Chicago in 1899, the district court was the first uniform approach to juvenile court in North Carolina, by which all cases were handled by the same kind of judge with the same jurisdiction.

The prevailing view in the early days of juvenile court was that the court should stand in the place of the parent. That meant that the role of the court was to do what parents should do—guide the offender toward life as a responsible, law-abiding adult. To do that, courts needed wide discretion and did not view punishment as an end itself, as is often the case in adult criminal court. By the 1960s that view was being questioned in high places.

In 1966 the US Supreme Court noted, "that there may be grounds for concern that the child receives the worst of both worlds [in juvenile courts]: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children."<sup>7</sup> In 1967 the US Supreme Court, in the landmark *Gault*<sup>8</sup> case, fundamentally changed the way these cases are handled by interpreting the US

Constitution to require the state to observe the basic protections afforded to adults in criminal court in handling juvenile delinquency cases. While the standard—the best interest of the child—remained the same, the means to get there changed dramatically. Despite whatever else *Gault* may have done, things got more complicated, which for courts almost always means more time and resources to dispose of a case.

Since 1970, North Carolina's delinquency laws have been rewritten twice. The most recent rewrite, in 1998, imposed an approach to dispositions that was conceptually similar to the adult "Structured Sentencing" model used in North Carolina since 1994. In the current framework, a judge must consider the seriousness of the offense and the juvenile's prior history to place the case on a grid that limits or mandates the judge's dispositional decision.

The child protection version of juvenile court has also not been static. Federal mandates designed to provide permanent placements for abused and neglected children have been in place for decades. The federal laws provide resources for courts, but they come with mandates about timing and frequency of hearings and priorities about outcomes.

Hearings have also become more complex, as more parties and more attorneys get involved. Acting on a desire to create a better outcome, the legislature in 1983 created a special Guardian Ad Litem program to assist the court in handling abuse, neglect, or dependency cases.<sup>9</sup> While this has largely been a beneficial addition to the court's ability to reach a positive outcome, it means that the court now has to consider information provided by advocates for the state (county departments of social services, who represent the child), the guardian ad litem (typically through an attorney who works with a volunteer assigned to the child's case and whose only role is to provide an independent view of what is in the best interest of the child), and both parents who are also represented by an attorney(s). More attorneys can lead to better results, but not usually to quicker ones. Juvenile court is as important as ever. It is just more complex.

**Family Court.** In the late 1990s, the idea of a "family court" began to appear regularly in court administration circles. The idea was simple—every aspect of a case involving a family should be heard by a single judge. Typically the judge would be specialized in

such cases, and he or she would be aided by a case manager who would keep the case moving. None of these changes have affected the basic domestic relations law. They instead provide a different way to handle those cases. Beginning in 1998, North Carolina created pilot programs to establish “family courts,” building on the recommendations of the Futures Commission.<sup>10</sup> As of December 31, 2015, there are family courts in 14 district court districts that serve 22 counties and 45.4% of North Carolina’s population.<sup>11</sup> For much of the 1990s and 2000s, the court system’s goal was to expand family court to all districts. In 2015, family court funding was threatened for elimination, in part because it was not a statewide program. There are obviously two ways to remedy that—make it statewide or eliminate it. Given the status of the state budget, the choice most often has been to propose elimination, although the court system’s leaders have resisted that budget cut, and family court remains an active program in the places where it has been established, at least for now. The long term future of the family court model appears to still be an open question for North Carolina’s courts.

### Criminal Jurisdiction

The district court’s role in handling criminal cases has also changed and grown more complex. Three examples are the changing nature of DWI litigation, the role of therapeutic courts, and an expanding role in the handling of felony cases.

**Impaired Driving.** In 1970, driving under the influence was a standard crime, not much different than any other misdemeanor. Alcohol was involved in 70% of traffic deaths.<sup>12</sup> By the early 1980s, with the advent of advocacy organizations like MADD and SADD, extensive media exposure to the tragic consequences of many impaired driving episodes, and changing social mores about drinking, impaired driving became a hot issue. In 1982-83, Governor Hunt’s administration and a study commission developed a comprehensive revision of those laws. It was so important to the administration that the governor persuaded each house of the legislature to allow the recommendations to be in the very first bills introduced in each house (Senate Bill 1, and House Bill 1), a place usually reserved for the leadership to include start-up matters. The “Safe Roads Act,” as the 1983 legislation

came to be known, dramatically changed the impaired driving statutes, and created a unique five-level sentencing structure, with many mandates and collateral consequences.<sup>13</sup> The result for the district court was a significantly more complex process to impose sentence. In 2006 the General Assembly revisited the law and enacted several changes which had a cumulative effect of making both the trial and sentencing process more complicated.<sup>14</sup> DWI cases now take significantly longer to reach disposition and take more court time. As one experienced judge put it: “When I took the bench 21 years ago we could try the typical DWI case in 20 minutes, and only a small percentage of the cases were appealed. Today it is rare to spend less than an hour in a DWI trial in district court. Just recently we had a DWI trial that lasted all day...Pretrial motions are routine...Attorneys make more demands for discovery, particularly videos.” DWI cases are now qualitatively different from any other criminal offense. And since DWI is one of the most frequently charged criminal offenses in North Carolina, the resources that must be devoted to those cases have risen disproportionately. But alcohol is now involved in 37% of traffic deaths. For whatever reason—and the criminal justice system’s role is significant if not the only reason—the harm caused by impaired driving, as a statistical matter, is moving in the right direction.

**Therapeutic Justice.** Family court challenged conventional wisdom about how family law cases should be handled. Therapeutic courts did the same for some criminal courts. It began with judges rethinking how they handled substance abuse cases. Traditional criminal sentencing had very few success stories in leading drug offenders to a drug-free life. In the 1990s the federal government created funding incentives for “drug courts” that use a different model of judging. Instead of a traditional advocacy structure, cases in drug court are handled by a team consisting of the judge, a case manager, defense and prosecution, treatment professionals, probation officers, and others as available. Sanctions and incentives are decided by the team. Instead of the normal sequence of sentencing followed by supervision by probation or prison authorities, a therapeutic court defendant appears for reviews in court regularly over a period of a year or more. Courts assume responsibility for helping defendants find treatment, hous-

ing, and other needs. Judges are cheerleaders and counselors. It is a dramatic departure from the neutral umpire role for judges.

For some, this departure from the traditional role is extremely uncomfortable. For others, it is the most meaningful work they do. Over time, drug courts became generally presided over by judges who embrace the new role of a therapeutic court. These courts grew rapidly, but in the recent recession funding began to lag. Federal funding, which typically covers only start-up costs, merely lasts for a few years. The General Assembly picked up many of the courts, but in 2015 it eliminated all funding for drug courts.

The problems associated with handling substance abusing and mentally ill defendants are still around, however, and the state continues to struggle to find the best means to address the problems. Some local court officials have cobbled together enough resources to keep their therapeutic courts in operation. It is another example of the goal of uniformity in local courts being challenged, as some localities provide this resource and others do not.

**Felony Pleas.** When the district court was established, all felonies were disposed of in superior court. District court heard misdemeanors, and conducted some preliminary hearings in felony cases. That changed in 1996 when the General Assembly expanded district court jurisdiction to include the handling of guilty pleas in Class H and I felonies.<sup>15</sup> While that seems to be a small change, class H and I felonies are 64 % of all felonies; 26% of all felony pleas to these offenses were taken in district court in 2013-14.<sup>16</sup> The jurisdiction is unusual in that it is not uniformly available. It is only available if the prosecution and the defendant agree that the district court should handle the case and a superior court judge transfers the case to the district court. Barely two decades after the leaders of the Bell Commission and the original Courts Commission fought so strenuously for jurisdictional rules that were the same in every local court district, there are again different rules in different counties about who would handle these cases.

### Challenges

North Carolina is a much different state than it was 50 years ago. It is bigger—much bigger. It is ethnically and culturally diverse. It has suffered economically as major industries like tobacco, textiles, and furniture have



declined dramatically as a source of good manufacturing jobs. It has attracted sun-seeking retirees by the thousands. It has a vibrant technology sector in some parts of the state. All of these trends impact the court system, including the district court. And they all pose challenges for the future, as the district court turns the page on its first 50 years.

**Cultural Diversity.** To provide a fair hearing, a court has to communicate with the people with whom it is dealing. When those people don't speak or understand English, some means to translate different languages is required. In recent years, one constant item in court system budget requests has been increased funding for interpreter services. There is now a separate division within the Administrative Office of the Courts that does nothing else. One future challenge will be to meet what appears to be an ever-increasing need for these services. The challenges are financial, but they are also administrative. Scheduling interpreters, especially for uncommon languages, inevitably slows down proceedings and takes administrators' time.

Cultural diversity poses other challenges as well. American courts take for granted American cultural norms. When people from other cultures bring different perspectives on things like family norms, gender roles, deference to authority, or similar cultural norms, it poses difficult questions for judges in deciding what is fair, or just, or reasonable. Training on matters like implicit bias and cultural competency can help judges make consistent judgments about such matters, but it is likely to be an ongoing challenge for the district courts as the state's cultural diversity increases.

**Self-Represented Litigants.** An increasing trend in courts generally, and especially in the district court, is the growth in the number of people who choose to represent themselves. Often that choice is because the party cannot afford a lawyer. It is especially prevalent in civil cases. One chief judge reported that in a recent year, 70% of all domestic cases in the district had one self-represented litigant (SRL) and 40% had only SRLs in the case. Dealing with a SRL makes the judge's job more complicated. Lawyers know the rules, so things don't have to be explained to them. SRLs don't. When there are no lawyers involved, the longstanding practice of directing a lawyer to provide a draft of an order is not an option for the judge. The cases also pose challenging ethical issues for judges, as

they constantly have to decide when, in the interest of justice, to intervene and when to say nothing when a SRL is making a mistake in presenting a case. There is a growing consensus that judges do not need to treat lawyers and SRLs exactly the same way, but the boundaries of any additional consideration given to SRLs are not settled. It is another area where education and judicial practices will be reshaping the district court culture in North Carolina.

**Elections Rules.** District judges are elected in their districts for four-year terms. They almost never leave the counties in their district. A large component of their work involves hearing matters without a jury in which the party being charged with a crime is a voting citizen. The politics of retaining their seats are unique, even among court elections. For most of the 50 years in question, that path involved partisan politics. In "red" or "blue" districts, that system shifted the essential election to the party primary. In "purple" districts, which tended to be in urban areas, in national wave elections it was not uncommon for most of the district court bench to be voted out of office when their party was not the one favored by national trends. In 2001 the elections became nonpartisan. While nonpartisan elections don't eliminate party politics, the incidents of "sweep" elections were mitigated. In recent legislative sessions, frustrations about the difficulty of choosing judges without the benefit of party affiliation has led to legislative discussion about reintroduction of partisan elections. The elections are still nonpartisan, but it is clear that finding the right balance in a judicial election system is a never-ending question, as the district court experience illustrates.

**Uniformity.** There was no value more important to court reform leaders in North Carolina than uniformity—in subject matter and geographical jurisdiction, in costs, in available programs, in how judges are selected. The district court, as the replacement for the over 250 local courts of the 1950s, was the crown jewel of that effort. In 1970, that goal was largely achieved. It would not be long, however, before the local pressures to shape courts to meet local desires would reappear. It would not be too much longer before kinks in the idea of uniformity began to appear. Here are some examples of court administration programs or jurisdiction not available in every district:

- District courts hearing felonies;
- Problem-solving courts;
- Family courts;
- Local government providing funding for court employees;
- Court costs funding local programs; and
- Local government funding, or obtaining grants for unique local programs for juvenile, criminal, or domestic cases.

Local court funding for employees is a particularly difficult practice to reconcile with the ideal of a court system that is fully state funded. It is understandable that localities with resources want to improve the services available to their communities. They are often not willing to wait for the state to provide the level of support they want for their courts, even if they agree that it should not be necessary. But not every community has the will or the resources to offer that support. Tensions among competing principles are inevitable in such a system. As the practice becomes more widespread, it is clearly a strain on the foundational principle of uniform state funding. While it is a complicated issue and one that pitted state court officials against local officials for decades, in 1999 the General Assembly formally recognized the practice and made optional local funding the policy of the state.<sup>17</sup> In 2016, 14 counties had employees funded by local governments. While the employees funded range from deputy clerks to administrative support staff, to pay for retired judges, most of the funds are for assistant district attorneys and support staff in DA offices. Mecklenburg County courts are the single largest recipients. The District Attorney's Office in Mecklenburg County has funding from Mecklenburg County and the city of Charlotte for over 25 assistant prosecutors and a similar number of support positions. In 2015-16 the court system in Mecklenburg received over \$3.2 million.<sup>18</sup>

In yet another pressure on the original notion of uniformity, the districts used to administer the courts have also changed in two important respects. In 1970, in all districts the same lines were applied to district court, superior court, and prosecutor districts. Beginning in 1975, districts began to be subdivided, but it was often the case that the division applied only to prosecutors, or to prosecutors and superior courts. As a result, none of the three functions today have the same district lines, which creates challenging administrative problems when coordination across the functions is needed.

In addition, the scale of the districts is now much different. In 1970 the ratio of largest to smallest district, by population, was four to one. In 2015 it was 16.9 to one. That disparity has implications for the cost of running a district, and makes the job in small districts qualitatively different from the job in larger districts.

As these examples suggest, the tension between providing a uniform court experience across the state and responding to local pressures to adopt unique or special components is powerful. It certainly appears that in many cases uniformity is losing.

**Financing.** The clear vision of those responsible for court reform was that operational costs would be borne by the state, and that those costs would primarily be paid from general tax revenues, and not from user fees. The underlying principle is that court operations are an essential part of the state's government institutions, and are worthy of support without relying on user fees. That was the philosophy behind the original court cost structure of the district court. In 1970 there were four items in a typical bill of costs for a criminal case. Court costs accounted for under 40% of the costs of operating the courts. In 2015 there were 16 items that could be included in a criminal bill of costs. Court costs now offset nearly 60% of the cost of the court system. These trends (more costs and increased user fee funding) have been accelerating since the recession of 2008. It is yet another example of the difficulty of maintaining the vision of a uniform, state-funded court system the Bell Commission that others fought so hard to make a reality.

**Social Media.** In 1970, courts used manual typewriters. There were no fax machines, no email, no cell phones, no personal computers, no cable television. Today's judges work in a world where tweets, Facebook posts, 24 hour cable news—both local and national—and blogs are everywhere. These new media offer great opportunities to interact with the public, and many judges effectively use the proliferation of media outlets to better inform the public. But in a world where everyone with a computer can be a publisher, the potential for abusive information is great. When a judge finds himself or herself in an internet storm precipitated by a controversial decision, there is often little the judge can do to defend himself or herself. Judging in 2016 poses challenges that judges in 1970 could not even contemplate.

## Future

The future of the district court is likely to be much like its past. Its work will grow more complicated. It will be focused on people problems that society doesn't always address adequately in other forums. There will be more work. And there will be new problems or new approaches to old problems that we don't currently know about.

There are a few places where some modest predictions are possible, however. Family structures will continue to present new complications for the courts. The recognition of a constitutional right to marry a person of one's own sex will likely bring new parties into court. Conflict based on different understandings of gender identity will likely find its way into our courts. Medical science's ability to aid in the reproductive process will inevitably create conflict that only courts can address. A new time capsule 50 years from now will be full of such challenges.

The role of the judge will almost certainly continue to evolve. One area of frequent conversation is whether some of the work of the district court can be handled by other officials, such as magistrates, or diverted from the court system altogether. That conversation is not likely to go away.

Judges will continue to seek and retain their seats in a political environment. The details of that may change, as election and/or appointment rules change. What will not change is that judges are public officials who constantly have to navigate both a political world in which getting and keeping the job is the primary goal, and a judicial world in which neutral, independent application of legal principles is the goal. The tensions between the two are often severe. How the system finds the balance between accountability measures and the need for judicial independence may change, but it will always be a work in progress. How individual judges navigate those pressures will continue to be one measure of the effectiveness of the district court.

Technology will continue to play an increasingly important role in how the courts are run. The resources needed to provide technological support for the courts have not kept up with the needs—that fact is widely acknowledged. Addressing that imbalance will be a significant factor in how the future of the district court unfolds.

The only sure prediction is that there will be change. A lot of it. But what is not likely

to change are the most important things:

The courts will be staffed by people who seek to do justice, who are mostly idealists at heart. They will do the important work of applying the court's authority to address the state's most pressing problems, one case at a time. They will be continuing the job assigned to the courts over 200 years ago in Federalist Paper 51: "Justice is the end of government. It is the end of civil society. It ever has been and ever will be pursued until it be obtained, or until liberty be lost in the pursuit." Some things never change. ■

*James Drennan is the Albert Coates Professor of Public Law and Government (part-time, semi-retired) at the UNC School of Government. Since 1974 he has helped the school provide educational resources to the North Carolina District Court. In the mid 1990s he took a leave of absence for nearly three years to serve as the director of the Administrative Office of the Courts, and he has been fascinated by court administration as a field of study ever since.*

## Endnotes

1. For a description of the events leading up to the formation of the district court, see M. Crowell, *The Origins of the North Carolina District Court*, North Carolina State Bar Journal, Spring 2016.
2. The system was phased in over three election cycles—1966, 1968, and 1970. By December of 1970 every county had a district court in operation.
3. *Highly Qualified Judges Needed for New District Court System*, Gov. Dan K. Moore, The Robesonian, June 22, 1966.
4. 1 Kings 3:16-28.
5. SL 1981, Ch. 815, codified as GS 50-20 and 50-21.
6. SL 1979, Ch. 761.
7. *Kent v. United States*, 383 US 541 (1966).
8. *In Re Gault*, 387 US 1, (1987).
9. SL 1983, Ch. 761, originally codified as GS Ch. 7A, Article 39, now codified as G.S. Ch. 7B, Article 12.
10. For a more complete explanation of the work of the Futures Commission, see Crowell.
11. 2016 Annual Report of the Administrative Office of the Courts, Annual Report on North Carolina's Unified Family Court Programs, March 2016, available at [nccourts.org/Citizens/CPrograms/Family/Documents/2016\\_FC\\_AnnualReport.pdf](http://nccourts.org/Citizens/CPrograms/Family/Documents/2016_FC_AnnualReport.pdf).
12. [report.nih.gov/nihfactsheets/viewfactsheet.aspx?csid+24](http://report.nih.gov/nihfactsheets/viewfactsheet.aspx?csid+24).
13. SL 1983, Ch. 435.
14. SL 2006-253.
15. SL 1995, (Reg. Sess. 1996), Ch. 725.
16. North Carolina Sentencing and Policy Advisory

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# Retirement Planning and the Transitioning Lawyers Commission

BY WOODY CONNETTE AND MARK SCRUGGS

**N**ow what? We've made it this far. We've developed successful practices. We have devoted clients whom we have served for decades. We're known and respected in our communities. We're at the top of our games. And now what?

Every phase of our professional lives is entangled with personal challenges. Lawyers in the early years of their careers struggle with the stark challenge of finding a comfortable work/life balance: how do we shelter time for the families we love while perfecting our lawyer skills and getting ahead with our careers? We struggle to accommodate those demands for time and attention, and years pass. The issues become more nuanced. How do we finance our kids and our lifestyle choices while doing work we find personally rewarding: my family or my soul?

And now what? By the time we reach our 60s, after 30 or more years of practice, those work/life issues are wrinkled and graying. Our contemporaries are retiring; some in ways we admire, others in ways we don't. Some of our contemporaries are starting to die, sometimes without ever having experienced the pleasure of playing golf or fishing on a school day or watching the grandkids perform in the school play on a Wednesday. We are moving up in the rotation.

Listen to lawyers entering their 60s and you will hear comments like these:

- I don't know what I'd do if I retire. I'd go crazy if all I had to do was play golf or watch TV every day.
- My clients appreciate my counsel. We've worked together for decades. I'd miss them. What will happen to them?



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• My value to this community is as a lawyer. That's who I am. What can I do to find that level of meaning and engagement if I retire?

• I can't afford to retire. What if I live to be 90? I'd outlive my savings way before that.

