THE NORTH CAROLINA STATE BAR

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IN THIS ISSUE

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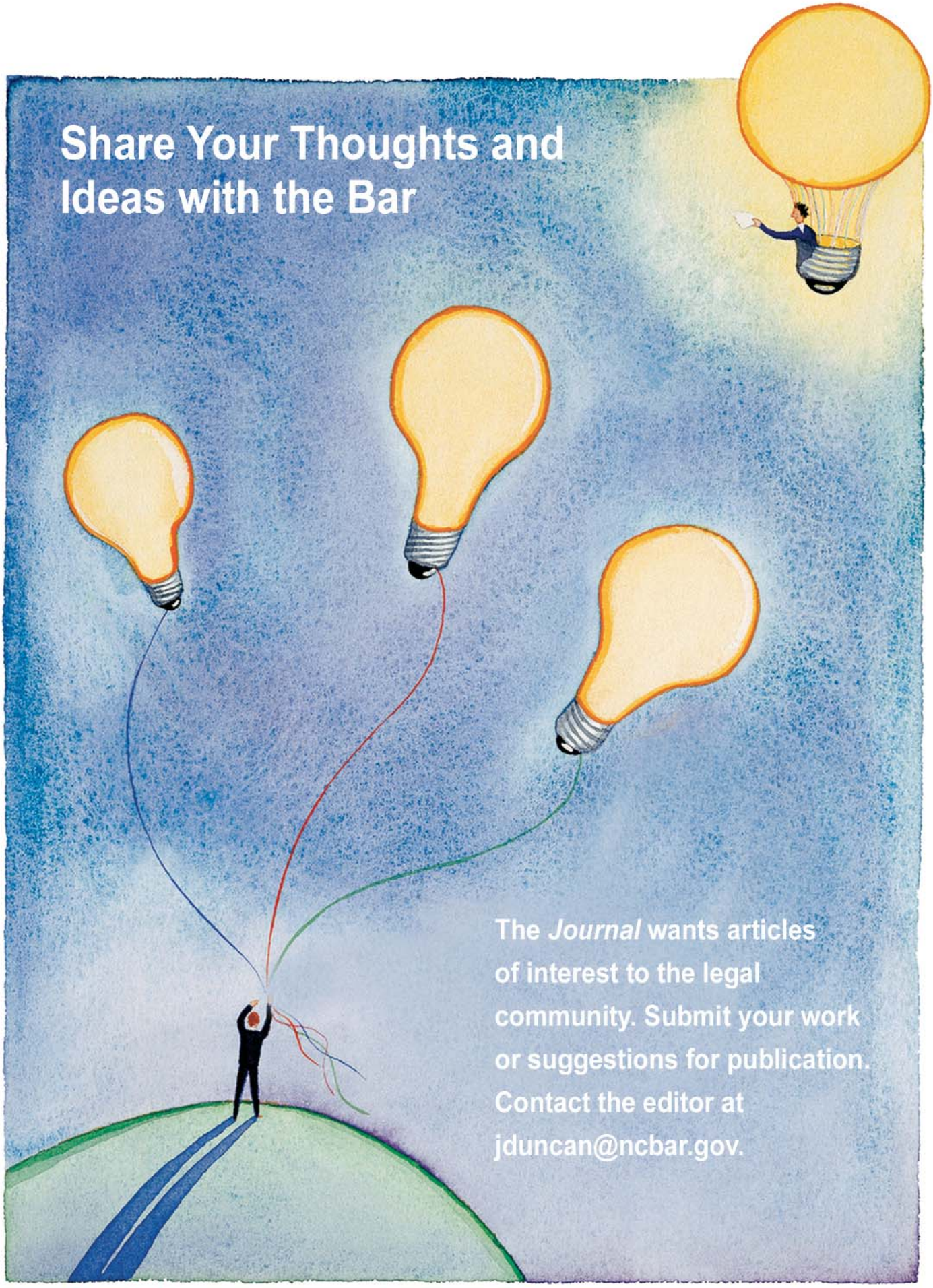