• I'm having fun. I'm happy just to keep working forever. I'd rather be carried out of my office on a gurney than to rot away in a nursing home.

So, now what? To answer these questions, the North Carolina Bar Association offers a little TLC. First, TLC (Transitioning Lawyers Commission) has been designated by the State Bar as a Lawyers Assistance Program for purposes of Rule 1.6(c) of the Rules of Professional Conduct. Communications with or about lawyers who may need assistance from TLC are confidential and are exempted from any obligation to report ethical violations to the State Bar. This is of critical importance to the lawyers on TLC and the lawyers we serve. Second, working with TLC is completely voluntary. TLC is not the State Bar; it has no enforcement power. TLC is friends and

colleagues at the bar helping one another.

TLC evolved from the Retiring with Dignity Task Force created by NCBA President Michael Wells in 2012. The initiative grew with early support from the NCBA Senior Lawyers Division and the Solo, Small Firm, and General Practice Section. Nan Hannah chaired TLC for almost three years, bringing vision and passion that has made her almost synonymous with TLC. Brad Schulz took the helm next and has been a tireless advocate for the work of the TLC. Now in its fourth year of existence, TLC is committed to serving North Carolina lawyers and the public.

TLC serves three groups: lawyers who need to retire but will not, lawyers who want to retire but need help with strategic planning, and caregivers dealing with dementia-related issues of loved ones.

## Identifying and Intervening with Lawyers Impaired by Dementia and Other Cognitive Issues

In its early stages, task force members were

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\*\* Winter 2016 preLaw magazine

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concerned by the number of attorneys who were determined to continue practicing despite advancing dementia that impaired their ability to adequately represent their clients. In many instances, these impaired lawyers had not planned adequately for their retirements and felt that they could not afford to retire, particularly with the economic downturn in 2008. Others had stayed at the bar too long; they had no outside interests or hobbies. Practicing law was all they knew to do. Their sole identity was as a lawyer, but now their practice skills were failing.

Obviously, the bar needs to protect the public by assuring that licensed attorneys are competent to practice. Something needed to be done in the cases of aging lawyers with dementia. To address these cases, the task force ultimately sought and obtained designation of TLC as a Lawyers Assistance Program (LAP).

TLC has commissioned HRC Behavioral (HRC)—a group of psychologists and psychiatrists who have worked with BarCARES for years—to help develop an intervention process. As noted earlier, we have now tested the model and believe it works. TLC has trained over 20 “team leaders” to lead interventions. These leaders are able to respond

when attorneys with dementia or cognitive decline are identified and a confidential referral is made to TLC.

Referrals come from many sources. Judges, court personnel, and other attorneys most often see aging attorneys who are suffering decline. Sometimes the affected attorney’s partners or staff members become concerned. In other instances clients or family members might make referrals.

To initiate a confidential referral, anyone can call the North Carolina Bar Association at 800-662-7407 or send an email to [tlc@ncbar.org](mailto:tlc@ncbar.org). These confidential calls are screened by staff, and in appropriate cases the cases are referred to TLC team leaders to investigate and respond. The LAP designation is critical beginning at this point, because the team leader may discover information which, without that designation, would require a report to the State Bar. Instead, a combination of a program-imposed confidentiality, Ethics Rule 1.6 imposed confidentiality, and the LAP exemption from the duty to report pursuant to Ethics Rule 8.3, allows the team leader to have open and honest conversations with the lawyer and his or her friends and family so that a complete understanding of

the issues and challenges can be obtained and a plan developed to address the issues.

The team leader can use neuropsychological and other professional resources through HRC as needed. No two cases are the same, but team leaders generally decide how to approach the affected attorney and identify who should participate in an initial meeting. The team leader may participate in that initial meeting, or perhaps a trusted friend, colleague, or judge will take part. The initial goal is to engage the affected attorney in a discussion of his or her circumstances and the performance concerns that have been identified. The attorney may request cognitive testing, and initial costs are covered by TLC.

One thing TLC has learned in administering this program over the last three years is that there are pharmaceutical and medical issues that can result in cognitive impairment. Our team leaders have been trained not simply to assume the outcome will be retirement or the end of a career, but instead to work with lawyers experiencing cognitive issues by providing resources available for assessment. In cases where impaired functioning is confirmed, TLC seeks to persuade the attorney to retire voluntarily, with as little fuss as possible.

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In cases of advanced dementia, immediate retirement may be necessary. In other cases, there may be time for an orderly winding down or transition of the practice.

A goal of TLC this year is to add to our roster of team leaders, and to increase the geographic, ethnic, and gender diversity of our team leaders. Not surprisingly, we have found there is a better chance of a successful outcome if a local lawyer who is respected by the area bar is part of the team. We are planning a 2016 training session for new and existing team leaders, so now is the time to get involved. If you are interested in learning more about how you can be a part of this important work, please contact Woody Connette of Essex Richards PLLC in Charlotte. Woody is co-chair of TLC.

In many ways, TLC's work is akin to convincing an aging parent that it's time to give up the car keys. Some of those conversations go well and the parent goes gently. Others go not so well. TLC strives to make the process tender, caring, and confidential. However, there are cases where the lawyer denies an obvious impairment or lack of competency and is determined to continue practicing as an impaired lawyer. In those cases, the State Bar has its own grievance and investigation processes to assure that the public is protected—although it is never the TLC that makes the report.

Lawyers of a certain age remember the great Cal Ripken, the Iron Man who played in 2,632 consecutive games for the Baltimore Orioles. In 2001 he voluntarily retired, recognizing that he no longer was at the top of his game. Most professional athletes, like Cal Ripken, recognize the point where they need to take themselves out of the game. Some continue to play, and their years of greatness are blurred in fans' memories by their years in decline.

As with professional athletes, we as lawyers

need to know when to say when, lest we stay too long at the bar. We deserve to be remembered for our excellence, rather than for the mediocrity or incompetence that comes with age-related cognitive decline.

#### Lawyers who Want to Retire but Need Help with Strategic Planning

Another important mission of TLC is education. We want to teach lawyers how to plan for the unexpected, as well as the expected. Issues range from unanticipated death or disability to the planned transition to life after the law. Issues such as succession planning for your law practice, preparing oneself emotionally for life away from the day-to-day practice of law, and preparing financially for a retirement are just some of the issues on TLC's agenda.

An issue of particular importance, especially to the sole practitioner, is planning for the orderly transfer or winding down of his or her law practice in the event of sudden death or disability. This is not just a good idea; it's good ethics. Comment [5] to Rule 1.3 states "the duty of diligence may require that each sole practitioner prepare a plan, in conformity with applicable rules, that designates another competent lawyer to review client files, notify each client of the lawyer's death or disability, and determine whether there is a need for immediate protective action." This is a task akin to preparing a will and other estate planning documents. We would just as soon not think about it—everything will get taken care of one way or another. But why leave this work to a grieving family member or the State Bar? Why not arrange now for the orderly transfer or winding down of the practice?

Begin by selecting a trusted colleague to assist in the process when you are no longer able to do so. Make sure the financial resources are there to pay staff and perhaps the assisting attorney during the winding down process. Make sure the assisting attorney has the tools to carry out the assignment. A complete client list with contact information is a necessity, as is the ability to handle the trust account.

TLC is a resource for lawyers who want to begin this process. TLC is working to update *Turning Out the Lights: Planning for Closing Your Law Practice*. This popular book was first published in 2003 as an initiative of the Solo, Small Firm, and General Practice Section of the North Carolina Bar Association and has guided many a lawyer through the legal and

ethical thicket of winding down or transitioning a law practice. It is available through the North Carolina Bar Association. On TLC's webpage, there are links to many other "toolkits," checklists, and publications that can help in this process.

TLC can help in good times, as well as in not-so-good times. TLC works with lawyers experiencing cognitive impairment issues and encourages lawyers to prepare for unexpected death or disability. But there is also the joyful transition to another phase of life. The word "retirement" is too often viewed as a dead end. It does not have to be. Those who "retire" from the practice of law can still find meaning and fulfillment using their knowledge and skills to benefit society, while decreasing the level of stress imposed by a demanding law practice. TLC's charge is to educate lawyers on how they might prepare for a successful and fulfilling life away from the daily grind. In September 2015, TLC organized a CLE program sponsored by the Bar Association entitled: "Retiring Well: Developing Strategies for a Successful Transition." The full-day program consisted of caregivers, doctors, lawyers, and financial professionals addressing issues of importance to lawyers desiring to plan well for life after the law. Have you ever thought about selling your law practice? It is an idea whose time has come, and it was one of the topics discussed at TLC's seminar. Selected portions of the seminar are available on the Bar Association's website as an "On Demand" video CLE entitled "Strategies for Success: How Does a Lawyer Retire?" The manuscript for the complete CLE program is also available from the Bar Association.

TLC is working in many areas affecting and of interest to lawyers who are looking toward retirement. To learn all that TLC has to offer, visit TLC's webpage on the North Carolina Bar Association's website: [ncbar.org/members/committees/transitioning-lawyers-commission](http://ncbar.org/members/committees/transitioning-lawyers-commission). ■

*Woody Connette practices with Essex Richards, PA in Charlotte. He co-chairs the Transitioning Lawyers Commission with Mark Scruggs and is a past member of the NCBA Board of Governors.*

*Formerly a partner with Spear, Barnes, Baker, Wainio & Scruggs, LLP in Durham, Mark Scruggs joined Lawyers Mutual in March 2001 as claims counsel. He serves as co-chair of the North Carolina Bar Association's Transitioning Lawyers Commission.*

## President's Message (cont.)

cannot afford to retain a lawyer.

6. *Regulation of the Profession*—Regulation presents two areas of concern: regulation of lawyers and regulation of non-lawyers who offer services traditionally provided by lawyers. Since lawyers, until recently, were generally the only providers of legal services, regulation was directed at lawyers and was accomplished through the adoption of rules of professional conduct, with misconduct resulting in discipline including suspension or disbarment. Lawyers have traditionally self-regulated with supervision by state Supreme Courts or state legislatures. Some states are reassessing whether and to what extent lawyers should be permitted to self-regulate.

Regulation of nonlawyers who provide what many lawyers consider to be legal services is more difficult because there is not a national definition of what constitutes the practice of law. Various definitions have been crafted by both the courts and legislatures across the country, and many of these were

done prior to the proliferation of internet providers. Hopefully, all are in agreement that nonlawyer providers of legal services need to be regulated; however, before they can be properly regulated, we have to clearly define what constitutes legal services and the practice of law. Over ten years ago, an American Bar Association task force was unable to draft an acceptable model definition of the practice of law, and left the issue up to individual states to define it. The Legal Professionalism Committee of the Chief Justice's North Carolina Commission on the Administration of Law and Justice acknowledged in its interim report that this issue needs to be addressed.

The items addressed above are just a few of the challenges facing our profession. As the methods and means of delivering legal services continue to change and develop, and technological advances are unveiled almost on a daily basis, we will continue to face increasingly complex issues and be called upon to make difficult decisions that will have a profound effect on our profession and on the public we strive to protect.

While these issues will continue to change, the values and principles we use to address

these issues should remain constant. The core values of our profession that have guided lawyers for generations are contained in our Rules of Professional Responsibility and include: (1) undivided loyalty to clients; (2) duty to exercise our independent legal judgment for the benefit of our clients; (3) duty of client confidentiality; (4) duty to avoid conflicts of interest; (5) duty to promote access to justice; and (6) duty to act as an officer of the legal system. If we continue to adhere to these core values, we can and will, working together, be successful in formulating new policies and procedures for tackling these issues.

My challenge to each of you is to study these issues, and share your knowledge, experience, and expertise with the State Bar, the North Carolina Bar Association, and other organized Bars that have the responsibility of addressing these matters. Please let your voices be heard so that you can help shape the future of our profession. ■

*Margaret M. Hunt, an alumnus of Wake Forest University Law School, has practiced law in Brevard since being admitted to practice in North Carolina in 1975.*

## State Bar Outlook (cont.)

prescribed by that estimable gentleman, the State Bar expects, hopes, and resolves to spend less than it receives this year, so that even as it advances the general welfare by the application of substantial sums of your money, it will preserve and enhance a widespread sense of professional wellbeing akin, dare we say, to happiness. I trust you'll be watching and holding us to it, not unlike Mr. Micawber who, after many years of separation from his protégé, offered this very reassuring sentiment in closing his last letter to David Copperfield:

*Among the eyes elevated towards you from this portion of the globe, will ever be found, while it has light and life, the eye appertaining to Wilkins Micawber, Magistrate. ■*

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

### Endnotes

1. The State Bar pays 72 of its employees from its operational budget. The other 14 employees are compensated by programs having their own revenue streams.

2. For State Bar purposes, judicial districts are coterminous with prosecutorial districts, except in the case of High Point, which has a district that is coterminous with the High Point Superior Court District. See N.C.G.S. 84-19.
3. If we had to pay for their time, we would almost certainly be miserable, in the Micawberian sense.
4. Leadership in Energy and Environmental Design. Certification is based on accumulation of points at the

"platinum," "gold," or "silver" levels, platinum being the highest level of certification attainable.

5. Well, not forever, as our groundlease is only for 99 years.
6. The IOLTA Board of Trustees, the Board of Continuing Legal Education, the Board of Legal Specialization, the Board of Paralegal Certification, and the Client Security Fund's Board of Trustees.
7. Another fine lawyer who became an administrator.

## Speakers Bureau Now Available

Speakers on topics relative to the North Carolina State Bar's regulatory mission are available at no charge for presentations in North Carolina to lawyers and to members of the public. Topics include the State Bar's role in the regulation of the legal profession; the State Bar's disciplinary process; how the State Bar provides ethical guidance to lawyers; the Lawyer Assistance Program of the State Bar; the Client Security Fund; IOLTA: Advancing Justice for more than 20 Years; LegalZoom, HB 436, and updating concepts of the practice of law; and anti-trust questions for the regulation of the practice of law in North Carolina. Requests for speakers on other relevant topics are welcomed. For more information, call or email Lanice Heidbrink at the State Bar: 919-828-4630 or lheidbrink@ncbar.gov.

The purpose of the Speakers Bureau is to provide information about the State Bar's regulatory functions to members of the Bar and members of the public. Speakers will not be asked to satisfy the requirements for CLE accreditation; therefore, sponsors of CLE programs are encouraged to look elsewhere for presenters.

# Legal Ethics and Social Media

BY CHRIS MCLAUGHLIN

The number of lawyers using Facebook, Twitter, LinkedIn, and other social media networks grows daily. So too

does the number of lawyers doing foolish and unethical things on those networks. Be it insulting Tweets, deceitful Facebook friend

requests, or “reply all” mistakes, lawyers continue to wade into trouble on the Internet in varied and creative ways.

Social media is not inherently bad, of course. Lawyers can and do use evolving technologies to benefit themselves, their clients, and the public without drawing the ire of the courts or the State Bar. This article seeks to empower more lawyers to use social media in more appropriate fashion. It highlights some of the more egregious social media missteps made by lawyers in recent years in the hope that other lawyers won't repeat them. It then analyzes how the Rules of Professional Conduct apply to Internet activity both generally and in specific contexts such as investigations, litigation, client testimonials, and inadvertent emails.

## The Stats

The ABA's annual Legal Technology report suggests that lots and lots of lawyers are on social media. The 2014 survey results included these stats:

- 96% of attorneys have a LinkedIn account;

- 33% of lawyers have a presence on Facebook;
- 10% of lawyers maintain a Twitter account;
- 8% of lawyers maintain a legal blog.

For law firms, the figures are even higher: 52% on Facebook, 19% on Twitter, 24% with blogs.

## The Easily Avoidable Gaffes

Many lawyers find themselves in trouble after social media missteps because they forgot the basic rules of civility that our parents tried to teach us as kids: be nice, play well with others, treat everybody like you'd like to be treated. None of those guidelines are unique to social media; it's simply that when we ignore them on the Internet our misconduct is memorialized for ridicule and quite possibly legal discipline.

## Think It, Don't Tweet It

A Kansas court of appeals research attor-

ney was fired and subject to Bar discipline in 2013 when she tweeted insulting comments about former Kansas Attorney General Phill Kline during his own disciplinary hearing concerning alleged lies about his agency's investigations into abortion providers. The research attorney, Sarah Peterson Herr, tweeted that Kline was a “naughty, naughty boy” and then criticized his facial expression during the disciplinary hearing: “Why is Phil Klein [sic] smiling?” she wrote. “There is nothing to smile about, [derogatory name].” (Apparently Herr's spelling needs as much work as her impulse control.) Herr later apologized, saying “I didn't stop to think that in addition to communicating with a few of my friends on Twitter I was also communicating with the public at large.”

## You're Not Funny, Just Offensive

Oceans of ink have been spilled over the ongoing email scandal at the Pennsylvania Supreme Court. So far Justice Seamus



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McCaffery has resigned and Justice Micheal Eakins has been suspended for sending not-safe-for-work photos and jokes about minorities and women. Eakins argued that his emails were just harmless “male banter” and “locker room” humor. In late 2015 the Pennsylvania judicial disciplinary board disagreed, concluding that the jokes “tainted the Pennsylvania judiciary in the eyes of the public.”

### Disguises Work for Batman and Superman but Not for Online Lawyers

Former Arkansas Circuit Court Judge Mike Maggio is apparently a huge LSU fan, often posting on a popular LSU fan board under the pseudonym “Geauxjudge.” Many of those posts were full of offensive jokes and insults to women, while one disclosed confidential information about the adoption of a baby by movie star Charlize Theron that took place in his courthouse. Unfortunately for Maggio, the state judicial ethics board had little difficulty piercing the veil of his pseudonym and permanently barring him from serving as a judge. Maggio won't have to worry about finding a job anytime soon, however, as he'll be spending the next few years in federal prison for accepting a bribe to reduce a jury verdict against a nursing home from \$5 million to \$1 million.

### No Selfies in the Courthouse

Attorneys aren't immune to the urge to snap cute photos with their phones and share them with their Facebook friends. But those selfies can lead to trouble when you take them in the courthouse. In 2015 Wisconsin Criminal Defense Attorney Anthony Cotton got in hot water with a judge after capturing a courtroom selfie with his client after a not guilty verdict in a murder trial. The judge was concerned that the photo might traumatize the victim's family or inadvertently show jurors' identities. Also in 2015, Pittsburgh Assistant District Attorney Julie Jones angered her boss by posing with weapons that had been entered into evidence in a criminal case. After the photo was posted on a colleague's Facebook page, the district attorney's office commented that Jones' conduct was “contrary to office protocol with respect to the handling of evidence” and was being investigated.

### The Good Tweeters

It is possible to use social media to benefit

both you and your audience without being disbarred or fired. Check out Don Willett, the Twitter laureate of Texas, who also happens to serve on that state's supreme court. He tweets using the handle @JusticeWillett. The justice has been written up in the *New York Times* for his “oblique political commentary (“When it comes to legislating from the bench—I literally can't even”), savvy cultural references, and good-natured sports talk.” Or UNC School of Government faculty member Jamie Markham, whose entertaining and informative Tweets cover everything from sentencing law to the scary face he once found in a jalapeno. Find him on Twitter @jamie\_markham. (The author, a proud Blue Devil, notes approvingly that both of these smart and funny attorneys are Duke Law grads.)

### The Rules

None of the Rules of Professional Conduct that govern lawyers in NC is aimed specifically at the use of social media. But that doesn't mean that attorneys are free to act as they wish online. The same rules that restrict deceptive, offensive, or inappropriate behavior by attorneys in the real world also restrict attorney behavior in the digital world. If an attorney can't do something in person, she can't do it online either.

A few examples:

#### *Social Media Investigations*

Rules 4.2 and Rules 4.3 limit an attorney's ability to interact with third parties who are represented by counsel or who may be adverse to her client's interests. Combined with Rule 8.4, the general prohibition against deceitful conduct, these rules mean attorneys must be careful when using social media to investigate opposing parties, witnesses, and potential litigants.

Although the North Carolina State Bar has not issued any opinions on this issue, the lessons from other state bars are fairly consistent. All public Facebook posts are generally fair game for viewing by attorneys. But an attorney can never send a Facebook friend request to a represented person or to jurors. It's also a no-no for attorneys to conceal their identities when sending Facebook friend requests for investigatory purposes by using pseudonyms or other peoples' Facebook accounts. Some states require an attorney who sends an investigatory friend request to fully disclose his identity as an attorney involved in a particular legal dispute. See the

Law Firm of Military Veterans is seeking Veterans for their growing law firm. PI Jr Associate Attorneys (0-3 years' experience and recent grads). Salary commensurate with experience. Please send cover letter and resume with references to Ron@youhurtwefight.com

*Social Media Ethics Guidelines* issued by the New York State Bar Association in June 2015 for an excellent summary of the most recent rules and opinions on the use of social media for investigations.

It's not just legal ethics you need to worry about when using social media for investigations, especially when those investigations arise in the employment setting.

Consider clients who wish to investigate potential hires using Facebook or other social media networks. So long as the attorney doesn't advise the client to conceal its identity on Facebook, this activity probably would not trigger any legal ethics concerns. But it could lead to employment law problems if the client stumbles upon protected information about job candidates (religion, disability, sexual orientation, etc.). For more guidance on this issue, please see School of Government Public Employment Law Bulletin #38, *Using the Internet to Conduct Background Checks on Applicants for Employment*, October 2010, by Diane Juffras.

Similar employment law concerns arise if an attorney assists a client's social media investigation into potential misconduct by current employees. Those legal risks increase tremendously if the client uses coercion to obtain access to nonpublic Facebook posts. Forcing an employee to provide access to a Facebook account (be it her account or that of another employee with whom she is a Facebook friend) could violate state laws prohibiting that practice as well as the federal Stored Communications Act. Although North Carolina has not adopted any prohibition on this issue, more than two dozen other states have. See [ncsl.org](http://ncsl.org) for a summary of state laws concerning employer access to employee's social media accounts. *Ehling v. Monmouth-Ocean Hospital Service Corp.*, 961 F.Supp.2d 659 (D.N.J. Aug 20, 2013) discusses how the Stored Communications Act applies to nonpublic Facebook posts.

### *Scrubbing Your Client's Social Media Sites*

Attorneys need to worry about their own clients' Facebook pages as well as those of opposing parties. The "competency" requirement in Rule 1.1 obligates attorneys to counsel clients on the potential legal impact of their social media activity. NC 2014 Formal Ethics Opinion 5. This guidance makes clear that it is not only wise for attorneys to recommend that clients filter their social media posts, but obligatory.

An attorney can go too far in this direction, however. Deleting existing Facebook posts and failing to preserve copies for discovery purposes might violate rules governing the spoliation of evidence and violate ethical rules requiring candor to the court and opposing parties. See *Lester v. Allied Concrete Co.*, 2011 Va. Cir. LEXIS 245 (Va. Cir. Ct. 2011 Sept. 6, 2011) for an extreme example (and for proof that it's rarely a good idea to wear an "I ♥ hot moms" t-shirt).

In *Lester*, a wrongful death plaintiff lost his young wife in a tragic accident and claimed severe emotional distress as a result. Yet prominently displayed on his Facebook page were photos of him drinking beer while surrounded by young female adults and wearing the questionable t-shirt. Reasonably fearing that these posts undermined his client's claims, the attorney ordered the client to delete his Facebook account. The defendant had already submitted discovery requests, including a request for all social media postings by the plaintiff. Nevertheless, the attorney concluded that he could still certify that the client had no social media accounts because the Facebook page had been deleted before the attorney signed the discovery response. The court and the State Bar took a dim view of the attorney's actions, sanctioning him for \$700,000 of the defendant's legal fees and suspending him from practice for five years.

### *Communicating with Judges*

It's fine to be friends with a judge. But be careful when accepting a Facebook friend request or a LinkedIn invitation from a judge before whom you regularly appear. And definitely do not use social media to contact a judge during a pending proceeding for fear of violating the ban on *ex parte* communications. See NC 2014 Formal Ethics Opinion 8.

### *Online Reviews*

Facebook, LinkedIn, Avvo, and other sites offer the opportunity for client reviews

and testimonials. It's fine for attorneys to accept (and even request) these reviews so long as they conform to traditional rules governing lawyer advertising. In particular, attorneys should make sure those reviews don't contain references to specific jury award amounts or promises that the attorney can get the same results for other clients. See NC 2012 Formal Ethics Opinion 8.

If you happen to get a bad online review, feel free to respond, but take care not to reveal confidential client information while doing so. Consider Illinois Employment Lawyer Betty Tsamis who replied to multiple negative online reviews thru the Avvo website with this:

"I dislike it very much when my clients lose, but I cannot invent positive facts for clients when they are not there. I feel badly for him, but his own actions in beating up a female co-worker are what caused the consequences he is now so upset about."

The Illinois State Bar reprimanded Tsamis for disclosing confidential information about the client while "exceeding what was necessary" to respond to the negative review.

### *"Reply All" and Misdirected Emails*

It's not just new social media networks that present ethical dangers for attorneys. Good old email can create just as many headaches. Consider the seemingly innocuous "reply all" button. How many times have you seen that button misused on your office? Misdirected emails can do more than embarrass the sender and annoy the recipients. When they occur in connection with litigation, they can violate the ethical restrictions against communicating with a represented party and raise attorney-client privilege concerns.

NC 2012 FEO 7 discusses how and when the ethical prohibition against contacting represented parties in Rule 4.2(a) is violated thru use of the "reply all" button. In general, an attorney may not email an opposing party without the explicit consent of that party's attorney. The fact that an attorney cc'ed her client in an email to the opposing attorney does not automatically give the opposing attorney permission to email that client thru use of the "reply all" button.

A misdirected email usually will not be fatal to the attorney-client privilege so long as the sender takes quick action to remedy the mistake. See *Multiquip v. Water Management*

*Systems*, 2009 WL 4261214, (D. Idaho) for an example of how a court would typically deal with confidential communications inadvertently sent to opposing parties via email. The court bases its analysis largely on discovery and evidentiary rules that forgive the inadvertent production of privileged materials in the discovery process so long as the sender took reasonable steps to prevent the disclosure and to remedy it once it occurred. See North Carolina Rule of Civil Procedure 26(b)(5)(B), the nearly identical Federal Rule of Civil Procedure 26(b)(5)(B), and Federal Rule of Evidence 502(b).

But repeated email mistakes could demonstrate that the attorney was not taking reasonable steps to protect the confidential information. (Did you know you can install a pop-up warning box for "reply all" emails? Google the "TuneReplyAll" add-on for Outlook.) A court could then conclude that any privilege attached to the misdirected emails was waived while also questioning that attorney's competence under Rule 1.1.

It's not just the sending attorneys who need to worry about misdirected emails. The recipient of an email that was clearly not intended for that attorney has an ethical obligation under Rule 4.4 to "promptly notify the sender." The rule does not explicitly require the recipient to stop reading or destroy the misdirected email.

That said, the wisest course of action for an attorney who receives information she knows she wasn't supposed to receive is to seek guidance from the sending party or the court as to how she should proceed. See "Inadvertent Disclosure and the Attorney-Client Privilege," *California Bar Journal* (Wendy L. Patrick, August 2011), and "What Do You Do With Misdirected Documents?" *Florida Bar News* (Jeffrey M. Hazen, June 2010) as well as New York City Bar Association Formal Opinion 2003-04.

The NC State Bar has not issued an opinion directly on point. But a 2009 opinion barring attorneys from using confidential information inadvertently in an electronic communication as embedded metadata suggests that North Carolina would also frown upon attorneys who used confidential information in emails that clearly were not meant for their eyes. See 2009 FEO 1. ■

*Chris McLaughlin is an associate professor of public law and government and the UNC School of Government.*

# New Rules for Permanent Relinquishment of State Bar Membership

BY ERIC M. FINK

Until recently, North Carolina attorneys who ceased to practice law in the state had no recognized means of voluntarily terminating their membership in the State Bar.<sup>1</sup> New rules adopted last Fall<sup>2</sup> now establish a process and conditions for permanent relinquishment of State Bar membership. With this change, North Carolina joins the majority of US jurisdictions with similar provisions for voluntary resignation outside the disciplinary context.

Under the new rules, “A member of the State Bar may petition the council to enter an order of relinquishment.”<sup>3</sup> The rules spell out conditions that an attorney must satisfy before the council will grant the order of relinquishment:

- There must not be any unresolved complaints of professional misconduct against the petitioner.
- The petitioner must not have any outstanding financial obligations to the State Bar (i.e. “all membership fees, Client Security Fund assessments, late fees, and costs assessed by the North Carolina State Bar or the Disciplinary Hearing Commission, and all fees, fines, and penalties owed to the Board of Continuing Legal Education.”)
- The petitioner must have completed the wind-down of their law practice, pursuant to the terms of Subchapter 1B, Rule .0124 and any other applicable law.
- The petitioner must acknowledge that the State Bar retains investigative and disciplinary authority for any alleged misconduct by the petitioner prior to the order of relinquishment; that the petitioner may regain a license to practice law in North

Carolina only by satisfying the requirements applicable to a first-time applicant for admission to the State Bar; and that the confidentiality provisions of Subchapter 1B, Rule .0129 will not apply to any information pertaining to professional misconduct that the State Bar receives after entry of the order of relinquishment.

The procedures and conditions under the new rules provide a two-fold safeguard against manipulative resignations by attorneys hoping to evade their professional responsibilities. Review of petitions by the State Bar Council provides an opportunity to identify any pending complaints or unfulfilled obligations before granting relinquishment. Retaining jurisdiction over prerelinquishment misconduct enables the State Bar to investigate and remedy any complaints that only come to light after the fact.

Attorneys may have different reasons for wanting to resign from the Bar. Some jurisdictions do not offer the option of inactive or retired status for nonpracticing members. In those jurisdictions, resignation may be the only way to avoid the continued expense of maintaining a license that the attorney no longer intends to use.

Even in jurisdictions like North Carolina, where inactive or retired members are excused from payment of annual fees, a lawyer might desire to relinquish Bar membership for nonfinancial reasons. An attorney might conclude that the activities or positions of the Bar are inconsistent with their beliefs, and may want to resign as a matter of protest or principle. In such cases, constitutional principles, most notably the right of association under the

1st & 14th Amendments, come into play.

Of course, “a state may constitutionally condition the right to practice law upon membership in an integrated bar association.”<sup>4</sup> Compulsory Bar membership for practicing attorneys is justified by the state’s compelling interest in regulating the legal profession and enhancing the quality of legal services.<sup>5</sup>

But if an attorney is willing to give up the right to practice of law, imposing continued Bar membership becomes constitutionally suspect. Even without the imposition of fees or other membership obligations, the inability to resign amounts to a state-compelled association. While many might view that association as cherished, or at least benign, for others it may be a tie that chafes at the conscience. Having surrendered the rights and privileges of bar admission, they should be permitted to sever the associational tie as well.

North Carolina’s new rules for voluntarily relinquishing State Bar membership strike an appropriate balance between the institutional and individual interests at stake. The conditions for relinquishment preserve the State Bar’s ability to hold attorneys to their professional responsibilities. Subject to those reasonable conditions, attorneys who, for whatever reason, wish to give up the practice of law in North Carolina and the associational tie it entails now have that option. ■

*Eric M. Fink is an associate professor of law at Elon University School of Law.*

CONTINUED ON PAGE 31

# BarCARES and LAP—Working in Harmony

BY ZEB BARNHARDT AND ROBYNN MORAITES

There is some confusion for some between the NC Lawyer Assistance Program (NC LAP) and BarCARES. We hope to clear up the confusion. Both programs assist lawyers who need counseling, medications, or treatment for the full panoply of addictions and mental health issues. Both are confidential programs. Both are also free of charge. But they operate very differently—each working as a superb complement to the other.

NC LAP is a program of the NC State Bar, and the BarCARES Program is sponsored by the NC Bar Association (NCBA). BarCARES provides referral for counseling services to lawyers who are either members of the NCBA or of local bar associations that have subscribed to the program. The program also serves district court judges, paralegals, and members of the Eastern Bankruptcy Institute. Members in qualifying districts are entitled to three free visits a year with a counselor in the BarCARES referral network. In many districts, a unique feature of BarCARES is that any of the three free annual visits may be used by a family member and are not limited to only the lawyer. Following the free visits offered within BarCARES, an attorney can generally continue work with the same counselor, if need be, using insurance benefits.

All BarCARES contact is made through HRC Behavioral Health & Psychiatry, PA, the organization that administers and arranges counseling provider services for the BarCARES program. BarCARES has a network of counselors and therapists across the state who specialize in treating a wide variety of mental health and addiction conditions, as well as work with normal stress and personal dilemmas that could interfere with lawyer performance and/or quality of life.

NC LAP provides services to all lawyers, judges (both federal and state), and law students in the state. While NC LAP has three full-time, licensed counselors on staff and provides some short-term or targeted direct counseling services, most of their work involves initial assessment, referral, and longer-term support and case management. First, NC LAP

provides an initial consult to determine what issues most need attention and assistance. NC LAP then refers lawyers to counseling services that are likely the best fit, or makes treatment recommendations based on the unique needs of the lawyer. NC LAP may pull from its network of over 200 lawyer and judge volunteers across the state who have overcome similar issues, and connect the lawyer with a peer support person or a lawyer discussion group. For lawyers who are recovering from any drug or alcohol problems, NC LAP supports them when they return from treatment for the first few years with mentor pairing, support groups, and case management. NC LAP also runs peer support and discussion groups across the state. These groups are not limited to lawyers recovering from alcohol or drug problems—lawyers dealing with stress,



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depression, and other issues also benefit. Many lawyers who engage with NC LAP long term eventually become volunteers. NC LAP provides ongoing training for its volunteers, and through its support groups and annual conferences, volunteers and clients become a tight-knit community across the state.

BarCARES and NC LAP work cooperatively and cross-refer. For example, if a lawyer contacts NC LAP and is located in a BarCARES district, in the event long-term counseling is recommended (and it almost always is), NC LAP will match the lawyer with the most suitable counselor in the BarCARES network, so that the first three visits each year are free. For example, NC LAP counselors know which counselors in the BarCARES network specialize in career counseling, divorce, depression, and the like. And NC LAP can pair client and therapist personalities and approaches—sometimes we need a

comforting ear, sometimes we need a kick in the rear. Getting that match right is important. Sometimes a lawyer has a unique issue that requires a specialized counselor. When NC LAP has requested that lawyers be paired with such specialists, BarCARES has agreed to bring those NC LAP-recommended counselors “in network” for the benefit of the lawyer. This has proved especially helpful in smaller, more rural districts. Similarly, if a lawyer has been seeing a counselor in the BarCARES network, and the counselor thinks the lawyer would benefit from additional support like speaking to peers who have overcome similar issues, or that the lawyer needs more comprehensive, engaged support than traditional therapy can provide, the BarCARES counselor will recommend that the lawyer contact NC LAP. Lawyers who are cross-referred in this way sign releases allowing the BarCARES and NC LAP counselors to

confer about what would be most helpful to the lawyer along the way. Lawyers who take advantage of these programs fare incredibly well and receive a network of support enjoyed by few.

Both programs are confidential and work together for the good of North Carolina’s legal community. Each program can be contacted independently. Few states have such comprehensive resources available to their lawyers and judges. We should count ourselves lucky. ■

*Zeb Barnhardt practiced for 30 years in corporate and securities law. He was a member of the founding Board of Directors of BarCARES of North Carolina; chaired a task force to bring BarCARES and the NC LAP together to focus on common goals; and now serves as president of LAP Foundation of North Carolina, Inc.*

*Robynn Moraites is the director of the North Carolina Lawyer Assistance Program.*

### The Robin Williams in Each of Us

By Ronnie Ansley

When you look in the mirror, do you ever see Robin Williams staring back at you? Every attorney who has ever dealt with a client is in many ways like Robin Williams, in more ways than you may have considered. No, we are not funny all of the time, but we are relieving the pressures life can heap upon our clients, whether by their own doing or by someone else’s. Each of us is called upon to deal with the part of our population which, in many cases, cannot handle their own problems without the assistance of the professional who can say and do the things which will ease their situation, even if only for a short time.

When the audience arrives, the curtain goes up, and no matter what is going on in the life of the performer—whether Robin Williams or the attorney—the nerves must steady, the brain must switch on, and the words that come out must comfort, console, amuse, or otherwise ease the crowd. When information is conveyed that makes the audience/client uncomfortable, something must follow that will ease the crowd and make them feel as if they have not wasted their money on useless babble.

While a client is with the lawyer, the stage is lit and the performer is the most insightful person in the world. The client

believes the person they are with has insight and understanding they could only wish for. They turn their problems over to the lawyer and allow their problems to leave them. The problems are heaped upon the lawyer, who is left to deal with them—deal with them in a way that will make the client the good guy, no matter what the problem is. The client feels the attorney should make him or her laugh, cry, forget the problems, feel better—take the weight of the world off of his/her shoulders and put it on their own.

When the client leaves the venue, the attorneys, like Robin Williams, must study, work, review, prepare, practice, and spend countless hours getting ready for the next client/show/battle. The client is long gone, leaving the attorney to not only do the work and heavy lifting, but also the worrying about the client’s situation. Over time, bit by bit, the pressure begins to wear on the attorney and his/her mental attitude.

Comedians are always supposed to be funny, and attorneys are always supposed to be mentally strong, fighting for the client’s desired outcome, no matter what. We all know this is NOT correct nor a healthy way to live. However, too many of our colleagues buy into this way of thinking, which is detrimental to the attorney, the attorney’s family, the attorney’s business, and every part of the attorney’s per-

sonal and professional life. Left uncorrected, this type of thinking can be deadly. Far too often we lose brothers and sisters in our profession to depression, drug/alcohol abuse, or suicide.

IF you or someone you know is suffering, feeling alone, or is at the end of the rope, please know YOU ARE NOT ALONE. Talk to a friend or colleague, talk to a counselor, or contact the BarCARES Program or the NC Lawyer Assistance Program. We are very fortunate in NC to have some of the best resources in the country when it comes to lawyers’ mental health.

We all need somewhere and someone to turn to, to lean on, and to rely upon when we have reached the end of our rope. You have options. You have friends. You are not alone. Reaching out for assistance is a sign of strength, not weakness. We lost Robin Williams far too soon. You are an important part of our legal family, the legal community, and we need you healthy and happy for many years to come. ■

*Ronnie Ansley practices primarily in the areas of criminal & juvenile law, from traffic tickets to murder cases. Ronnie also works with parents of defiant children and offers consulting services to fellow attorneys helping them develop a “theory of the case” for upcoming criminal and civil trials.*

# Fulfillment through *Pro Bono Publico*—An Interview with Carole Bruce

BY JOHN GEHRING

**C**arole Bruce and our family have been friends since Jane (my wife) and Carole entered Wake Forest University School of Law in 1977. In particular, this friendship has centered upon exchanges of thoughts about how the world turns and how it should turn. Carole has taken the philosophy of *pro bono publico* as a personal goal toward a full and satisfying life. How did this all happen? Let us find out.

**John Gehring (JG):** Thank you for taking my interview questions. Please talk about your childhood and your early adulthood, and how your life then has molded the person you are today. What was Birmingham like in the 1950s and 1960s and what was the school and racial atmosphere like?

**Carole Bruce (CB):** Birmingham of the 1950s and early 60s was a totally segregated city. My dad was a Birmingham City policeman and he was enforcing segregation laws, so I saw life from his point of view. From 1955 through 1959, I rode the city bus to grammar school every day, from East Lake to West End, from one end of the city to the other, and changed buses in downtown Birmingham. That experience gave me another view of the efforts to integrate public facilities, which at time were frightening. I think I realized fairly early on that enforcing segregation was very harmful to my dad's mental health, and that treating all people as equals was the fair and right thing to do.

My dad would take my older brother and me to all parts of Birmingham; he had

friends both white and black and would lend a hand to anyone. It was quite a dichotomy to know that he believed it was his duty to follow orders and to go with him to black folks' homes and meet them on a one-to-one basis. I think that taught me that we're all human beings.