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Breaking News

By John M. Silverstein

In this era of the 24-hour news cycle, "breaking news" induces breathless anticipation over what dramatic change in the world order has occurred to both interrupt and impact our otherwise mundane lives. At the North Carolina State Bar, any change in the executive suite qualifies for that classification. After 38 years of dedicated service to the State Bar, including more than 26 years as executive director, Tom Lunsford will be relinquishing his duties effective with the Annual Meeting in October, and he will be retiring at the end of this year. Alice Mine, our assistant director with more than 25 years' experience in that role, is poised to succeed Tom. Brian Oten has already joined the executive team as of July 1, moving from his position as a staff counsel primarily handling grievance files to assistant director responsible for many of Alice's former program duties, including the Ethics Committee. And effective October 1, Peter Bolac, the only person alive with the ability to both adroitly handle legislative affairs and clearly and concisely explain trust account reconciliation rules, will become the assistant director handling most of Alice's former management duties. To ensure the proper place of continuity in the workplace, Katherine Jean will remain as counsel.

Fortunately, there are three brightly shining silver linings in the clouds accompanying Tom's departure. First, he will only be a short distance away in Chapel Hill, where we can continue to mine priceless deposits of institutional knowledge, and perhaps even convince him to prolong his contributions to the legal profession in North Carolina by continuing his erudite and literate observations that have graced the pages of this *Journal*. Second, the management team that will be in place is, as noted, experienced, talented, and prepared to hit the ground running. Third, working through the transition in leadership will be the responsibility of my successors, Gray Wilson, Colon Willoughby, Barbara Christy, and their progeny, not mine.

This rare changing of the guard accompanies the annual reconstitution of the State Bar Council and its officers. Most bar councilors serve three consecutive three-year terms, which are staggered so that all 61 elected councilors do not have terms expiring the same year. While the State Bar is energized each January with a new class of councilors who invariably bring fresh ideas and new perspectives to our deliberations, it also means losing the wise counsel of their predecessors as we bid them a reluctant farewell. On the evening before our annual dinner in October, we will note the valuable contributions of departing councilors Bob Detwiler (Jacksonville), Nick Dombalis (Raleigh), Darrin Jordan (Salisbury), Nancy Norelli (Charlotte), Lonnie Player (Fayetteville), Randy Pridgen (Rocky Mount), and Judge Mike Robinson (Winston-Salem). Barbara Christy (Greensboro) will also be retiring as a councilor, but her service to the State Bar will continue when she is installed as vice-president of the State Bar by Chief Justice Mark Martin at our annual meeting.

The business of the State Bar is conducted through standing and special committees, and our retiring councilors have served with distinction as committee chairs or vice-chairs, and as valued members of virtually every committee in existence at the State Bar during their terms. When they began their service as councilors in 2010, the State Bar headquarters building was not even large enough to accommodate their orientation. In contrast, their last meeting as State Bar councilors will take place in a multi-purpose room that will accommodate the entire 68-member council, State Bar staff, and visitors. The State Bar's progression from rudimentary office space to a state-of-the art headquarters building is a metaphor for the transition of the individuals mentioned above from "rookies" to essential cogs in the workings of the State Bar. As Bar councilors, we share respect and gratitude—and most importantly, friendship—that extends well beyond the end of our terms, and we will miss them and their many contributions.

It is even more difficult to articulate what Tom Lunsford has meant to the North Carolina State Bar. Tom's tenure has been more than four times longer than the nine years most Bar councilors serve, and three times longer than the 13 years most officers serve. Tom has visited each of North Carolina's Judicial Districts (now 45) several times. Tom has witnessed and led the State Bar's long journey from a state office building that housed a handful of employees, to the State Bar's own building on the Fayetteville Street Mall, and finally to an architecturally significant headquarters that contains adequate space and technology for the State Bar's 90+ staff members to administer the practice of law for the more than 29,000 attorneys licensed in North Carolina. It is more than fitting that Tom has spent the final few years of his career in the executive director's office of the building that will be an important part of his legacy.