My mother worked in the credit department of Busch's Credit Jewelers; their advertising line was, "50 cents down and 50 cents a week." During summers and holidays, I'd work there wrapping packages and working on files. At the end of my first day during the Christmas season, Mother said to me, "Carole Jeanne, you need to learn that every gift someone buys is very special to that person, and you need to treat that person and their gift with respect." That's a lesson I remember often.

**(JG):** When did you decide that you wanted to be an attorney, and what was your pathway toward that goal? When did the idea of public service enter the equation, and what (or who) guided you in that direction?

**(CB):** When I was lucky enough to receive two scholarships to Auburn University, I thought the highest and best career I could possibly have was to become a shorthand and typing teacher, so I began majoring in Business Education. An aha moment for me was my first day in Accounting 101; when I understood that debits equal credits, the world made sense to me and I knew I wanted to be an accountant. After about seven years with a Greensboro CPA firm in their tax department, I joined the law firm of Smith Moore Smith Schell & Hunter as a tax pre-

parer. I never considered law school as an option until one Saturday night in early January 1977. At dinner, Roger Soles, then the president of Jefferson Standard Life Insurance Company, said to me, "Carole, you prepare my income tax return, but you can't sign it; you need to go to law school." I thought about that on Sunday and on Monday morning, I called Wake Forest Law School to see what I needed to do to apply.

One of my earliest mentors was Mildred Mashburn, a CPA and partner of A.M. Pullen & Co. Millie was a trailblazer as one of the first women to become a partner in a large CPA firm. She was also active in the Greensboro community and the chair of the Greensboro ABC Board. Her term ended shortly after I finished at Wake, and she encouraged the city to appoint me to the ABC Board. That was my first volunteer activity, which I have jokingly said was representing the women drinkers of Greensboro.

I found that I really enjoyed being a part of an effort to make a difference in people's lives and was asked to participate on the boards of United Way, Hospice of Greensboro, and Cone Hospital. Over the years I have developed a personal philosophy that social and economic justice can grow when all people have access to a healthy lifestyle, education, and economic opportunity. Most of my volunteer work has been centered in these areas.

**(JG):** It has been said that the "conservatives" and the "progressives/liberals" of our nation and state have similar ideas of the needs of our people (such as food, clothing,

shelter, medical care, education, and peace of mind), but cannot agree on how to meet those needs. Yet, your public service efforts have succeeded in bringing people of different philosophies together toward common goals. How have you accomplished this miracle and, in particular, how have you balanced the requirements of a busy law practice with your other efforts?

(CB): I agree that most people in our country want equal opportunity for all people. I think in all settings we need to hold that goal as our highest goal and work towards it. When we can listen more that we talk and always put the goal above our egos and personal objectives, I think we continue to make progress. We need so many different people at the table to make certain we understand as well as we can the diverse issues and challenges people face. Over the years I have learned from so many people the importance of the process and of perseverance toward the goals we have established.

On the question of life balance, I have joked that I spend 50% of my time practicing law, 50% volunteering, and 50% with my family. I think each one of us makes time for the things that we believe are important. One of my rules is to participate only in volunteer activities about which I am passionate, that makes me find the time.

(JG): For those of us in the legal profession, the concept of *pro bono* usually means offering legal services for free to those who cannot afford to pay. Please describe your idea of public service and why you have expanded this philosophy beyond the law office. Would you comment on some of your current projects?

(CB): My volunteer work has been very separate from my legal practice. That separation of focus gives me variety and joy in both my practice and my volunteer activities. I've enjoyed meeting people from all over the community and from all walks of life, which makes me a more understanding person.

One perspective I think about is the fact that I don't have any children, and that children give many people a sense of legacy that is very meaningful. I hope in some small way, some of the projects I've worked on will create a better community for all of us, which will be a legacy for me to leave behind.

Currently I'm very excited about working on the Union Square Campus project, the Greensboro-Randolph Megasite, the Greensboro Science Center fundraising, the Greensboro Police Foundation Board, and the Cone Health Board. I think Greensboro and the Triad are on the cusp of recapturing economic vitality and opportunity for all its citizens.

(JG): Who have been your mentors and who are your heroes? In your spare time, and I cannot imagine when you find spare time, what are your hobbies?

(CB): I have had incredible opportunities to work with and learn from so many committed and caring people over the years—too many to name—and yet each one has taught me a special lesson I'll always remember. I am truly thankful for each one.

In my spare time, I'm still struggling to learn to play golf, I'm trying to work out regularly, and I'm spending time with my junkyard rescue dog, Buddy. On the golf front, I'm lucky to be on the boards of The First Tee of the Triad and the Wyndham Championship, so I get to share my love of golf with those activities.

(JG): What advice do you have for the young lawyer, and us gray hairs, for using our talents to make North Carolina a better place in which to live? Any other thoughts about your life in the law?

(CB): I think each one of us needs to find our own joy and peace in life, and that's probably different for each and every one. For some, the practice of law is all fulfilling, and for others, more diversity is desirable. The important thing to me is to be joyous and thankful each day.

My life in the law is so very meaningful to me because of the relationships with people I've had over the years. Given the nature of my practice—tax and estates—I have worked with many clients for many years. There's nothing more special to me



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than for a client-friendly to say to me, "You've meant so much to our family." ■

*John Gehring, a former State Bar counselor and chair of the Publications Committee, is now semi-retired, which means that he "works less and enjoys it more."*

## Relinquishment of Membership (cont.)

### Endnotes

1. L. Thomas Lunsford II, *Hello! You Must Be Going!*, 18(1) NC State Bar Journal, Spring 2013, Resignation by attorneys under investigation for alleged misconduct

is governed by the State Bar's Discipline & Disability Rules, 27 NCAC 1B, Rule .0117.

2. 27 NCAC 1A, Section .0300.
3. 27 NCAC 1A, Rule .0302
4. See *Keller v. State Bar of California*, 496 US 1, 8 (1990), quoting *Lathrop v. Donohue*, 367 US 820, 849 (1961) (Harlan, J., concurring).
5. *Keller*, 496 US at 7-9, 13-14; *Lathrop*, 367 US at 842-33.

# Special Education Team Impacts System

BY ELAINE WHITFORD

**L**ong time legal aid attorney Christine Trottier has retired from the practice of law, but leaves a vibrant legacy at Disability Rights North Carolina—the Special Education Juvenile Justice Project (SEJJP). Lisa Rabon, her longtime colleague in the project, said, “Working with Chris taught me everything about special education law. She was my mentor, she guided me, and really not only

helped me to learn the laws of special education, but also how to be a better advocate for my clients than I had ever been before.”

The SEJJP was the brainchild of attorneys Deborah Greenblatt and Christine Trottier. The two attorneys helped launch Carolina Legal Assistance (CLA), the predecessor of Disability Rights NC. CLA was active in litigation on behalf of disadvantaged and vulnerable people with disabilities, including prison inmates, nursing home residents, troubled adolescents, and people with intellectual and developmental disabilities.

Some of CLA’s early accomplishments include:

- CLA co-counseled with Pamlico Legal Services to force the state to improve the quality of care of nursing home residents. A three-year lawsuit ended in a settlement in which the state agreed to regulate nursing homes by establishing guidelines and enforcing them through inspections, investigations, and penalties for violations.



*Christine Trottier celebrating being the first recipient of the Adele Foschia Award for Lifetime Cross-Disability Advocacy with her family: son and daughter-in-law, Ben and Liz Heinberg, and spouse, Richard Trottier.*

- A patient at a psychiatric hospital refused treatment for cancer and was declared incompetent through the “lunacy statute,” without notice or hearing. CLA filed suit on behalf of the patient and fought for the repeal of the lunacy statute before a commission of the General Assembly. The

statute was eventually repealed.

Every state has a designated protection and advocacy system, mandated and funded by the federal government to enforce the Americans with Disabilities Act and other disability rights laws. CLA’s track record of effectively fighting for the rights of people



with disabilities made the agency a natural fit to be designated as North Carolina's protection and advocacy system in 2007. CLA was renamed Disability Rights North Carolina that year.

As a legally-based advocacy organization, Disability Rights NC has a staff knowledgeable in the laws protecting people with disabilities and can take legal action to effect change impacting large populations. Disability Rights NC employs a blend of investigatory action, individual representation, educational outreach, and systems advocacy to ensure that the 1.9 million children and adults with disabilities living in North Carolina have a full opportunity to live safely and with dignity in the community of their choice. Its attorneys and advocates provide services at no charge.

As an integral part of that work, the SEJJP is housed on the Education Team, which was led by Chris Trottier prior to her retirement. Understanding that illiteracy and disability-related behaviors are the biggest predictors for school suspensions, Chris advocated for the rights of suspended students to receive the special education services to which they are entitled by law.

Jane Wettach, director of the Children's Law Clinic at Duke Law School, worked with Chris on statewide special education reform. Jane applauded Chris for being "a great inspirer." She recalled, "Chris was always willing to challenge the status quo to say 'that's not right,' and to be a leader by being the one to say 'what can we do about that, can we change the law, can we change the policy, let's try to fix the system.' She always wanted to use our tools as lawyers to make things better."

The Individuals with Disabilities Education Act (IDEA) requires that state and local education agencies provide a free and appropriate public education (FAPE) for all children with disabilities. The IDEA does not allow school systems to exclude students who are too severely disabled. It does not allow them to reduce services to children who are difficult to serve. Yet students with disabilities are frequently excluded from school based on behaviors related to their disabilities.

A study by The Civil Rights Project found that students with disabilities are suspended twice as often as students without disabilities.<sup>1</sup> And the consequences of letting these children slip through the cracks

can be devastating, contributing to what is commonly called the "school to prison pipeline."

The Southern Poverty Law Center reported in 2007 that "up to 85% of children in juvenile detention facilities have disabilities that make them eligible for special education services, yet only 37% had been receiving any kind of services in their school."<sup>2</sup>

Obviously, students who leave school and end up in the juvenile justice system have low prospects for gainful employment and independent living. It is an outcome that is tragic and altogether too common.

The education team at Disability Rights North Carolina wants to know two things when they take a case. Can they help a child who has been denied a free and appropriate public education? And can they bring change to a system that has failed to provide that free and appropriate public education for a number of children? So when the attorneys at Disability Rights NC heard from the mother of "Aaron," they knew they had to help him.

Aaron had been frequently suspended for a few days at a time for behavioral problems, once for ten days. He was given only packets of worksheets to keep him current on his schoolwork while at home, and received no special education services during that time. When Disability Rights NC took the case, his time on suspension added up to 50 days of the 185-day school year. Aaron was 8 years old.

This is the kind of case that fits the criteria of the Special Education Juvenile Justice Project (SEJJP), administered by Disability Rights NC and funded by IOLTA. The SEJJP addresses this problem and has a track record of keeping kids with disabilities in school where they can receive the educational services described in their IEPs. Many times, compensatory services are in order; if a child has missed instructional time, he is entitled by law to have those hours made up.

When a complaint was filed with the Department of Public Instruction (DPI), DPI separated the complaint into individual and systemic complaints and addressed the individual concerns first so Aaron's situation could be resolved quickly.

DPI required the school to provide Aaron with 175 hours of compensatory education, to include 50 hours of reading instruction, 50 hours of math instruction, 50 hours of social skills training, and 25 hours of counseling as a related service. DPI required training for the

staff and administrators of Aaron's school to include positive behavioral intervention strategies. The staff, administrators, and district officials would also receive training on disciplinary procedures, manifestation determinations, and the appropriate programming for students on suspension.

Aaron's situation has improved greatly. He was placed in a classroom with one other student, a highly skilled special education teacher, and an assistant teacher with the goal of a gradual transition back to the regular classroom. His behavior problems have reduced significantly, and he has made academic improvements as well.

Under the second systemic complaint, DPI went on to look at whether the district provided a free and appropriate public education to students with disabilities who were suspended longer than ten consecutive days. DPI found that the school system was not adequately serving students with disabilities.

DPI required the district to develop a protocol for obtaining technical assistance and consultation when students with disabilities are suspended for ten days or more, and for implementing FAPE, including proper communication, documentation, manifestation determinations, Functional Behavior Assessments/Behavior Intervention Plans, specially designed instruction, and educational services. In addition to the protocols, DPI required training of all administrators responsible for discipline in the district, and all exceptional children's instructional and administrative staff. These systemic changes, prompted by the complaint filed on Aaron's behalf, stand to benefit a large number of students within the school district.

Clients served through the SEJJP also included a seventh grader reading on a second-grade level, referred to the juvenile court system for school conduct violations. Because of Disability Rights NC's advocacy, he received comprehensive evaluations and reading assessments, which revealed a learning disability that impacted his ability to read. The school provided compensatory education including specialized reading instruction during the summer with a trained specialist.

The student successfully returned to school, and the case served as a catalyst for the school system to train special education and regular education teachers in data collection for effective behavior plans, rather than relying

CONTINUED ON PAGE 35

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## *An Interview with Christine Trottier*

**Q: Why did you help start Carolina Legal Assistance?**

When I graduated from law school in 1978, I was awarded the Reginald Heber Smith Law Fellowship, which was a poverty law grant from the Legal Services Corporation. I knew when I went to law school that I wanted to focus on representing low-income clients. Two years before I started law school, I had the opportunity to work for a legal aid program. My work experience coupled with my family background helped me realize that I wanted to work with people toward the goal of leveling the playing field for everyone. The legal profession provided the best opportunity for realizing that goal. It still does.

I was assigned to a special client project that became Carolina Legal Assistance (CLA). CLA started as a special project of the American Bar Association and the Wake County Bar Association in 1977. The program provided civil legal services to indigent patients at Dorothea Dix state psychiatric hospital. When I joined CLA, it had recently affiliated with the confederation known as Legal Services of North Carolina. I had a foreshadowing of CLA's potential and impact when its first director, John Decker, along with colleague Georgia Springer, filed a lawsuit on behalf of a woman who was declared incompetent through the "lunacy" statute without notice or hearing because she refused surgery as a cancer treatment.

Because of the vision of my colleagues, Debbie Greenblatt and Roger Manus, CLA evolved from a traditional legal aid program serving patients in state psychiatric hospitals, to a statewide mental disability law reform program. We pursued strategies to make the service delivery systems more responsive to our clients' needs. We represented clients who, because of their disabilities and poverty, were lost in the public and institutional service systems that were supposed to help them. We wanted to change that.

**Q: What kinds of issues did you want to see addressed by CLA?**

Every client's case presented crucial issues, as we only accepted cases consistent with our mission and priorities. Because of my clients

and colleagues, I learned to value and appreciate cases that presented issues compatible with multidisciplinary strategies consisting of public education and training, public policy advocacy, and litigation. We were more successful with our cases when we pursued multiple strategies. For example, the litigation referenced above was a catalyst for repealing the "lunacy" statute. Another example was when I co-counseled with Jack Hansel of Pamlico Legal Services to enforce the rights of nursing home patients. Our litigation culminated in a settlement agreement establishing the state's responsibilities to regulate nursing homes, document violations, assess financial penalties, and protect nursing home patients' rights to adequate care. We also trained licensure staff about the rationale for and relationship between the new patient care guidelines and the settlement agreement when performing inspections and investigations in nursing homes. In addition, this litigation was a catalyst for the enactment of legislation establishing a system for imposing penalties against nursing homes for violations of patients' rights.

**Q: Why did you begin working on education issues?**

The Willie M. systemic litigation CLA pursued with private counsel (Melinda Lawrence, Sandra Johnson, Jerry Hartzell, and Robert McDonnell) and a public interest attorney (Loren Warboys) along with our individual cases consistently reminded me that special education was a crucial bootstrap for children and youth having to navigate the intertwining disadvantages related to poverty and disability. Access to appropriate educational services helped our clients become literate and acquire other skills needed to become employable. Illiteracy remains the biggest predictor for school suspensions, school drop-out, and juvenile court referrals. Education is also an opportunity for our clients (and everyone) to feel competent, which helps motivate them to continue with their education and pursue challenges.

On a personal note, all of my grandparents were immigrants, and so education became a religion in my family. However you define success, education is one crucial and

available avenue for achieving success. However, often you have to advocate for education to become available, accessible, and appropriate for everyone, especially students with disabilities.

**Q: How did you develop the strategy to have the greatest impact?**

Despite and because of limited resources, CLA pursued collaboration and coalition-building among local and statewide groups in order to continue working toward the goal of advancing the rights of people with disabilities. In 1998 when CLA lost all sources of stable funding and most of its staff, we submitted more grant applications. IOLTA was our boot-strap. An increase in our IOLTA grant allowed CLA to diversify its funding base to include training and advocacy contracts and projects. One project, The Special Education Juvenile Justice Project, helped juveniles and youth with disabilities stay in school through legal representation, and by helping parents and stakeholders (juvenile justice, mental health, and child advocates) through public education and training. To address system-wide violations, CLA—now Disability Rights NC—filed state administrative complaints against school systems for illegally suspending our clients from school and denying them their rights to special education. Our clients taught us that it was not enough to have them return to school, they also needed to receive appropriate educational services in order to learn how to read. The success of our administrative complaints often allowed us to improve educational services not only for our clients, but also similarly situated students throughout the school system.

**Q: How do you feel about passing the SEJJP to younger attorneys?**

I feel fortunate to know that this project will continue to operate with a dedicated legal team. This team and Disability Rights NC continue to champion the rights of the most vulnerable, and achieve the best legal outcomes for our clients. I am proud (and lucky) to have worked with creative, committed, and generous individuals who represent the best qualities of our profession. It doesn't get better than that. ■

# New Statewide *Pro Bono* Resource Center Launched

BY JARED SMITH

In 2010, the North Carolina State Bar adopted Rule 6.1, Voluntary *Pro Bono Publico* Service, which states in part: “Every lawyer has a professional responsibility to provide legal services to those unable to pay. A lawyer should aspire to render at least 50 hours of *pro bono publico* legal services per year.” In 2016, North Carolina lawyers now have a statewide, comprehensive initiative to support them in fulfilling this professional responsibility.

Chief Justice Mark D. Martin is pleased to announce the launch of the North Carolina *Pro Bono* Resource Center, the newest program of the North Carolina Equal Access to Justice Commission. The *Pro Bono* Resource Center is tasked with increasing *pro bono* participation statewide, initially focusing on connecting recent law graduates with projects that address unmet legal needs in Wake and Mecklenburg counties. It will also provide a way for North Carolina lawyers to report their *pro bono* service, and will encourage and support such service through recruitment, training, and communication. The center will be one of only a handful of statewide *pro bono* resource centers in the country. “We have worked to establish a statewide *pro bono* resource for years, and we have finally achieved that goal,” said Jennifer Lechner, executive director of the NC Equal Access to Justice Commission. “I know the center will increase the capacity to serve unmet legal needs and recognize the many *pro bono* efforts of North Carolina attorneys.”

At the helm of the *Pro Bono* Resource Center is Sylvia K. Novinsky, its inaugural director. “I could not be more excited to have Sylvia Novinsky as our first *Pro Bono* Resource

Center director,” said Chief Justice Martin. “As a national leader on *pro bono*, she will bring an unparalleled enthusiasm and professionalism to this new position.”

Sylvia comes to this role after nearly 20 years of service to the University of North Carolina School of Law, where she most recently held the role of assistant dean for public service programs. During her tenure at Carolina Law, Sylvia founded and advised the UNC Law *Pro Bono* Program, a national model for inspiring students and alumni to participate in *pro bono* service. She has also served as the institution’s associate director for public interest law, assistant dean for student affairs, and associate dean for student affairs. Sylvia also spends time inside the classroom as an adjunct professor, teaching Spanish for American Lawyers.

In addition to her career in higher education, Sylvia has experience working for legal aid. After receiving her JD from The American University’s Washington College of Law, Sylvia litigated federal employment-related issues and administrative unemployment, wage, and hour claims, and consumer cases for Peninsula Legal Aid in Virginia. She also has an understanding of legal aid program administration from her time as legal director for the Center for Immigrants’ Rights in New York, New York.