My experience in serving as an officer of the North Carolina State Bar has been

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What If I Don't Like Being Retired?

By L. Thomas Lunsford II

If you've been paying any attention at all, you know that my days as the State Bar's executive director are numbered. Last summer, in a weak moment, I gave my notice and advised the agency that I would be resigning at the end of the current year in order to effectuate my retirement. When no one begged me to reconsider, I realized that I had overplayed my hand and was, like my fictional hero Barney Fife, on the verge of being "swept into the dustbin of history." Exit, Tom Lunsford. My only hope in the wake of such folly is that you, my faithful readers, will somehow learn from my mistake and be better for it.

The standard question for most people in my position is, of course, what do you plan to do after you retire? I wish I knew. I recently inventoried my skills and interests to see how I might most effectively use my leisure time. I discovered that after 38 years on the job, I had become very accomplished at delegating, making small talk at cocktail parties, and writing pithy essays in the Bar's *Journal*. So far so good! I then imagined how I might leverage those talents in pursuit of my real passions—the Tar Heels, the *Andy Griffith Show*, and chinchilla ranching. Surprisingly, the anticipated epiphanies are yet to be realized, and I continue to languish without direction or purpose. Indeed, it would appear that I am, like former race car driver Danica Patrick, on the verge of retiring for no reason other than to work on my "personal brand."

Unlike Danica, however, I have a professional license and my personal pride to consider. Although I haven't practiced in many years and am absolutely uninsurable, I am nevertheless an active member in good standing of the North Carolina State Bar. As such, I am privileged to style myself as an attorney, participate in district bar elections, and receive the State Bar's quarterly magazine. Those highly valued prerogatives are offset, it must be said, by several not inconsiderable obligations of membership, including liability for dues and the requirement of attending, and paying for, 12 hours of approved but increasingly irrelevant continuing legal education each year. Obviously, there is a fine balance to be struck between cost and benefit for the aging attorney. And that calculation finds its most cogent and sublime expression in answer to the question that now faces me and countless other survivors of the Baby Boom, namely: "Should I go inactive?"

Now, I would not presume to answer that question for my entire demographic cohort. Everyone's circumstances are different, and most lawyers of my vintage seem to have a more coherent plan for life after the law than I do. If you are one of those folks, you can stop reading now. If, on the other hand, you, like me, are pretty sure that any decision you make will be wrong and need to be reversed, you should soldier on for at least a few more paragraphs.

Here's the good news. The ink never dries on a grant of inactive status. Under the State Bar's administrative rules, it is absolutely possible to "retire," for whatever reason, and then to be reinstated by the Bar Council. In short, if you guess wrong about whether you should hang it up and want to rejoin the club, you're entitled to a "do-over" if you can satisfy a few conditions, mostly having to do with settling financial accounts and getting current on CLE. This assumes that you file your petition for reinstatement within seven years of the time you started your misbegotten sabbatical. After seven years you can still be reinstated, but only if you sit for and pass the bar exam—an exercise that would almost certainly call into question your sanity and fitness to be licensed.

Actually, fitness is the aspect of this sort of transaction that interests me the most. The rules require that an applicant seeking reinstatement from inactive status demonstrate that he or she has the requisite "character and fitness to practice." That is to say, "[T]he member must have the moral qualifications, competency, and learning in the law required for admission to practice law in the state of North Carolina, and must show that the member's resumption of the practice of law within this state will be neither detrimental to the integrity and standing of the Bar or the administration of justice nor subversive of the public interest." The same is required of an applicant seeking to be reinstated from administrative suspension occasioned by failure to satisfy an obligation of membership, such as failing to meet the CLE requirements.