Finally, Sylvia has been a long-time advocate for *pro bono* and other access to justice issues in North Carolina. She was appointed to the commission in 2014 and served as co-chair of the *Pro Bono* Committee. Sylvia previously chaired the NC Bar Association’s *Pro Bono* Activities Committee, and has also served as a chair and member of the NCBA’s Latino Affairs Committee and member of

the 2011-2012 Strategic Planning *Pro Bono* Task Force. While at UNC, Sylvia served as an advisory board member for the Carolina Center for Public Service. Throughout her career, Sylvia has made frequent presentations about *pro bono* and public interest law at conferences. ■

*Jared Smith is the communications specialist at the NC Equal Access to Justice Commission.*

*The NC Equal Access to Justice Commission was established in November 2005 by order of the North Carolina Supreme Court and is chaired by Chief Justice Mark D. Martin. The mission of the commission is to expand access to civil legal representation for people of low income and modest means across North Carolina. To learn more about the North Carolina Pro Bono Resource Center, visit [ncprobono.org](http://ncprobono.org).*

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## Special Education Team (cont.)

on suspension and juvenile court referrals to address challenging behaviors.

Chris Trotter may have retired, but her legacy lives on in the SEJJP program and the education team at Disability Rights NC. ■

*Elaine Whitford joined Disability Rights NC in February 2010 as its first director of development.*

## Endnotes

1. Losen, Daniel J. and Gillespie, Jonathan, *Opportunities Suspended: The Disparate Impact of Disciplinary Exclusion from School*, The Civil Rights Project, August 2012, p. 13.
2. [splcenter.org/news/2007/09/11/splc-launches-school-prison-reform-project-help-risk-children-get-special-education](http://splcenter.org/news/2007/09/11/splc-launches-school-prison-reform-project-help-risk-children-get-special-education).

# Voter Education is the Key to Judicial Elections

CHARLES E. RAYNAL IV

ON BEHALF OF THE NCBA'S JUDICIAL PERFORMANCE EVALUATION COMMITTEE

**A**s we approach the general election in November, cable news networks, local papers, and social media saturate the public with information about the presidential race and statewide elections. But ask an average North Carolina voter which candidates they support for superior court and district court, and most voters respond with blank stares. Given the importance of our trial court judges, the lack of informed voters is a problem that we, the members of the North Carolina Bar, have the opportunity and the obligation to address.

It is beyond debate that North Carolina citizens are often uninformed about judicial candidates. There are many reasons for this. By most measures, our trial court judges are not politicians, but instead are public servants who spend most of their time serving their communities and a small amount of time campaigning. Most of us prefer our system to operate that way. Meanwhile, the media does cover the appellate court races—perhaps because there is a view that our court of appeals judges and Supreme Court justices have a broader impact on our communities and our state's policies because they interpret the law and establish binding precedent—but the media gives short shrift to elections

of our trial judges. Campaign funding follows suit, with only meagre attention given to our trial judges.

But the impact of our superior court and district court judges on the daily lives of ordinary North Carolina citizens cannot be overstated. Each year our district court judges handle tens of thousands of cases of domestic violence, child custody, juvenile matters, criminal cases, and a range of other civil cases, which impact the lives of our citizens and the harmony of our communities. Our district court judges often are a juvenile criminal defendant's first encounter with the legal system, and for that reason are perhaps the defendant's best opportuni-



ty for the legal system to alter behavior that can keep them out of our justice system and change the course of their life. Most of these cases never reach the appellate courts, but each of them affects our citizens, often in profound ways.

Although our superior court judges preside over fewer cases, they oversee civil and criminal dockets in cases, both large and small, that have significant impacts on our communities, including constitutional questions, zoning matters, and violent crimes including rape and murder cases. Our judicial system is not perfect, but ensuring that we have excellent trial judges is a first step toward getting it right.

With this backdrop, what is or should be the role of members of the North Carolina Bar during election season with regard to educating the public about trial court judges? The members of the Bar are uniquely situated to assess the qualifications and experience of our trial court judges and judicial candidates. In addition to court personnel, the members of the Bar who appear in court are the only citizens who regularly see our judges in action and have a basis to evaluate their demeanor, judicial temperament, judgment, and ethics.

Over the last decade, the North Carolina Bar Association's Judicial Performance Evaluation Committee (the JPE Committee) has facilitated a survey of incumbent judges and challenging candidates. The JPE Committee's members include over a dozen retired judges, practitioners, and nonlawyer representatives throughout the state. The Bar Association takes seriously its aim of having the JPE Committee be representative of the members of the Bar and the citizens of this state, in terms of ethnic and gender diversity and geography.

For each of the last three election cycles, the members of the Bar have risen to the occasion, completing over 35,000 evaluations in each cycle. The 2016 statistics for participation are impressive:

#### Phase I (Incumbent Judge Survey)

Unique Attorney Participants	3,788
Evaluations Completed	29,131
District Court Judges in Survey	146
Superior Court Judges in Survey	15

#### Phase II (Challenging Candidate Survey)

Unique Attorney Participants	2,164
Evaluations Completed	7,219
Total Candidates in Survey	80

This level of participation in the survey is high considering that the vast majority of the 23,000 North Carolina lawyers do not regularly, if ever, appear in court.

Survey participants rate each candidate on a five point scale in five discrete categories: (a) integrity and impartiality; (b) legal ability; (c) professionalism; (d) communication; and (e) administrative skills. The survey data is collected anonymously by independent consultant BDO Seidman and then reviewed independently by a statistician at NC State University. This year, as in prior cycles, the data that has been collected has

been substantial and has been certified as statistically reliable. Once reviewed, the survey results are reported and publicly available at [ElectNCJudges.org](http://ElectNCJudges.org).

The JPE Committee works during non-election years to improve the survey, including to address concerns expressed by candidates and survey participants. For example, members of the Bar and candidates have occasionally speculated that the survey results could be skewed if local Bar members conspire or collude to support or oppose a particular candidate in the survey. (To the best of the JPE Committee's knowledge, there has been no confirmed instance of collusion in the survey process.) A more important concern—consistently discussed by the JPE Committee—is that the survey results could be impacted by subconscious gender or racial bias. The JPE Committee has taken steps to address this concern and communicate clearly to survey participants to avoid subconscious biases, asking participants to focus on objective criteria and concrete experiences with particular judges in evaluating them rather than on the survey participants' general impressions of the candidates. The JPE continues to evaluate the phenomenon of survey bias and to solicit and receive comments from members of the Bar.

The Bar Association has now released survey results of our 173 trial judges for the 2016 election, and needs the help of the legal community to get these results to the voting public. There are at least four things we all can do regardless of whether we are litigators or tax lawyers, real estate lawyers or in-house counsel. First, in just five minutes we can each review the survey results online to educate ourselves about our local candidates and how our peers have evaluated them. Second, for those of us who participate in LinkedIn, Facebook, or other social media, with the click of a button we can share the survey results with our friends and colleagues. Third, we can ask our local Bar in all 100 counties to take note of the survey results and report on local elections in Bar meetings and publications. Finally, we can forward the survey results to local newspapers, television, and radio outlets to make sure the survey results are reported and reach North Carolina voters.

On behalf of the JPE Committee, thank you for participating in the survey and for sharing the survey results. ■

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*Charles E. Raynal IV is a partner at Parker Poe. He litigates business cases in federal and state courts, arbitrations, and government agency proceedings. He is the current chair of the NCBA's Judicial Performance Evaluation Committee.*

## District Court (cont.)

Commission, [nccourts.org/Courts/CRS/Councils/spac/Documents/statisticalrpt\\_fy13-14.pdf](http://nccourts.org/Courts/CRS/Councils/spac/Documents/statisticalrpt_fy13-14.pdf).

17. SL 1999, Ch. 237, s 17.17.

18. 2016 Report on Local Government Contracts for the Provision of Services, North Carolina Administrative Office of the Courts, March 1, 2016.

# The Privilege of Mentoring

BY SUZANNE LEVER

At its meeting on July 21, 2016, the Ethics Committee voted to revise the editor's note for 2014 Formal Ethics Opinion 1, Protecting Confidential Client Information When Mentoring, an opinion that was adopted by the council on February 1, 2016. The editor's note now cites a recent court of appeals opinion on whether a third party is an agent of the lawyer or the client such that the attorney-client privilege is not waived although the third party is privy to client-lawyer communications. The committee concluded that a lawyer should consider this appellate opinion when analyzing whether a protégé's presence during a client-lawyer consultation will waive the attorney-client privilege. The court of appeals opinion is *Berens v. Berens*, No. COA15-230, 2016 WL 1569215 (N.C. April 19, 2016).

*Berens v. Berens* is an interesting case. In *Berens*, the North Carolina Court of Appeals considered whether the attorney-client privilege is waived when a person—who has been designated by the client as the client's agent—participates in private communications between the lawyer and the client. The *Berens* court stated that an agency relationship arises when an agent has the express or implied authority to act for a principal and the principal has control over the agent.

Based on several unique factors, the *Berens* court held that an agency relationship did exist between the client and her friend/"personal advisor," an inactive member of the State Bar, for the purpose of assisting the client in her litigation against her spouse. Because the friend was an agent of the client, her presence and participation in private communications between the client and her lawyer remained subject to the attorney-client privilege.

2014 FEO 1 offers no opinion on whether *Berens* supports the proposition

that protégés are agents of their mentors or of their mentor's clients. This omission is not inadvertent. Whether an agency relationship exists is a matter of agency law. The Ethics Committee opines on lawyers' professional conduct as governed by the Rules of Professional Conduct. In general, the Ethics Committee will not respond to ethics inquiries that seek an opinion on an *issue of law*. 27 N.C.A.C. 1D § .0102(g).

Another issue of law raised by the inquiry in 2014 FEO 1 relates to the attorney-client privilege. Although the opinion examines the application of the ethical duty of confidentiality to communications to which a protégé may be privy, the opinion references—but does not determine—the effect the presence of a protégé may have on the attachment of the attorney-client privilege. Again, the omission is not inadvertent.

Ethics counsel receives numerous inquiries from lawyers regarding the attorney-client privilege as a consequence of lawyers' misconception that the privilege is encompassed within the Rules of Professional Conduct. Although the concepts of confidentiality and attorney-client privilege are often used interchangeably, only the duty of confidentiality is governed by the Rules of Professional Conduct. *See* Rule 1.6. The attorney-client privilege is a matter of common law and the law of evidence. The Ethics Committee can only speak to the application of the Rules of Professional Conduct.

Another distinction between the ethical duty of confidentiality and the attorney-client privilege is that the privilege applies to a much narrower category of client information than does the ethical duty of confidentiality. Comment [3] to Rule 1.6 explains:

[3] The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work product doctrine, and the rule of confidentiality established in profession-

al ethics. The attorney-client privilege and work-product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the client, but also to all information acquired during the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law.

Privileged information is always confidential information, but confidential information may not be privileged. In general, a lawyer has an ethical duty to protect a client's information under Rule 1.6(a). The duty of confidentiality "applies not only to matters communicated in confidence by the client, but also to all information acquired during the representation, whatever its source." In contrast, client information is deemed privileged only if: (1) the relation of attorney and client existed at the time the communication was made, (2) the communication was made in confidence, (3) the communication relates to a matter about which the attorney is being professionally consulted, (4) the communication was made in the course of giving or seeking legal advice for a proper purpose although litigation need not be contemplated, and (5) the client has not waived the privilege. *State v. McIntosh*, 336 NC 517, 444 S.E.2d 438 (1994).

To reiterate, the attorney-client privilege is not governed by our professional rules. Neither is the attachment or the waiver of the privilege. For that reason, 2014 FEO 1

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# An Interview with Robert “Bob” Mason, Board Certified Specialist in Elder Law

BY LANICE HEIDBRINK

**Q: What motivated you to become a specialist?**

I moved to North Carolina from a state (Georgia) that had (and has) no system of legal specialization. So the very existence of the system was a direct challenge to me. I'm a competitive guy and when you put a challenge in front of me I may well grab it. I also thought I'd be the local chief of a satellite office of a big law firm that merged with a larger out-of-state firm shortly after I arrived. I liked Asheboro, but I realized I better make a mark quickly if I wanted to “get the word out” and stay. Going for a certification seemed like the right thing to do.

**Q: You are currently serving as vice-chair on the Board of Legal Specialization. What do you like best about serving on the board? What challenges have you encountered in serving on the board?**

I can't believe that I have ended up on the Board of Legal Specialization! For years I was very involved in elder law matters. I served two tours as Bar Association section chair, on various committees, and the like. I have been involved in various elder law organizations nationally. It was all elder law. On the board, I have had an opportunity to get acquainted with different specialists. I have cast votes affecting other specialties. I have served on committees affecting the course of specialization over many areas. It's good to be reminded that I am a lawyer first, an elder law attorney second. I feel most privileged to have been given the opportunity of making friends from around the state who are truly “special” lawyers and judges.

My biggest challenge? Walking into a meeting and getting out of my elder law skin! I have to remind myself that I am serving the interests of the public and the

bar in everything from criminal law to trademark law.

**Q: What piece of advice would you give lawyers who are interested in pursuing certification?**

Do it! And start early. If you are a younger attorney who thinks you might be interested, take a look at the subject matter covered by your exam and make a conscious effort to take cases involving a variety of issues. Work on being...well...a specialist.

**Q: What would you tell someone who is intimidated by the thought of sitting for a certification exam?**

Tell yourself, “I can do this thing!” You're smart. You passed the bar exam. Look at what you need to cover, chop it up into segments, identify where you are weakest, and then attack it. But start where you're weakest.

Find a certified specialist/mentor to help you through it. The best would be a friend who is not afraid to hold your feet to the fire. A scholarly marine drill instructor who happens to be a specialist in your area might be good if you can't provide that internal motivation to study an arcane corner of the specialty four or five months before the exam.

Commit to the effort. It won't be easy. You won't be able to knock this off with a weekend of “looking things over.” But you can do it if you make the effort. If it was too easy, it wouldn't be special. But clearing that hurdle can be the happiest day since you passed the bar. Maybe happier.

**Q: How would you explain the benefits of specialization to someone who says, “I practice in a small town; specialization is for lawyers in large law firms in large cities”?**

Well, I've done both. I practiced with one of the world's biggest firms in Atlanta, and

one of the world's smallest firms in Asheboro. In the big firm, it may be one of those tickets you need to get punched to make partner. In the small town, it can be the one thing that sets you apart, gets the public to realize what you do, and perhaps even enables you to get on the path to building a regional practice. It is comforting for clients to know they are getting the same level of expertise “right at home” that they might otherwise have to go to the Big City to access.

**Q: What are the hot topics in elder law right now?**

Asset protection, trusts and trust taxation, and elder financial abuse.

**Q: How does certification benefit the public?**

Selecting an attorney is stressful. There are two general elements: competence and personal chemistry. There are plenty of good noncertified attorneys out there, but certification is an objective “Good Housekeeping” seal of approval. That's half the battle for the client.

**Q: How has specialization changed since you became a specialist?**

It's becoming even more specialized. We've added several specializations since I came on the board. It's becoming more like medicine in that it is tougher for someone to be a good general practitioner. There is simply too much there.

**Q: Finish this sentence: “I'm excited about the future of legal specialization because...”**

It is becoming more the norm than the exception.

**Q: Name the top three benefits you've experienced as a result of becoming a specialist.**

Great colleagues, an enriched practice, a sense of accomplishment.

**Q: You have always been a strong advocate for elder law continuing legal education and regularly travel to present on elder law**

CONTINUED ON PAGE 49



Mason

# Grievance Committee and DHC Actions

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## Disbarments

**Robert M. Chandler Jr.** of Rocky Mount surrendered his law license to the Wake County Superior Court and was disbarred. Chandler acknowledged that he misappropriated entrusted funds totaling at least \$117,300.

The DHC disbarred **William I. Diggs** of Myrtle Beach, South Carolina. Diggs acknowledged that he misappropriated entrusted funds totaling at least \$100,000.

**J. Hal Kinlaw Jr.** of Lumberton tendered his affidavit of surrender and was disbarred by the council. Kinlaw pled guilty in the US District Court for the Eastern District of North Carolina to the felony offense of bank fraud.

**Scott McCormick** of Winston-Salem surrendered his law license to the Wake County Superior Court and was disbarred. McCormick acknowledged that he misappropriated entrusted funds totaling at least \$3,000.

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## Suspensions & Stayed Suspensions

**Keith C. Booker** of China Grove was suspended by the DHC for five years. The DHC concluded that Booker neglected multiple clients, unintentionally misappropriated entrusted funds, and did not maintain proper trust account records.

Winston-Salem lawyer **Michael Paul Crowe** was suspended by the DHC for three years. In two criminal cases, Crowe subpoenaed State's witnesses to depositions in his office without notifying the ADA. The DHC concluded that he also engaged in a conflict of interest and dishonest conduct in an unrelated matter. After serving 18 months active suspension, Crowe will be eligible to apply for a stay of the balance upon showing compliance with numerous conditions.

**John "Monte" Holmes** of Sanford was convicted of criminal offenses including assault on a government official during an episode of public intoxication. The DHC suspended him for three years. The suspension is stayed for three years upon his com-

pliance with numerous conditions.

**Sandra C. Kullmann** of Charlotte was suspended by the DHC for three years. The DHC concluded that Kullmann commingled personal funds with entrusted funds, did not maintain client ledgers, did not reconcile her trust account, and did not properly maintain and disburse entrusted funds. The suspension is stayed for three years upon her compliance with numerous conditions.

The DHC concluded that **Christopher W. Livingston** of White Oak assisted a debt elimination organization in the unauthorized practice of law, attempted to share a legal fee with a nonlawyer, filed frivolous pleadings, knowingly made a false statement of material fact to a third person, engaged in conduct prejudicial to the administration of justice, and used means that had no substantial purpose other than to burden or embarrass a third person. The DHC suspended Livingston for five years. After serving two years active suspension, Livingston will be eligible to apply for a stay of the balance upon showing compliance with numerous conditions.

**Marlon B. Messer** of Altadena, California, was suspended by the DHC for two years. The DHC concluded that Messer aided a California business in debt adjusting and in the unauthorized practice of law in multiple states. The suspension is stayed upon his compliance with numerous conditions.

**John Brooks Reitzel Jr.** of High Point was suspended by the DHC for four years. The DHC concluded that Reitzel engaged in the unauthorized practice of law in South Carolina, a felony in that state. After serving two years active suspension, Reitzel will be eligible to apply for a stay of the balance upon showing compliance with numerous conditions.

**Sean David Soboleski** and **Jane (Soboleski) Dearwester**, husband and wife who practiced together in Asheville, were suspended by the DHC for three years. The DHC concluded that they did not properly reconcile their trust accounts, did not main-

tain accurate client ledgers, and did not properly maintain and disburse entrusted funds. As a result they disbursed client funds for purposes other than instructed by the client and received payments for legal fees before the fees were earned. After serving six months active suspension, they will be eligible to apply for a stay of the balance upon showing compliance with numerous conditions.

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## Censures

**Randolph Hill** of Raleigh was censured by the Grievance Committee. Hill did not participate in the State Bar's fee dispute resolution program and did not respond to the Grievance Committee.

The Grievance Committee censured **Marlon Howard** of Durham. Howard provided legal services to North Carolina residents as "of counsel" to an out-of-state law firm, thereby aiding others in the unauthorized practice of law and in debt adjusting, a crime in North Carolina. Howard also made false or misleading statements about his services, shared a fee with a nonattorney, and collected an illegal fee.

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## Reprimands

**Wayne Crumwell** of Reidsville was reprimanded by the Grievance Committee. Crumwell engaged in conduct involving deceit or misrepresentation by failing to disclose professional discipline on his initial application to the Dispute Resolution Commission for certification as a mediator, and repeatedly failing to disclose pending disciplinary proceedings and civil judgments on renewal applications.

**R. Kelly Calloway** of Hendersonville was reprimanded by the Grievance Committee. Calloway did not refund an unearned fee, did not participate in the State Bar's fee dispute resolution program, and did not respond timely to the Grievance Committee.