Quite appropriately, the burden of proof is on the applicant. For most people, this is not, and has never been, a problem. Statistically speaking, it is extremely rare for anyone without a recent felony conviction to be denied reinstatement. That being the case, you would suppose that the odds would be in my favor. But, unlike most applicants, I do have a "record," in that I have, during the past 20 years, published more than 70 articles in the Bar *Journal*, a great many of which have contained japes, exaggerations, and fictions that some may have found inappropriate for such a serious publication. Is it possible that in my vain attempts to amuse, I have written the petards upon which I might now be hoisted?

To answer that question, I have just completed a quick inspection of the so-called "long form" reinstatement petition on the State Bar's website. I was greatly relieved to find that journalistic offenses are not referenced in that questionnaire. However, there are queries about whether the applicant has been charged with fraud in any legal proceeding (negative, in my case); has failed to pay his taxes (also negative); has been declared legally incompetent (negative); has been impaired as a result of a mental, emotional, or psychiatric condition (probably negative); has been impaired as a result of the use of alcohol or drugs (impaired would be too strong a word); or has been "told" that he was impaired as a result of a mental, emotional, or psychiatric disorder (definitely).[1] Since I can probably get an affidavit from the psychiatrist to whom I am married attesting to the fact that calling someone crazy doesn't necessarily make it so, it seems possible that I might be able to squeak through the reinstatement process. Good for me.

Interestingly, applicants for reinstatement from disciplinary suspension are generally not required to prove that they have good character. Unlike retired bar executives and CLE derelicts, lawyers who have been suspended for serious ethical transgressions are not required by rule to demonstrate that they possess the "moral qualifications" to practice law. They must satisfy certain administrative requirements relating to the winding down of their practices, and they must fulfill reasonable conditions precedent contained in the Disciplinary Hearing Commission's order imposing their suspensions, like making restitution or cooperating with the Lawyer Assistance Program, but they are not typically compelled to prove that they have good character. It may be, of course, that having "done their time," they are presumed rehabilitated or at least chastened to the point where the likelihood of further indiscretion is acceptably small. Or it may simply be an anomaly.

It is worth noting in this connection that disbarred lawyers, in contrast to those who have been merely suspended for a definite period not to exceed five years, do, under the rules, have to prove "proper reformation of character" in order to be eligible for reinstatement. In this they are rather like retired bar executives who tire of chinchilla ranching and want to become active members again. Nothing anomalous about that. It makes perfect sense.

I would like to make one last observation as to how the determination of character and fitness relates to reinstatement. As noted above, applicants for reinstatement from administrative suspension are required to prove good character. There is an exception to the rule, however, for those who are willing and able to satisfy a delinquent membership obligation with 30 days of having been served with an order of suspension. In such cases the order is precluded from becoming effective and no suspension is deemed to have occurred. Since there was never any suspension, there is no need to apply for reinstatement. From an administrative standpoint, this is an excellent rule. It incentivizes compliance, albeit belated, and it obviates the necessity of further costly and time consuming proceedings for everyone. It is curious, though, in regard to the matter of character and fitness. One wonders what it is about the 30th day post-service that should relieve us of our concern about the subject lawyer's *bona fides*. Is there a point along the temporal continuum where the character issue ripens? And is that day 31? If late payment of dues warrants a C&F inquiry a month after service, is such an inquiry somehow less necessary 29 days after service? Maybe there's no anomaly here, just the sort of benign arbitrariness that accompanies most regulatory line-drawing, but I'm inclined to think we ought to take another look at this rule—and maybe others that relate to reinstatement.