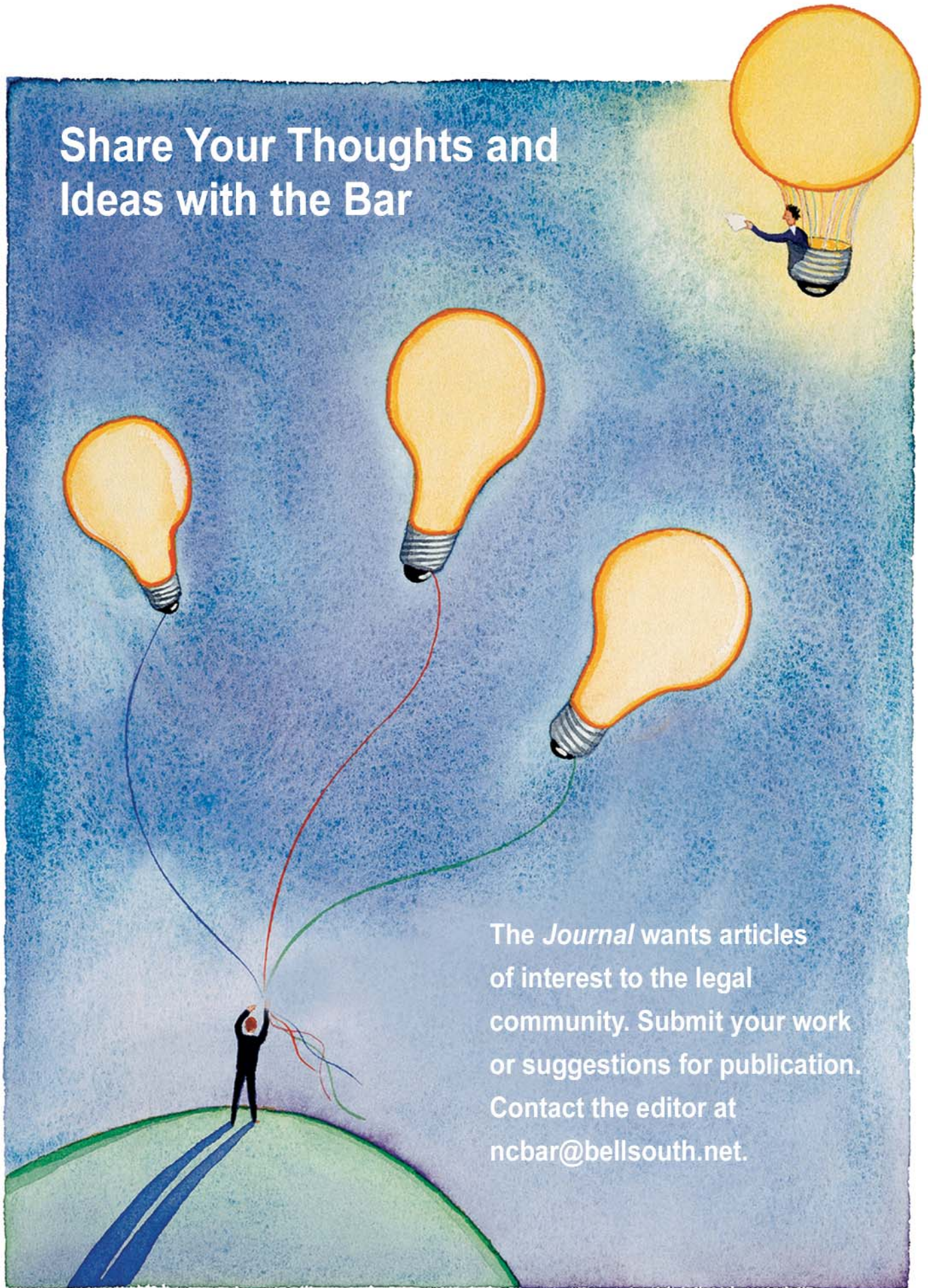
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## Transfers to Disability Inactive Status

The DHC transferred **V. Lamar Gudger III** of Asheville to disability inactive status. ■



# Share Your Thoughts and Ideas with the Bar



The *Journal* wants articles of interest to the legal community. Submit your work or suggestions for publication. Contact the editor at [ncbar@bellsouth.net](mailto:ncbar@bellsouth.net).

# How to Work for Multiple Attorneys and Thrive

BY JACQUELINE KING

Let's be honest, managing our bosses can feel like a cross between taking care of our children and our significant other. Much like children, we are tasked with keeping them organized, maintaining their schedules, preparing them, and making sure they have food at the necessary times. A "hangry" boss is no fun. When things go bad, we take the brunt of any moods and roll our eyes behind closed doors, like we do with our significant others. Then we dive in head first and fix the problem. It seems impossible at times, especially when they are playing tug-o-war and you are the rope. Other times there isn't enough ibuprofen in Walgreens to get through the day. Do not break. You can survive. I promise.

When I started in this field 13 years ago, I worked for one attorney. That appears to be the norm: one paralegal to one attorney. Now I get the pleasure of working for four. Yes, that's right, four—three partners and an associate. Sometimes I feel like my office should be a padded room. All I need is a straitjacket. Two attorneys thankfully have additional paralegals, and two have just me. The workload, which is the nature of the beast in this field, isn't the only difficult aspect. Prioritizing tasks and keeping each attorney organized is equally stressful and difficult.

The other day I was in my office, minding my own business (filing my nails, as my supervising attorney says). I looked up and I had one attorney sitting in the chair in my office and two standing outside my door. Kind of similar to when you're riding down the road and you see three or four vultures circling in the air. You feel an immediate onset of sympathy for the dead animal you know is in the field. That's me—the poor animal getting ready to be picked apart by the vultures. Each had a task they needed completed. Each task was equally important to them. My job? Handle it all. The ability to manage your workflow, and their workflow, and manage it sufficiently and timely, is the

most important job you have when working for multiple attorneys. Knowing your limits is the second.

I'm lucky enough to have four great bosses, each a mentor to me. Even better, I'm a rock star to them. I handle my business and I get the job done. The down side? I work for four of them. My sanity is questionable at times. Ask my husband. My firm is a small firm, but is leading the technology game in our area. It ascends above the norm in supplying me with the necessary tools to do my job and do it well.

The most essential tool I have is a task system. If you don't have one, get one. Now. Your top priority for yourself, and your firm, is to find a task system. It is imperative to effectively manage your work. A missed deadline is a work death sentence—say hello to the guillotine. Next, once you have it, use it. I know people who don't. It was nice working with them. Remember, it wasn't that long ago that the only way to function was with a list of tasks on a piece of paper, or a sticky note stuck to your monitor. Of course, the most important sticky note was always the one that fell off. It would stick to something else, or worse, it ended up being trashed. Now we live in a world with a mass amount of technology available at our fingertips. There is no reason to miss a deadline, or worse, a statute of limitation.

When all four attorneys expect that you will get that demand letter out, file the lien, prepare the accounting, and draft that answer, all at the same time, a task management system allows you to enter all of my tasks in one place. The task management system allows me to see what deadlines I have coming up and manage my weekly workload by deadlines and importance, not solely by answering whichever attorney is screaming the loudest. (Sometimes I almost expect steam to start coming out of their ears and their head to explode. Don't get me wrong. It could be entertaining. But, you know who would be left with the mess. Just

call me Cinderella.) When this happen to you, don't hesitate to tell each attorney that something has to take precedence. They rely on you to keep them tasked and make sure they don't miss deadlines. You are doing yourself, or them, no favors if you don't tell one attorney he has to wait because the other one has a deadline ahead of him.

Next, organization is key to alleviating some stress. (If you ever find a way to be stress free, bottle it and sell it. Hello, millionaire!) Organization also maintains a happy boss when you have four of them. It is guaranteed your attorney is going to be unorganized. (I believe it is a prerequisite to obtaining your JD, along with passing a sloppy handwriting class.) We are paid to stop that from spiraling too far out of control. When they are pulling their hair out and cannot locate the letter they just signed, we should be able to produce it with a smile almost immediately. If I have to climb to the top of Mount Correspondenceville (yes, that's a real place) to get it—because I haven't filed in two months—then the chances of me surviving in this field are slim to none. My boss is going to throw a temper tantrum when I can't produce what he needs, when he needs it. Think two-year old in full meltdown mode because he can't have ice cream for dinner. I'm guaranteed to miss something if my desk looks like the aftermath of a Category 5 hurricane.

Here is where I also have to advocate for going completely paperless. Yes, getting there will test every ounce of patience you have and make you question your sanity. You may look around and think it isn't possible, but I have lived to tell the tale. It really is possible. Once you go paperless, you will never put labels on another folder again! When your boss is yelling for you to find that one interrogatory response in a sea of thousands of responses, being able to pull the response in less than two minutes is like winning a paralegal gold

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# Messy, Unruly, Chaotic Life

BY ROBYNN MORAITES

**A**fter working at the NC Lawyer Assistance Program (LAP) for the past five years, I can say with confidence that most of what we see clinically is lawyers' and judges' responses to the serious difficulties of life and a career in law. Not that there isn't true psychopathology, because there certainly is. But it is a teeny-tiny fraction of what we encounter in the lawyers we see and work with day to day.

NC LAP follows a medical model as it relates to alcoholism. We have given hundreds of CLE talks emphasizing the biological factors in the brain that contribute to the development of the disease of alcoholism as it is defined by the American Medical Association. It is a medically researched and documented reality that once certain chemicals enter the brain, it will create a craving response for some people. However, that is only part of the picture. We sometimes joke in recovery that for an alcoholic, once you remove the "alcohol," you are left with the "ic." That is: you are left with the emotional turmoil and struggle to accept life as it comes at you. And that is most of what we see and deal with at LAP, whether a person drank over it or not. It is there where the real transformational work happens. How do we deal with life on Life's terms (rather than our own)?

Life is messy, unruly, chaotic, and unpredictable. We all know it—we live it every day. People do not behave as they should. Our well-trained, mellow dog suddenly snaps at a neighbor's toddler. Good children get into trouble. Spouses and teenagers spend money faster than we can make it. Loved ones get sick; they die. An aunt visits for a weekend and forgets to turn off the second floor bathroom sink faucet when going to bed, and the first floor ceiling collapses from water damage in the middle of the night. (True stories. All of them.)

The power of emphasizing resilience and

strength, and de-pathologizing normal struggle cannot be overstated. So much of our journey (here, in life) involves learning to accept our humanness. It is not easy work. And it involves evolution of our consciousness.

As an example, many lawyers are anxious or depressed because they are deeply unhappy in their current professional circumstance. They don't have a practice area that suits their particular talents or personality, or their firm's culture is not a good fit for them. Instead of accepting that fact and taking action to make a change, they mentally grit their teeth with grim determination to stay in their present circumstance. They tough it out because they think they should for various reasons. Maybe they are worried about financial insecurity even though they have substantial savings and can afford to make a move. Maybe they are striving to live up to an ideal their parents (alive or deceased) set for them about what it means to be a success. Maybe they are worried a spouse will leave if they are honest about wanting to make a change. The real work involves identifying these underlying issues, fears, and motivations that are often hidden to the person struggling with depression or anxiety.

While medication can be helpful for depression and anxiety, especially in the early stages of treatment and stabilization, it is not a permanent stand-alone solution to the scenarios outlined above. One can only medicate misery for so long before reaching a breaking point. While clearly depression, anxiety, and a host of other issues exist, it is rarely effective to view them as stand-alone illnesses to be treated as diseases using only a medical model. NC LAP utilizes a model of assistance based on collaboration between lawyers, their peers, and their counselors. Our role is to find and activate the lawyer's internal resources and to teach, model, and share healthy tools and coping mechanisms. For many lawyers, stoic self-reliance has been the architect of their downfall, and their learning



involves asking for help and being willing to take suggestion and direction from others to do something they think will serve no useful purpose (only to discover the glorious benefit once they have taken the action). If experience has shown us anything, it is that we can learn and grow from any circumstance if we are willing.

Growth and change are at the center of the disruptions that bring people to LAP. Something that used to work is not working anymore, whether it is our drinking or our thinking. What used to work to ease the nerves or create success in our lives is no longer effective. Our usual first response is to double down and try that tried-and-true technique even harder. But here is a secret I have learned in my time in recovery: anything we do we will eventually outgrow, no matter how good and effective it may have once been. We either leave it behind or it will boomerang on us. And when that boomerang hits, it hits us pretty hard. Lawyers usually come to LAP after the boomerang has hit them in the head...a couple of times.

Many lawyers think LAP is about not drinking. Sometimes it is. Mostly, however, it is about transformation of consciousness. It is about learning how to stay relatively sane and reasonably happy in a pretty insane

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# IOLTA Prepares to Make Grants with New Funding

## Income

Though we were pleased to see an increase in income from IOLTA accounts in 2015, that trend has not continued. The first quarter of 2016 showed a 3% decrease in income from the accounts as banks continue to adjust their interest rates downwards and a number of bank mergers result in less favorable bank policies. We are working on again strengthening our relationship with the NC Bankers Association, and will begin a communication strategy with banks to encourage more favorable policies. Revisions to the trust account rules now include credit unions under the definition of bank. We are working with the Carolinas Credit Union League to help them communicate to their constituent members how to become eligible to hold IOLTA accounts.

As previously reported, we have received a second distribution of funds from the Bank of America (BoA) settlement with the Department of Justice in the amount of \$12,071,404. As with the first BoA settlement funds received, these funds come with significant restrictions as to grants. The funds are to be distributed to legal aid organizations in the state of North Carolina to be used for foreclosure prevention legal assistance and community redevelopment assistance.

## Grants

As previously reported, the IOLTA trustees dramatically reduced the number of grants beginning in 2010 as we dealt with a significantly changed income environment due to the economic downturn, which has seen unprecedented low interest rates being paid on lower principal balances in the accounts. The trustees decided to focus grant-making on organizations providing core legal aid services. Even with that change, IOLTA grants have dramatically decreased by over 50% from their highest level of just over \$4 million in 2008 and 2009. During this downturn in income from IOLTA accounts, we have relied heavily on cy pres and other court awards desig-

nated for the provision of civil legal aid to the poor. Receiving our portion of the first funding distribution for IOLTA programs included in the settlement with Bank of America (\$842,896) was crucial to our ability to make 2016 grants.

The IOLTA Trustees decided to use half of the Bank of America settlement funds, leaving half to remain invested to use in 2017, as otherwise our reserve would be just under \$250,000. We were able to make just over a 3% increase in the individual grants and to bring total grants back to \$2 million—an emotional boost to all. Though the settlement funds are restricted to foreclosure work, we do have six strong legal aid programs that have been collaboratively handling significant foreclosure work. That work is highlighted in an article in the Winter issue of the North Carolina State Bar *Journal*. As other funds for this work are decreasing or ending, these funds will provide significant support to continue the foreclosure projects.

The IOLTA trustees decided to open a separate grant cycle in 2016-17 to begin to make grants with the additional Bank of America settlement funds received in 2016. Applications for that cycle are due August 1, decisions will be made at the September board meeting, and grant distributions will begin in the last quarter of 2016 on October 1. NC IOLTA has prepared a grant program description for this cycle that includes definitions of terms used in the restrictions applied to the funding and a description of the reporting that all IOLTA programs have agreed to make to the National Association of IOLTA Programs regarding work completed using the funding.

Given the large amount of funds received in the second BoA settlement distribution and the time required for some community redevelopment projects, it is expected that these restricted funds will be granted over a number of years.

## State Funds

In addition to its own funds, NC

IOLTA administers the state funding for legal aid on behalf of the NC State Bar. Total state funding distributed for the 2013-14 fiscal year was \$3.5 million. The state budget adjustments beginning in 2014-15 eliminated the appropriation for legal aid work (\$671,250 at that time). Total state funding distributed for the 2014-15 fiscal year from filing fees alone was just under \$2.8 million, and just over \$2.7 million for 2015-16. The Equal Access to Justice Commission and the NC Bar Association continue to work to sustain and improve the funding for legal aid.

## IOLTA Leadership

The State Bar Council appointed John B. McMillan and Edward C. Winslow III as chair and vice-chair of the NC IOLTA Board of Trustees for 2016-17. McMillan, a former NC State Bar president, is in private practice in Raleigh and also currently serves on the Equal Access to Justice Commission. Winslow, who was also appointed to a second three-year term as IOLTA trustee, has just completed service as managing partner at Brooks Pierce law firm in Greensboro where he practices in the areas of banking and financial services, including representing bankers associations and banks within and outside North Carolina.

In addition to reappointing Winslow, the council appointed two new trustees: 1) Maria Missé, attorney at law, who represents clients in counties throughout northeastern North Carolina, including Hertford, Bertie, Northampton, Gates, Pasquotank, Camden, Currituck, Perquimans, Chowan, Dare, Halifax, Martin, Washington, Beaufort, Tyrrell, Hyde, and Pitt and 2) Steven D. Michael of Sharp, Michael, Graham and Baker in Kitty Hawk, whose varied legal experience includes service as an assistant district attorney, a superior court judge, and a certified mediator. When he served as NC State Bar president, he worked with the Bar and IOLTA trustees to move to a mandatory program in North Carolina. ■

# Amended Trust Accounting Rules Approved by the Supreme Court

BY PETER BOLAC, TRUST ACCOUNT COMPLIANCE COUNSEL

**O**n June 9, 2016, the Supreme Court approved the amendments to Rule 1.15 that were discussed in detail in the last edition of the *Journal*. While there are many significant changes to the rules and its subparts, including a new quarterly review requirement, the most talked about change seems to be the requirement that any signatory to a trust account check complete a one-hour trust account management CLE.

Newly approved Rule 1.15-2(s)(2) requires checks drawn on a trust account to be signed by a lawyer or by an employee who is not responsible for performing monthly or quarterly reconciliations. Any lawyer or supervised employee with check signing authority must take a one-hour trust account management CLE course approved by the State Bar for this purpose. To allow CLE providers time to develop and obtain approval for appropriate courses and to allow a reasonable time for all law firms to come into compliance, the CLE requirement may be satisfied in 2017; however, compliance with the other signature requirements for trust account checks should be prompt. Completion of a one-hour trust accounting

CLE course taught by the State Bar's Trust Account Compliance Counsel after January 1, 2015, satisfies the requirement. Additional courses that satisfy the CLE requirement will be identified on the CLE website.

To clear up any confusion, lawyers may still sign checks and reconcile the trust account; only nonlawyers are prohibited from performing both functions. Rule 1.15-2(s) also includes new prohibitions against signature stamps, electronic check signatures, and preprinted signature lines on checks. Lawyers and law firms should promptly refrain from using these processes.

The new rules became effective as of June 9, 2016; therefore, lawyers should act quickly to come into compliance. However, the State Bar knows that there will be a learning curve for the new requirements and plans to reasonably enforce compliance with that understanding.

To help lawyers comply with the new reconciliation and review requirements, three separate fillable forms are available on the State Bar's website, [ncbar.gov/for-lawyers/trust-accounting](http://ncbar.gov/for-lawyers/trust-accounting). You can also get updates and guidance on rule changes by following the State Bar on Twitter at @NCStateBar.

While word of mouth is helpful, don't rely solely on what you're told by colleagues about the new rules. Read the revised *Lawyers Trust Account Handbook* (revisions to be completed in August 2016) and contact us at the Bar with any questions about the new rules. We can be reached at (919) 828-4620, or via email at [EthicsAdvice@ncbar.gov](mailto:EthicsAdvice@ncbar.gov) or [PBolac@ncbar.gov](mailto:PBolac@ncbar.gov).

## Third Quarter Audit Selection

Lawyers randomly selected for audit are drawn from a list generated from the State Bar's database based upon judicial district membership designations. The randomly

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Thank you to Lawyers Mutual Liability Insurance Company and The Title Company of North Carolina for sponsoring the State Bar's quarterly meeting.

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selected judicial districts used to generate the list for the third quarter of 2016 are District 15B, composed of Chatham and Orange counties, and District 27B, composed of Cleveland and Lincoln counties. ■

# Council Approves Opinion Allowing Non-Equity Firm Lawyers to be Held Out as “Partners”

## Council Actions

At its meeting on July 22, 2016, the State Bar Council adopted the ethics opinions summarized below:

### 2015 Formal Ethics Opinion 8

#### *Representing One Spouse on Domestic and Estate Matters After Representing Both Spouses*

Opinion rules that a lawyer who previously represented a husband and wife in several matters may not represent one spouse in a subsequent domestic action against the other spouse without the consent of the other spouse unless, after thoughtful and thorough analysis of a number of factors relevant to the prior representations, the lawyer determines that there is no substantial relationship between the prior representations and the domestic matter.