That's the point of this essay, by the way. I think the reinstatement rules could stand some scrutiny. Rules review is something we engage in quite routinely at the State Bar. We know the value of introspection and we never tire of it. We have recently completed a very extensive review of our disciplinary system in order to make sure that our rules, policies, and procedures make sense and are working well. We are currently engaged in a substantive review of the rules relating to lawyer advertising. No sooner had the ABA proposed a new set of rules concerning commercial speech than our leadership initiated an internal study. I think the rules concerning reinstatement are also deserving of reconsideration, especially where the matter of character and fitness is concerned. Frankly, I'd feel a lot better about going inactive, and then changing my mind, if I didn't think I'd ever be required to prove my good character. It's not that I'm likely to engage in journalistic fraud again, or chinchilla ranching for that matter, but I'd like to keep all my options open. ■

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

Endnote

1. Several people have told me that I am crazy for quitting my job.

President's Message (cont.)

enhanced by the opportunity to work closely with Tom. The way I have been welcomed throughout North Carolina as president of the State Bar is a testament to Tom and the work of the outstanding staff he has assembled. Fortunately, we will not miss a beat with Alice, Peter, Brian, and Katherine on our executive team, with Gray, Colon, and Barbara as our officers, and with the support and guidance of our outstanding State Bar Council.

As my term as president concludes, I want to thank the officers with whom I served—Ron Gibson, Margaret Hunt, and Mark Merritt—for the lessons in leadership that made a great impression on me. On a personal note, this year would not have been nearly as enjoyable as it has been for me without the patience and understanding of the members of my firm—Howard and Keith Satisky and David Gadd—and especially my long-suffering wife, Leslie, who in addition to being my greatest asset, has become devoted to the State Bar as well. Thank you for the privilege of not only serving as president this year, but also for the opportunity to meet and work with so many good people throughout the state, and to make such good friends over the course of my time on the council. My departing wish for the State Bar is that there won't be any more breaking news for quite some time. ■

John Silverstein is a partner with the Raleigh firm of Satisky & Silverstein, LLP.

Freedom for Sale

By David E. Clark

Constructed in 1973, the New Guilford County courthouse has been showing its age for the better part of the past two decades. Like many buildings from this era, the facade is a harsh block of colorless stone with slits inserted for windows that don't open. The architectural style outside, known as Brutalism,[1] seems to have infected much of the criminal justice treatment of indigent defendants inside.

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Bond court is held in Courtroom 2C, which sits on the southwest side of the building. Tuesday through Friday at 2 PM, the small courtroom fills with defense attorneys and prosecutors in front of the bar, and friends and family of inmates and alleged victims behind the bar—all waiting for their chance to argue that their particular inmate should or should not be allowed pretrial release while their case works its way through the legal system.

Guilford County Criminal Court operates under a court order known as "pretrial release policies in the eighteenth judicial district."[2] The document sets out "suggested bond amounts" for every violation of the penal code, from local ordinances, like allowing weeds to grow over 12 inches high in your yard, to major felonies, like murder or drug trafficking.

It was in this stark setting earlier this year that Emorbridge Poole and David Stewart got their welcome to the world of court approved pretrial release bail policies—where those with money can buy their freedom, while the less fortunate languish in local jails for the exact same allegation; where indigent citizens spend more time in local jails than the law allows for their alleged crime simply because they don't have the money to purchase their freedom; where poor, non-violent misdemeanants remain in jail, while rich, violent felons are released; where a person's access to liberty is based exclusively on their ability to pay a pretrial bond.

On February 27, 2018, Mr. Poole was charged with trespassing while intoxicated at a local gas station and knocking over a store rack, all misdemeanor offenses.[3] One week later, Mr. Stewart was charged with a violent felony in connection to shots from a "semi-automatic handgun" being fired into a convenience store as well as resisting arrest.[4]

Unemployed with no resources, Mr. Poole was appointed a public defender. Despite the relative minor nature of the charges and the lack of any finding that he was a danger to himself or others, that he would not appear in court as ordered, or that he would intimidate potential witnesses,[5] he

was denied release until he paid the court $500 and was subsequently incarcerated in the local jail to await trial. On the other end of the spectrum, facing charges of feloniously conspiring to shoot a handgun into occupied property and resisting arrest,[6] Mr. Stewart was released from custody after posting a $5,000 bond.