### 2015 Formal Ethics Opinion 9

#### *Holding Out Non-Equity Firm Lawyers as “Partners”*

Opinion rules that a lawyer who does not own equity in a law firm may be held out to the public by the designation “partner,” “income partner,” or “non-equity partner,” provided the lawyer was officially promoted based upon legitimate criteria and the lawyer complies with the professional responsibili-

ties arising from the designation.

### 2016 Formal Ethics Opinion 2

#### *Duty of Defense Counsel Appointed after Defendant Files Pro Se Motion for Appropriate Relief*

Opinion rules that, when advancing claims on behalf of a criminal defendant who filed a *pro se* motion for appropriate relief, subsequently appointed defense counsel must correct erroneous claims and statements of law or fact set out in the previous *pro se* filing.

## Ethics Committee Actions

At its meeting on July 21, 2016, the Ethics Committee voted to revise the editor’s note for 2014 Formal Ethics Opinion 1, Protecting Confidential Client Information When Mentoring, an opinion that was adopted by the council on February 1, 2016. The editor’s note cites a recent court of appeals opinion on whether a third party is an agent of the lawyer or the client such that the attorney-client privilege is not waived although the third party is privy to client-lawyer communications. The committee concluded that a lawyer should consider this appellate opinion when analyzing whether a protégé’s presence during a client-lawyer consultation will waive the attorney-client

## Public Information

The Ethics Committee’s meetings are public, and materials submitted for consideration are generally NOT held in confidence. Persons submitting requests for advice are cautioned that inquiries should not disclose client confidences or sensitive information that is not necessary to the resolution of the ethical questions presented.

privilege. The ethics opinion, with the revised editor’s note, can be found in the ethics opinions section of the State Bar website: [ncbar.gov/for-lawyers/ethics/adopted-opinions/2014-formal-ethics-opinion-1](http://ncbar.gov/for-lawyers/ethics/adopted-opinions/2014-formal-ethics-opinion-1).

At the July 21, 2016, meeting, the committee also voted to continue to table proposed 2016 Formal Ethics Opinion 1, Contesting Opposing Counsel’s Fee Request to Industrial Commission, pending the issuance of an opinion on similar facts by the court of appeals.

No new opinions were proposed by the committee. ■

## LAP (cont.)

world and tough profession. It is about learning to accept life as it comes, without wearing ourselves and others out trying to make it be what we want. It is also about learning to accept ourselves and our human reactions for what they are, without denying them or overemphasizing them. It is about actively participating in our own growth and the evolution of our own consciousness.

Life—messy, chaotic, unruly life—is going to happen. There is nothing we can do about it. What we can do is practice mindful, honest

awareness of our reactions and behaviors. We can become skillful at making choices that do not harm ourselves or others. We can learn to pause when agitated or doubtful. We can ask for someone’s opinion or even their help. We can stay open minded to the possibility that our way may not be the best way. We can become willing to try something different. We can learn to take responsibility for our lives and learn from what our past choices have wrought. In many ways, we are the authors of our own lives, not in terms of what happens to us, but in terms of what we do with what happens to us and what we learn from what

happens to us. ■

*The North Carolina Lawyer Assistance Program is a confidential program of assistance for all North Carolina lawyers, judges, and law students, which helps address problems of stress, depression, alcoholism, addiction, or other problems that may impair a lawyer’s ability to practice. If you would like more information, go to [nclap.org](http://nclap.org) or call: Cathy Killian (for Charlotte and areas west) at 704-910-2310, Towanda Garner (in the Piedmont area) at 919-719-9290, or Nicole Ellington (for Raleigh and down east) at 919-719-9267.*

# Amendments Approved by the Supreme Court

On June 9, 2016, the North Carolina Supreme Court approved the following amendments to the rules of the North Carolina State Bar (for the complete text see the Fall and Winter 2015 editions of the *Journal*, unless otherwise noted, or visit the State Bar website):

## Amendments to the Rules Governing the Board of Law Examiners

27 N.C.A.C. 1C, Section .0100, Board of Law Examiners

Amendments to Rule .0101, Election, were recommended by the North Carolina Board of Law Examiners to modernize the outdated rule and to conform provisions of the rule to current practice in regard to the appointment of members of the board.

## Amendments to the Rules and Regulations Governing the Administration of the CLE Program

27 N.C.A.C. 1D, Section .1500, Rules Governing the Administration of the Continuing Legal Education Program; Section .1600, Regulations Governing the Administration of the Continuing Legal Education Program

The amendments to the CLE rules clarify

that the exemption from CLE requirements for members who teach law-related courses at professional schools has reference only to graduate level courses; require a sponsor of the Professionalism for New Attorneys Program to be an accredited sponsor; and allow credit to be granted to private/in-house CLE programs on professional responsibility and professional negligence/malpractice under certain circumstances.

## Amendments to the Standards for the Estate Planning and Probate Law Specialty

27 N.C.A.C. 1D, Section .2300, Certification Standards for the Estate Planning and Probate Law Specialty

The amendments to the standards for the estate planning specialty eliminate the subject matter listings for related-field CLE and for the exam, and explain that these listings will be posted on the specialization website.

## Standards for a New Specialty in Utilities Law

27 N.C.A.C. 1D, Section .3200, Certification Standards for Utilities Law Specialty

A new section of the rules for the specialization program sets forth standards for a specialty in utilities law. The standards are comparable to the standards for the other areas of specialty certification.

## Amendments to the Plan for Certification of Paralegals

27 N.C.A.C. 1G, Section .0100, The Plan for Certification of Paralegals; Section .0200, Rules Governing Continuing Paralegal Education

Amendments to the standards for certification of paralegals add the disciplinary suspension or revocation of an occupational or professional (non-legal) license and the unauthorized practice of law to the list of conduct that may be considered by the Board of Paralegal Certification when

## Highlights

- Supreme Court approves amendments to trust accounting rules that will facilitate the early detection of internal theft and errors.
- Court also approves standards for new utilities law specialty.
- Council approves and sends to the Supreme Court proposed amendments to the procedural rules for the Disciplinary Hearing Commission.

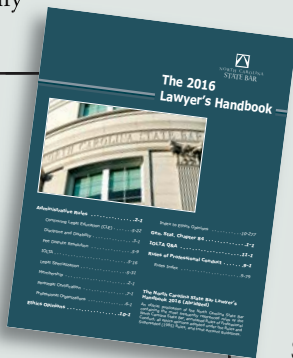
determining whether an applicant is honest, trustworthy, and fit to be certified as a paralegal. An amendment to the rules on paralegal continuing education eliminates the \$75 accreditation fee for any program that is presented without charge to attendees.

## Amendments to the Trust Accounting Rule in the Rules of Professional Conduct

27 N.C.A.C. 2, Rules of Professional Conduct, Rule 1.15, Safekeeping Property

Amendments to Rule 1.15, Safekeeping Property (and its subparts, Rule 1.15-1, Rule 1.15-2, and Rule 1.15-3), and to Rule 8.5, Misconduct, add requirements that will facilitate the early detection of internal theft and errors, and adjust the trust account recordkeeping requirements to accommodate “paperless” work environments. A new subpart—Rule 1.15-4, Alternative Trust Account Management Procedure for Multiple-Member Firm—creates a procedure whereby a firm with two or more lawyers may designate a firm principal to serve as the “trust account oversight officer” to oversee the administration of the firm’s general trust accounts in conformity with the requirements of Rule 1.15. The amendments, when proposed, were published in the Spring, Summer, and Fall 2015 editions of the *Journal*.

## Download the 2016 Lawyer’s Handbook



The digital version of the 2016 *Lawyer’s Handbook* is now available for download and is free of charge. Visit the State Bar’s website at [ncbar.gov/news-and-publications/lawyers-handbook](http://ncbar.gov/news-and-publications/lawyers-handbook).

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# Amendments Pending Approval of the Supreme Court

At its meetings on February 1, 2016, April 22, 2016, and July 22, 2016, the council of the North Carolina State Bar voted to adopt the following rule amendments for transmission to the North Carolina Supreme Court for approval (for the complete text of the proposed rule amendments see the Spring 2016 and Summer 2016 editions of the *Journal* unless otherwise noted):

## Proposed Amendments to the Rules on the Organization of the State Bar

27 N.C.A.C. 1A, Section .0700, Standing Committees of the Council

The proposed amendments establish the Technology and Social Media Committee as a standing committee of the State Bar Council.

## Proposed Amendments to the Discipline and Disability Rules

27 N.C.A.C. 1B, Section .0100, Discipline and Disability of Attorneys

The proposed amendments to the Discipline and Disability Rules separate Rule .0114, Formal Hearing, into five shorter rules, to wit: Rule .0114, Proceedings Before the Disciplinary Hearing Commission: General Rules Applicable to All Proceedings; Rule .0115, Proceedings Before the Disciplinary Hearing Commission: Pleadings and Prehearing Procedure; Rule .0116, Proceedings Before the Disciplinary Hearing Commission: Formal Hearing; Rule .0117, Proceedings Before the Disciplinary Hearing Commission: Post-trial Motions; and Rule .0118, Proceedings Before the Disciplinary Hearing Commission: Stayed Suspensions. In addition, the content of existing Rule .0114 is reorganized within this five-rule structure, and numerous substantive changes are proposed, including amendments to the provisions on mandatory scheduling conferences, settlement conferences, default, sanctions, and post-hearing procedures relative to stayed suspensions. Proposed amendments to the substance of existing Rule .0115, Effect of a Finding of Guilt in Any Criminal Case (renumbered as Rule .0119), explain the documents constituting

conclusive evidence of conviction of a crime and the procedure for obtaining an interim suspension.

With the division of existing Rule .0114 into five shorter rules, existing Rule .0115 and all subsequent rules in this section will be renumbered, and cross references to other rules throughout the section will be renumbered accordingly.

The proposed amendments to Rule .0129, Confidentiality, clarify that the State Bar may disclose the fact that a complaint was filed before the Disciplinary Hearing Commission pursuant to Rule .0113(j)(4), .0113(l)(4), or .0113(m)(4), because the defendant rejected discipline imposed by the Grievance Committee (1) after the DHC proceeding is concluded, or (2) to address publicity not initiated by the State Bar.

## Proposed Amendments to the Rules Governing the Board of Law Examiners

27 N.C.A.C. 1C, Section .0100, Board of Law Examiners

A proposed amendment to Rule .0105, Approval of Law Schools, recommended by the Board of Law Examiners, eliminates the ten year experience requirement from the rule which allows a graduate of a non-ABA accredited law school to be considered for admission to the State Bar if the graduate was previously admitted to the bar of another jurisdiction and remained in good standing with that bar for ten years. For the text of the proposed amendment see the Fall 2015 *Journal*.

## Proposed Amendments to the Procedures for the Administrative Committee

27 N.C.A.C. 1D, Section .0900, Procedures for Administrative Committee

Proposed amendments to the rules on reinstatement from inactive status and administrative suspension eliminate from the CLE requirements for reinstatement the condition that five of the 12 CLE credit hours required for each year of inactive or suspended status must be earned by taking practical skills courses. For the text of the proposed amendments see the Fall 2015 *Journal*.

Proposed amendments to Rule .0905 specify that *pro bono* practice status for an out-of-state lawyer ends when the lawyer ceases working under the supervision of a North Carolina legal aid lawyer, and clarify that the status may be revoked by the council without notice to the out-of-state lawyer or an opportunity to be heard.

## Proposed Amendments to the Continuing Legal Education Rules

27 N.C.A.C. 1D, Section .1500, Rules Governing the Administration of the Continuing Legal Education Program

The proposed amendments to Rule .1512 clarify that the sponsor/attendees fee charged for each hour of CLE credit is earned for every hour reported regardless of subsequently claimed exemption or adjustment in reported hours. In addition, proposed amendments to Rule .1517 add full-time tribal chiefs and vice-chiefs to the list of lawyers holding political office who are exempt from mandatory CLE.

## Proposed Amendments to the Specialization Rules

27 N.C.A.C. 1D, Section .1800, Hearing and Appeal Rules of the Board of Legal Specialization; Section .2400, Certification Standards for the Family Law Specialty; Section .2700, Certification Standards for the Workers' Compensation Specialty

Proposed amendments to Rule .1804 of the hearing rules for the specialization program simplify the procedure for a failed applicant to appeal a final certification decision of the Board of Legal Specialization to the council. The proposed amendment to the standards for the family law specialty will permit a family law specialist who was elected or appointed to the district court bench to meet the substantial involvement requirement for recertification if the specialist's service on the bench involved hearing a substantial number of family law cases. The proposed amendment to the standards for recertification in the workers' compensation specialty clarifies that a specialist must earn at least six CLE credits in workers' compensation law courses in each year of the five year period of certification.



## Proposed Amendments to the Rules of Professional Conduct

27 N.C.A.C. 2, Rules of Professional Conduct

The proposed amendments to Rule 1.0, Terminology, replace the term “Partner” with the more generic and apt term “Principal,” and modify the definition of the term to include lawyers who have management authority over a legal department of a company, organization, or government entity. In accordance with this change in terminology, proposed amendments in the other rules (and the comments thereto) replace the word “partner” with the word “principal” where appropriate. ■

## Legal Specialization (cont.)

**topics. What CLE presentations are you currently working on?**

I often present on CLE topics locally and in North Carolina. I have also started an educational resource for elder law attorneys and special needs law attorneys tackling the intricacies of public benefits, trusts, and trust taxation called “TrustChimp.” I love getting around the country and teaching (and demystifying) trust and trust taxation issues for other attorneys struggling to get a handle

on those topics.

**Q: What do you like to do when you're not working?**

Since my son went off to App State, those things have changed a bit. Cook. Write. In fact, I write a regular column for the local English language (as opposed to legalese) daily on a variety of topics. I try to leaven it with a bit of humor. That's not hard to do these days. ■

*For more information about becoming a board certified specialist, please visit [nclawspecialists.gov](http://nclawspecialists.gov) or call our office at 919-828-4620.*

## Legal Ethics (cont.)

does not opine on any legal issues pertaining to the application/waiver of the attorney-client privilege.

The take away from 2014 FEO 1 is that individual lawyers participating in mentoring relationships have an ethical duty to research the law pertaining to the attorney-client privilege and determine whether—in their own professional judgment—the presence of a protégé in a confidential client consultation will jeopardize the attachment of the attorney-client privilege. The lawyer also has an ethical duty to discuss any potential risks with the client and seek the client's

informed consent to the protégé's presence. As stated in 2014 FEO 1, “[i]f the lawyer concludes that the [protégé's] presence will jeopardize the attachment of the privilege and the resulting harm to the client's interests is substantial, the lawyer should consider carefully whether it is appropriate to ask the client to consent to the protegee's presence during the consultation.”

Formal and informal mentoring arrangements are an important part of a law student's education as well as a valuable resource for newly licensed lawyers. 2014 FEO 1 encourages lawyers to become involved in mentoring programs, while reminding lawyers that their primary ethical duty is to their clients. It is important to note that

issues pertaining to the waiver of the attorney-client privilege only arise with communications that otherwise would be protected by the privilege. As outlined above, the privilege only applies if the factors set out in *State v. McIntosh* are present. The representation of a client typically includes many activities that do not meet the *McIntosh* criteria, for example: real estate closings, court proceedings, and witness interviews. Therefore, there will generally be many opportunities for a protégé to observe and learn from a lawyer/mentor without implicating the attorney-client privilege. ■

*Suzanne Lever is assistant ethics counsel for the North Carolina State Bar.*

## Wilson Nominated as Vice-President



Winston-Salem attorney G. Gray Wilson was selected by the State Bar's Nominating Committee to stand for election to the office of vice-president of the North Carolina State Bar. The election will take place in October at the State Bar's annual meeting. Charlotte attorney Mark W. Merritt will assume the office of president, and Raleigh attorney John M.

Silverstein will also stand for election to president-elect.

Wilson is a cum laude graduate of Davidson College, and earned his JD from Duke University School of Law. He was admitted to the practice of law in North Carolina in 1976. He is currently a senior partner at Wilson & Helms.

Wilson's professional activities include serving as a district councilor for the Forsyth County Bar Association. He also served the North Carolina Bar Association on its Board of Governors, and was president from 2004-2005. Since 2006 he has served on the Board

of Directors of Lawyers Mutual Liability Insurance Company, and has been chair of the board since 2015.

Wilson was a North Carolina State Bar Councilor from 2007-2015, during which time he was vice-chair of the Grievance II Subcommittee, and chair of the Board of Paralegal Certification and Publications Committee.

In addition to his numerous professional activities, Wilson is also involved with his community, serving his church as a deacon, and working with the Old Hickory Council of the Boy Scouts of America. ■

## Client Security Fund Reimburses Victims

At its July 21, 2016, meeting, the North Carolina State Bar Client Security Fund Board of Trustees approved payments of \$247,511.82 to 16 applicants who suffered financial losses due to the misconduct of North Carolina lawyers.

The payments authorized were:

1. An award of \$370 to a former client of Garey M. Ballance of Warrenton. The board determined that Ballance was retained to handle a client's speeding ticket. Ballance failed to provide any valuable legal services for the fee paid, failed to pay the client's costs he had received, and failed to make a refund to the client. Ballance was disbarred on November 13, 2015. The board previously reimbursed one other Ballance client a total of \$370.

2. An award of \$150 to a former client of Garey M. Ballance. The board determined that Ballance was retained to handle a client's speeding ticket. Ballance failed to get the client's matter resolved prior to his disbarment, causing his client to be called and failed.

3. An award of \$900 to a former client of Garey M. Ballance. The board determined that Ballance was retained to get a client's assault charge expunged. Ballance failed to provide any valuable legal services for the fee paid prior to the surrender of his license.

4. An award of \$950 to a former client of Garey M. Ballance. The board determined that Ballance was retained to handle a client's two serious traffic charges. Ballance failed to provide any valuable legal services for the fee paid. Some of the payments to Ballance were made after the surrender of his license.

5. An award of \$370 to a former client of Garey M. Ballance. The board determined that Ballance was retained to handle a client's speeding ticket. Ballance failed to get the client's matter resolved prior to his disbarment causing his client to be called and failed. Ballance also failed to pay the client's costs from funds he received for

that purpose and failed to make a refund to the client.

6. An award of \$363 to a former client of Garey M. Ballance. The board determined that Ballance was retained to handle a client's speeding ticket. Ballance failed to get the client's matter resolved prior to his disbarment, causing his client to get a license suspension letter from the DMV. Ballance also failed to pay the client's costs and failed to make a refund to the client.

7. An award of \$63,730 to an applicant who suffered a loss because of L. J. Blackwood II of Greensboro. The board determined that Blackwood was co-trustee of a family trust, and later appointed as administrator CTA of the trust creator's wife's estate. Blackwood misappropriated funds from both the trust and the wife's estate. Blackwood was disbarred on November 20, 2015.

8. An award of \$810.39 to an applicant who suffered a loss because of Robert M. Chandler Jr. of Rocky Mount. The board determined that Chandler was retained to handle a client's personal injury claim. Chandler settled the matter, paid himself and the client, and retained funds from the settlement proceeds to pay to his client's medical providers. Chandler failed to pay any of the medical providers. Due to misappropriation, Chandler's trust account balance is not sufficient to pay all his client's obligations. Chandler was suspended on July 11, 2016, and was disbarred effective August 10, 2016.

9. An award of \$238 to a former client of Scott C. Dorman of Whiteville. The board determined that Dorman was retained to handle the client's speeding ticket. Although he got the client's charge reduced, he failed to pay the client's costs from the funds he had received for that purpose prior to absconding to Las Vegas. Dorman was suspended on March 16, 2015.

10. An award of \$10,598.27 to former clients of Ronald T. Ferrell of Wilkesboro.

The board determined that Ferrell was retained to handle a couple's personal injury claims resulting from an auto accident. Ferrell's employees settled the wife's claim without her knowledge or consent, forged her name on the settlement check, and misappropriated the proceeds. The husband received a property damage check directly from the insurance company, but wasn't satisfied with the amount and sent the check to the firm, as directed, to get a new settlement negotiated. Ferrell's employees forged the husband's endorsement on the check and misappropriated those funds as well. Due to his employees' dishonest conduct in the nature of embezzlement, Ferrell's trust account balance is insufficient to pay all his client obligations. The board previously reimbursed two other Ferrell clients a total of \$2,415.

11. An award of \$82,800 to former clients of Ronald T. Ferrell. The board determined that Ferrell was retained to handle a couple's personal injury claims resulting from two auto accidents. Ferrell's employees settled the claims and deposited into the trust account the liability and property damage checks from both claims without the clients' knowledge, consent, or signatures. Due to his employees' dishonest conduct in the nature of embezzlement, Ferrell's trust account balance is insufficient to pay all his client obligations.

12. An award of \$32,644.33 to a former client of R. Alfred Patrick of Greenville. The board determined that Patrick was retained to represent a client in recovering damages for injuries suffered in both a motor vehicle accident and a slip and fall accident. Patrick settled the client's claims without his knowledge and consent. When the client learned from the insurance company that Patrick had been paid and confronted him, Patrick delivered a check to the client. However, after taking his fee, Patrick failed to pay any of the client's medical providers or disburse the remaining funds to the client. Due to his

misappropriation, Patrick's trust account balance is insufficient to pay all his client obligations. Patrick was suspended on June 22, 2016.

13. An award of \$1,500 to a former client of Daniel L. Taylor of Troutman. The board determined that Taylor was retained to set up an estate for a client's deceased mother in order to dispute a claim from Medicaid against the estate. Taylor failed to provide any valuable legal service for the fee paid. Taylor died on December 25, 2013. The board previously reimbursed 11 other applicants and clients of Taylor a total of \$86,866.58.

14. An award of \$8,000 to a former client of Daniel L. Taylor. The board determined that Taylor was retained to set up an asset protection strategy and apply for Medicaid for a client. The same week the client paid, Taylor suffered a stroke and never recovered prior to his death. Taylor failed to provide any valuable legal services for the fee paid and neither he nor his estate made a refund to the client.

15. An award of \$42,687.83 to a former client of Devin F. Thomas of Winston-Salem. The board determined that Thomas

was retained to handle a client's personal injury claim from an auto accident. Thomas settled the matter without the client's knowledge or consent, took his fee from the settlement check, and never notified the client of the check nor disbursed any of the funds to the client. Thomas also received a med-pay check, but he never advised the client of nor disbursed to her. Due to misappropriation, Thomas's trust account balance is insufficient to pay all his client obligations. Thomas was disbarred on April 20, 2016. The board previously reimbursed three other Thomas clients a total of \$46,050.67.

16. An award of \$1,400 to a former client of Devin F. Thomas. The board determined that Thomas was retained to handle a client's personal injury claim from an auto accident. Thomas settled the matter, took his fee, and paid a medical bill, but failed to disburse the remaining funds to the client. Due to misappropriation, Thomas' trust account balance is insufficient to pay all his client obligations.

At its meeting in April 2016, the board made a conditional award of \$2,500 to a former client of A. Stanley Mitchell of

Winston-Salem if Mitchell failed to pay the client himself within 60 days. Mitchell was not able to pay the client by the deadline.

Pursuant to the rules adopted by the Supreme Court of North Carolina for operation of the Client Security Fund, the Board of Trustees of the Client Security Fund "shall operate the Fund so that, taking into account assessments ordered by the Supreme Court but not yet received and anticipated investment earnings, a principal balance of approximately \$1,000,000 is maintained." 27 N.C.A.C. 1D, § .1418(e). Adding uncollected assessment income and investment revenue to the June 30, 2016, fund balance, less anticipated expenses for the rest of the current fiscal year, which ends on September 30, leaves the fund balance of the Client Security Fund at \$1,006,531.25. Thus reimbursement will be made to the nine applicants with the smallest awards totaling \$5,551.39, and the seven remaining applicants will not be reimbursed until a new assessment order is in place for the next fiscal year. After the April 2016 meeting, awards totaling \$181,856.75 to two applicants were not paid for the same reason. ■

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## Paralegal Certification (cont.)

medal. We are the champions, my friend. As for your boss, that makes him happier than a pig in mud. Document management software, a desktop scanner, and a paperless office have saved my sanity on more than one occasion.

Now that I can somewhat manage myself and my stable of bosses, knowing my limits has been the hardest part. I'm a bit of a people pleaser. I suppose we all are to a degree. We all want to do our jobs, and do them to the best of our ability. If I make a mistake, I want to learn from it and fix it. Sometimes I want to bathe in wine, but that isn't as productive as fixing the problem, I suppose. I take pride in my work, and I want my bosses to take that same pride in my work. And in me. Always volunteering, always saying yes and taking on too much has been the biggest struggle of working for four attorneys. Whether it is fixing a technology issue with

the "magic button" each one believes exists, staying until midnight to get a brief filed, or handling another person's work, I had a problem with saying no and becoming overwhelmed. I still have that problem to a degree, but I have learned to go to the attorney to ask for help. We all have the "if you want it done right, you have to do it yourself" mentality. In this field though, it is important to find at least one other paralegal, or legal assistant, that you trust to help you when you're overwhelmed. Even if it is just making copies, scanning, or mass mailing, we need that help occasionally. Remember, we are all in this high stress profession together: stable of bosses, lost Post-Its, wine bathing, and all.

At face value, working for multiple attorneys seems daunting. I don't proclaim to be the best at it. I am constantly striving to improve my abilities. However, somehow I've managed to not get a wisdom hair yet, or maybe that's the dye. I also sleep most nights without being gripped in terror. Once you learn how each attorney operates and cater to

his or her working style by properly managing their tasks and files, you will find that your everyday life becomes less stressful and your work flows much easier.

Heck, you might even learn how to thrive... ■

*Jacqueline "Jackie" King is a North Carolina State Bar Certified Paralegal for Rose Harrison & Gireath, PC, in Kill Devil Hills, North Carolina. Jackie is a 2005 graduate of Halifax Community College with an Associate of Paralegal Technology, a 2014 graduate of Pennsylvania State University with a Bachelor of Law & Society, and a current student at West Virginia University where she is working to earn her Masters in Legal Studies. Jackie's current workload includes federal and state litigation, estate planning, and estate administration. She may be contacted at JackieKingNCCCP@gmail.com.*

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## Law School Briefs

### Campbell University School of Law

*Campbell Law mentorship program wins prestigious ABA Gambrell Award*—Campbell Law School's Connections mentorship program has been selected to receive the 2016 E. Smythe Gambrell Professionalism Award from the American Bar Association (ABA). Connections exposes students and newly minted attorneys to valuable learning opportunities and experiences by partnering them with practicing legal professionals.

Campbell Law will formally collect the award and a cash prize of \$3,500 at the ABA Annual Meeting in San Francisco on Saturday, August 6.

The honor marks the second time a Campbell Law program has received the coveted award, as the law school previously collected it in 2003 for the First-Year Professionalism Development Series.

*Ashley Campbell to head community law clinic*—Experienced trial attorney Ashley Campbell has been tapped to lead the Campbell Community Law Clinic. Campbell will guide law school students as they assist area organizations in providing legal services to members of the community in need. The clinic—Campbell Law's fourth—will open with the upcoming fall 2016 semester and will serve the community from the historic Horton-Beckham-Bretsch House in downtown Raleigh.

Campbell is a partner at Ragsdale Liggett PLLC in Raleigh, where she will continue to practice law in addition to leading the clinic. She is also the current president-elect of the Wake County Bar Association and Tenth Judicial District Bar.

The Community Law Clinic of Campbell Law will provide backup legal services free of charge to area nonprofit agencies and their clients when legal issues complicate such important steps as acquiring housing or employment. The clinic will support organizations like StepUp Ministry, Urban Ministries of Wake County, and the Raleigh Rescue Mission among others. A

grant of \$150,000 from the Z. Smith Reynolds Foundation that has been matched by other donors is making this effort possible.

### Charlotte School of Law

*Center for Compliance and Ethics (CCE) hosts first event*—On June 14, 2016, the center hosted a two-part expert panel on the CharlotteLaw campus focusing on current issues and challenges in the compliance industry. The event brought in over 60 compliance professionals from the Charlotte region representing corporations such as Duke Energy, Bank of America, Snyder-Lance, and Wal-Mart. The panel, as well as a recent article published by Emma Best, CCE Executive Director in the *Compliance and Ethics Journal*, sets the stage for a Compliance Symposium in October 2016. The cornerstone of the center is the Corporate Compliance Certificate, an online program for lawyers or nonlawyers who want to sit for the CCEP exam. More information can be found at [charlottecorporatecompliance.com](http://charlottecorporatecompliance.com).

*Mock trial team partners with Mecklenburg County court system*—CharlotteLaw's mock trial team hosted "Court Camp" which educates students on how trials and investigations really work in contrast to what is seen on television. The team provided the problem and mentored students as they held their own mock trial.

*CharlotteLaw professor cited by Arizona Supreme Court*—Professor Megan Annitto has been cited by the Arizona Supreme Court in a recent, important Fourth Amendment decision ([caselaw.findlaw.com/az-court-of-appeals/1702106.html](http://caselaw.findlaw.com/az-court-of-appeals/1702106.html)). In *State v. Valenzuela*, the Arizona Supreme Court decided a case concerning the state's implied consent law. In its discussion regarding this current legal question, the Court cited Professor Annitto's article, "Consent Searches of Minors," 38 N.Y.U. Rev. L. & Soc. Change 1 (2014).

*CharlotteLaw trial team wins first place*—On April 10, 2016, the

CharlotteLaw trial team competed at the Estrella Trial Advocacy Competition in San Juan, Puerto Rico, and came in first place among 16 teams from across the country.

### Duke Law School

*Gift expands reach for human rights program*—A \$500,000 gift to the International Human Rights Clinic from the Donald and Alice Noble Foundation has allowed Duke Law to expand its human rights program in terms of experiential learning opportunities for students and impact. In particular, by supporting the hire of Sarah Adamczyk as human rights clinical fellow and supervising attorney, the gift has enabled expanded clinic enrollment, the establishment of an advanced clinic, and increased mentoring and career advising of students. Directed by Clinical Professor Jayne Huckerby, the clinics enable students to engage with compelling human rights issues, institutions, and law in both domestic and international settings.

*New governing faculty*—Michael Frakes, a law and economics scholar and legal empiricist who focuses on health law, patent law, and innovation policy, came to Duke Law from Northwestern University Pritzker School of Law, where he was an associate professor and faculty fellow of the Northwestern Institute for Policy Research. He is also a faculty research fellow in the Health Care Group of the National Bureau of Economic Research.

Ofer Eldar, an emerging empirical scholar of corporate law, corporate governance, financial regulation, and law and economics with extensive practice experience, has recently completed a PhD in financial economics from the Yale School of Management. One strand of his work applies the econometric skills he acquired through training in financial economics to assess different corporate governance regimes.

Stephen Roady, an environmental litigator and policymaker, holds a joint appointment at Duke Law, where he has taught

since 2003, and at the Nicholas Institute for Environmental Policy Solutions. As a senior attorney at Earthjustice, Rody pioneered innovative litigation strategies to preserve ocean resources, and litigated precedent-setting cases that protect water resources and improve the nation's air quality, among others. He will continue teaching and help create interdisciplinary teams to examine approaches to large-scale environmental problems.

### Elon University School of Law

**Commencement**—In his commencement address to Elon University School of Law's Class of 2016, Judge Albert Diaz of the US Court of Appeals for the Fourth Circuit encouraged graduates to use their legal education to help "reason, law, and precedent triumph over might, caprice, and whim." The story Diaz shared on May 21 of his *pro bono* work highlighted a broader message to Elon Law's 88 graduates: "Use your newly acquired skills to ensure that people's rights don't suffer just because they are poor, or powerless, or unpopular."

**"Ask A Lawyer" with WECT**—Viewers of WECT-TV in Wilmington, North Carolina, shared a host of queries and woes on June 21 in the inaugural Elon Law & WECT "Ask A Lawyer" call-in program, broadcast into homes across the southeastern corner of the state. The Elon Law/WECT Ask a Lawyer partnership served as a representation of the law school's commitment to service in the community, innovation in the ways it partners with alumni, and the value given to students when exposed to practicing attorneys. The North Carolina Bar Association and Legal Aid of North Carolina helped make the call-in program possible.

**Honored students**—Joshua R. Bonney, who graduated from Elon Law in May, traveled to Chicago earlier in the spring for the 2016 Fundamentals of Municipal Bond Law Seminar. He was one of five recipients of the Frederic L. Ballard Jr. Memorial Scholarship from the National Association of Bond Lawyers. Current student Abigail Seymour has been named a member of the American Bar Association's inaugural Civil Rights and Social Justice Law Student Committee. Seymour will be the seventh attorney in her family over the past four generations, including her grand-

## In Memoriam

Jeffrey M. Acker  
Winston-Salem, NC

Everett Jackson Bowman  
Charlotte, NC

Ben Oshel Bridgers  
Sylva, NC

Frank Joseph Contrivo  
Asheville, NC

Billy R. Craig  
Winston-Salem, NC

Tracy Chappell Curtner  
Raleigh, NC

William Louis Daisy  
Greensboro, NC

Gustavus Latham Donnelly Sr.  
Mount Airy, NC

Albert A. Foster Jr.  
Charlotte, NC

William Gaston Holland  
Dallas, NC

Douglas Milton Holmes  
Fayetteville, NC

Stephen Francis Horne II  
Greenville, NC

Kenneth Richard Hoyle  
Sanford, NC

Ellen Earle Hunter  
Belmont, NC

John Rowe Milliken  
Monroe, NC

Robert Burren Morgan  
Lillington, NC

Patrick Burgess Ochsenreiter  
Asheville, NC

Robert Harrison Owen III  
Asheville, NC

Anthony John Pijerov  
Charlotte, NC

Regan Hungerford Rozier  
Wilmington, NC

Lynne Ann Rupp  
Durham, NC

Sergei Vladimirovich Semyrog  
Matthews, NC

John Meredith Simms  
Salem, VA

Ralph Nichols Strayhorn Jr.  
Winston-Salem, NC

Lindsay C. Warren Jr.  
Goldsboro, NC

father, Whitney North Seymour, who served as president of the American Bar Association in the 1950s.

### North Carolina Central School of Law

NCCU School of Law received a new grant from the Norflet Progress Fund to support the expansion of the Virtual Justice Project (VJP). The VJP provides two distance learning pre-law courses—Introduction to Law and the Legal Process and The Basics of Legal Writing—to students interested in pursuing law school. The VJP also provides a Know Your Rights Seminar Series to individuals seeking empowerment in critical areas of the law, including Family and Child Custody Law; Consumer Protection Law; Juvenile Law; Criminal Law; and Tax and Financial Literacy. The law school will broaden the use of technology to offer more distance learning courses and programs to wider tar-

get populations throughout the country, especially in the Mid-Atlantic and Northeast regions. With these grant funds, NCCU School of Law will invest in the virtualization of our existing telepresence and HD video conferencing capabilities, and expand the provision of much needed legal information to communities throughout the country. This effort complements the law school's nationally ranked clinical program, which covers 13 practice areas and provides legal services to low-income community members.

### University of North Carolina School of Law

**Carolina Law achieves historic \$1M annual fund milestone**—For the first time in the school's history, the Carolina Law Annual Fund exceeded \$1 million for the 2016 fiscal year. This historic milestone represents more than a 20% increase over the

previous best ever annual giving total. Because of the generous gifts of alumni, faculty, staff, and friends, Carolina Law is able to provide scholarships that bring outstanding law students to the school, retain nationally-recognized faculty, support programs that produce public spirited lawyers, and continue to keep Carolina Law both great and truly public.

"Gifts to the annual fund feed the law school's most basic needs," says Dean Martin H. Brinkley '92, who celebrated his one-year anniversary as dean in July. "We are grateful for the support, and are more energized than ever to tackle the ambitious goals we've set for the school over the next fiscal year."

**International Jurist Magazine recognizes Carolina Law's LL.M. program as Best in Academics and Experience**—The one-year degree program for international lawyers was included on the lists for best LL.M. programs for academics and law school experience for attorneys outside the United States. The incoming 2016-17 LL.M. class will have 10-15 students.

*New faculty hires and recognitions*—

UNC School of Law is pleased to welcome six new full-time faculty members, including Kevin Bennardo, Kate Elengold, Andrew Hessick, Carissa Hessick, Eisha Jain, and Jonas Monast.

Professor Erika Wilson's research on school segregation was recognized by Yale Law School and published in the *Cornell Law Review*, and her article on affirmative action was published in the *UCLA Law Review*.

Professor Kathleen Thomas presented two of her published papers to economists at the US Department of Treasury's Office of Tax Analysis, proposing ways the government could improve compliance and decrease tax evasion through behavioral economics.

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### **Wake Forest University School of Law**

The Wake Forest University School of Law will soon be home to the newest North Carolina Business Court. The court is slated to be ready to take cases in January 2017, says Wake Forest Law Dean Suzanne Reynolds (JD '77). "This is a terrific opportunity. It will provide an excellent

resource for our students because it gives us access to a real trial courtroom and it's a wonderful thing for the community." Judge Marion Warren, director of the NC Administrative Office of the Courts (NCAOC), says, "This court begins a new relationship that opens the door to greater opportunities for the unified North Carolina court system to serve its citizens, its business owners, and the international business community." Michael Lindsay Robinson was sworn in on July 1, 2016, as special superior court judge for complex business cases for the new court. North Carolina Business Court Chief Justice James L. Gale presided over the ceremony that had an estimated 150 attendees, including members of the North Carolina Supreme Court, the North Carolina Court of Appeals, the North Carolina Fifth Division Superior Court, the Forsyth County District Court, the North Carolina Bar Association, and the Forsyth County Bar Association. Judge Robinson's children, grandchildren, friends, and former colleagues at Robinson & Lawling LLP were also present. ■

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## **John B. McMillan Distinguished Service Award**

### **William O. King**

William "Bill" O. King was awarded the John B. McMillan Distinguished Service Award at the 14th Judicial District Bar Annual Meeting on Wednesday June 8, 2016.

Throughout his legal career, Mr. King established himself as an outstanding lawyer and leader, serving on the National Board of the American Board of Trial Advocates and as a past-president for the North Carolina Eastern District. He has also served as president of the North Carolina Academy of Trial Lawyers and the 14th Judicial District Bar.

Mr. King served for six years on the Judicial Standards Commission, was a member of the Chief Justice's Commission on Professionalism Board, and is a recipient of the North Carolina Chief Justice's Professionalism Award which is "presented annually to an individual or organization

whose contributions have demonstrated the highest commitment to genuine professionalism and the highest standards of legal ethics."

After nine years as a North Carolina State Bar councilor, Mr. King served the legal profession as president of the State Bar. While on the State Bar Council, he was chair of the State Bar's Grievance Committee. Thereafter, he served two five-year terms on the State Bar's Client Security Fund (twice as chair). Mr. King is a current member of the North Carolina State Bar Disciplinary Hearing Committee. He has served as a delegate to the American Bar Association and on the Executive Committee of the National Conference of Bar Presidents.

Mr. King was also a visiting professor of law at Campbell University's School of Law for ten years, providing instruction in the areas of trial practice, ethics, and law practice management.

Mr. King is a former partner at Walker, Lambe, Rhudy, Costley & Gill, PLLC, and currently serves as "of counsel" for the firm.

### **Seeking Award Nominations**

The John B. McMillan Distinguished Service Award honors current and retired members of the North Carolina State Bar who have demonstrated exemplary service to the legal profession. Awards will be presented in recipients' districts, with the State Bar councilor from the recipient's district introducing the recipient and presenting the certificate. Recipients will also be recognized in the *Journal* and honored at the State Bar's annual meeting in Raleigh.

Members of the bar are encouraged to nominate colleagues who have demonstrated outstanding service to the profession. The nomination form is available on the State Bar's website, [ncbar.gov](http://ncbar.gov). Please direct questions to Suzanne Lever, [SLever@ncbar.gov](mailto:SLever@ncbar.gov) ■



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