Mr. Poole provided the court with a sworn affidavit indicating that he had "$0" "monthly income," "$0" "cash on hand and in bank accounts," and "$0" "assets,"[7] yet he remained incarcerated for three weeks because he didn't have $500 to purchase his freedom. This came at a cost of $82 per night to the taxpayers of Guilford County, for a total of over $1,500. Meanwhile, Mr. Stewart, whose family was able to post his $5,000 bond, was released immediately to live under minimal judicial supervision in Greensboro, despite the violent nature of his charges.

The story of defendants like Mr. Poole and Mr. Stewart is all too common in courthouses across North Carolina. In this article we will explore the problems posed by the current haphazard state of pretrial release policies in North Carolina. We will explain how these seemingly arbitrary bail policies, which allow pretrial bail to act as an illegitimate form of preventive detention, violates the Fourteenth Amendment of the United States Constitution as well as Article I, Section 27, of the North Carolina Constitution.[8] We will conclude the article by making suggestions for reform that require pretrial detention to be based on objective evidentiary factors such as whether a defendant is a flight risk or a danger, rather than how wealthy the defendant is, that will bring North Carolina back into compliance with state and federal law.

Introduction

"In our society, liberty is the norm, and detention prior to trial or without trial is the carefully limited exception."[9] Two bedrock principles of constitutional law guide any pretrial detention analysis. In the words of the U . Supreme Court: "[T]he fairness of relations between the criminal defendant and the State" is analyzed under the Due Process Clause, while "the question whether the State has invidiously denied one class of defendants a substantial benefit available to another class of defendants" is analyzed under the Equal Protection Clause.[10]

I. Constitutional Impetus for Bail Reform

In applying this legal framework to a question of pretrial release for a criminal defendant, the Fifth Circuit Court of Appeals held as far back as 1978 that while "[u]tilization of a master bond schedule provides speedy and convenient release for those who have no difficulty in meeting its requirements, [t]he incarceration of those who cannot, without meaningful consideration of other possible alternatives, infringes on both due process and equal protection requirements."[11] Several federal district courts have also applied this reasoning to invalidate bond systems like those in North Carolina that have the effect of imprisoning indigent defendants solely because they cannot afford bail.[12]

One such example is *Jones v. City of Clanton*. In 2015, the city of Clanton, Alabama, used a bail schedule much like the one used in Guilford County to set bail in misdemeanor cases. Under this bail schedule, bail was set at $500 for each misdemeanor charge. Thus, defendant Christy Varden was given a $2,000 bail for four misdemeanor charges. When she couldn't make the bail, she was required to wait in jail until her trial. In a subsequent lawsuit alleging that the city's bail policies violated Ms. Varden's constitutional rights, the court ruled unequivocally: "[U]se of a secured bail schedule to detain a person after arrest, without an individualized hearing regarding the person's indigence and the need for bail or alternatives to bail, violates the Due Process Clause of the Fourteenth Amendment."[13]

More recently, in *Odonnell v. Harris County*, 882 F.3d 528 (5th Cir. 2018), the plaintiffs brought a § 1983 action,[14] alleging that Harris County's system for setting bail for indigent misdemeanor defendants violated both Texas statutory law and constitutional law and the Equal Protection and Due Process Clauses of the Fourteenth Amendment.[15]

The Texas Code requires court officials to conduct an individualized review when setting bail, basing decisions on factors such as ability to pay, the charge, and community safety.[16] However, the district court found that these individualized assessments do not actually occur in practice.[17] The district court concluded that the county violated both the procedural due process rights and the equal protection rights of indigent defendants, and granted the plaintiff's motion for a preliminary injunction.[18]

On appeal, the Fifth Circuit affirmed the district court's ruling.[19] With regard to due process, the court concluded that the procedure used in Texas did not sufficiently protect indigent defendants from magistrates imposing bail as an "instrument of oppression"[20] and thus violated the plaintiffs' due process rights.[21]

With respect to the equal protection claim, the court emphasized that the county's policies and procedures violated the Equal Protection Clause, both because of "their disparate impact" on indigent defendants,[22] and because the county's custom and practice purposefully "detain[ed] misdemeanor defendants before trial who are otherwise eligible for release, but whose indigence makes them unable to pay secured financial conditions of release."[23] The court conceded that ordinarily, "[n]either prisoners nor indigents constitute a suspect class."[24] However, the court emphasized that indigents do receive heightened scrutiny where two conditions are met: (1) "because of their impecunity they were completely unable to pay for some desired benefit," and (2) "as a consequence, they sustained an absolute deprivation of a meaningful opportunity to enjoy that benefit."[25] Under this framework, the court found that indigent misdemeanor defendants were in

Five Reasons for Bail Bond Reform in North Carolina

1. Money bail is an unfair and ineffective tool, whether intended to achieve community safety or to assure a defendant's appearance at trial.
2. Money bail creates a two-tier criminal justice system—one for those with money and another for those without.
3. Money bail does not ensure detention of the most dangerous defendants, but rather leads to detention of the poorest defendants.
4. Pretrial detention of non-dangerous defendants is costly to taxpayers and an inefficient use of limited criminal justice resources.
5. Detaining people on the basis of their wealth is unconstitutional under the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

fact unable to pay secured bail to obtain pretrial release, and as a result they sustained an absolute deprivation of "freedom from incarceration."[26] Thus, the court concluded that the county's use of secured bail also violated the Equal Protection Clause.[27]

Similarly, North Carolina courts have held that failure to provide a criminal defendant with a meaningful opportunity for pretrial release can result in a due process violation.[28] For example, in *State v. Thompson*,[29] the defendant alleged that N.C. Gen. Stat. § 15-A-534.1(b) as applied violated his procedural due process rights when a magistrate scheduled his pretrial release hearing exactly 48 hours after commitment, even though there were judges available to hold an earlier hearing.[30]

In determining whether the delay violated due process, the court began by noting that "it is beyond question that the private interest at stake, liberty, is a fundamental right."[31] Specifically, the "traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction."[32] The Court based its recognition of the right to freedom prior to trial in the "principle that there is a presumption of innocence in favor of the accused [which] is the undoubted law, axiomatic and elementary, and...lies at the foundation of the administration of our criminal law."[33] Next, the Court concluded that once a judge became available, "further delay in providing this hearing did not serve any underlying interest of the State."[34] Because Mr. Thompson had a fundamental liberty interest in pretrial release and there was no legitimate state interest to be served by the delay, the Supreme Court of North Carolina held that "the application of N.C. Gen. Stat. § 15A-534.1(b) violated Thompson's procedural due process rights."[35]

II: Seizing the momentum for reform in North Carolina

Although money bail has been deeply entrenched in North Carolina for decades, successful litigation around the country challenging the constitutionality of wealth-based pretrial release makes the moment ripe for bail reform in North Carolina. While advocates of the money bail system argue that it is a "well-founded tradition"[36] that "allows individuals of all financial means to leverage their social networks and community ties to obtain pretrial release," they fail to recognize that tradition is not a rational reason to detain non-threatening indigent defendants.[37] It also ignores the fact that not every defendant has the benefit of a robust social network or community ties that can assist in such times of need.

By definition, most indigent defendants do not have sufficient financial means to post bail. Instead of allowing wealthy defendants—even those facing charges of violent crimes—to purchase their freedom through money bail while poor defendants sit in jail for lesser crimes, North Carolina must stop focusing on suggested bond amounts[38] for particular crimes and begin focusing on each case and each defendant objectively and individually. This change in focus would allow North Carolina magistrates and judges to pay attention to not only the criminal allegation, but also to other significant factors, such as whether the defendant is a flight risk or a danger to themselves or the community, and, importantly, to the defendant's financial ability to post money bail. This reform would also allow the court system to balance its interest in securing the defendant's attendance and the defendant's own interest of pretrial release.

Not only does unnecessary pretrial detention adversely affect the defendant, it is also financially burdensome on the state and its taxpayers. Pretrial detention is both costly and inefficient—especially when alternative options like properly managed pretrial release programs can ensure public safety and the appearance of defendants in court.[39] Changing how North Carolina assesses who is released and who has a bond set is just the beginning to reforming the bail bond system.

In addition to changing how the system initially decides which defendants have a bond set and which are detained, North Carolina should also implement alternatives to monetary bail or incarceration, such as pretrial release programs.

Some North Carolina counties, such as Wake, Forsyth, and Alexander, already use pretrial release programs.[40] One of these programs is run by a nonprofit called ReEntry, Inc. ReEntry's goal is to divert all appropriate incarcerated individuals from pretrial detention to supervision in its pretrial release program.[41] This not only saves the county the cost of pretrial detention, it also assures community safety by strict monitoring of released defendants, and allows those defendants to move on with their lives while waiting for their case to be resolved.

ReEntry, like other pretrial service programs, uses a risk assessment tool in order to make recommendations to judicial officials.[42] The judge then has the final decision as to whether the defendant can be released into the program.[43] Of course, while risk-assessment is significantly fairer to indigent defendants than is money bail, these tools must be used with care. Judicial officials must make sure that the pretrial service units that use them are qualified and trained, and that the motivation is there to make sure everyone is treated with fairness and consistency.

ReEntry is one of around 30 such programs currently operating in North Carolina. All of these pretrial release programs have varying degrees and methods of supervision. Some of these methods include requiring the defendant to check in physically or by telephone, to complete drug tests, and to be subjected to mandatory electronic monitoring.[44] Ultimately, if risk assessment and pretrial release programs are to be accepted in North Carolina, these programs will need to be standardized so that all North Carolinians are treated equally. The goal of diverting qualifying (non-dangerous) defendants from jail when they would otherwise not be able to afford bond is admirable and should be pursued in North Carolina.[45]

Conclusion

In North Carolina, as elsewhere in the nation, there is growing recognition that money bail unfairly penalizes indigent defendants by incarcerating them for months or even years to wait for their trial, while comparable wealthy defendants walk free as they await trial. The way money bail is currently decided by North Carolina trial courts violates both the United States and North Carolina Constitutions. With everyone from the right-leaning former New Jersey Governor Chris Christie[46] to the left-leaning California Senator Kamala Harris[47] recognizing the serious deficiencies in the money bail system and advocating for reform, the time is right for North Carolina officials to act. ■

David Clark has been a criminal defense attorney for 32 years; first as a JAG with the United States Air Force, and for the past 27

years with the Guilford County Public Defender. During that time, he's tried in excess of 150 jury trials. The vast majority of these trials involved clients who were held in jail during critical pretrial preparation because they couldn't afford to post the monetary bail set by the court.

The author would like to thank three Guilford County Public Defender interns who helped research and prepare this article: James "Miles" Duncan, a rising 3L at UNC School of Law; Austin Foster, a rising 3L at Elon School of Law, who helped research and write the article; and Sarah Price, a rising 3L at Elon School of Law, who made certain the citations were accurate and in proper form.

Endnotes

1. Brutalism, *Oxford Living Dictionaries*, bit.ly/2uq1XMe (last visited May 22, 2018) ("A stark style of functionalist architecture, especially of the 1950s and 1960s, characterized by the use of steel and concrete in massive blocks.").
2. *Pretrial Release Policies in the Eighteenth Judicial District*, bit.ly/2LaQt8R (last visited May 22, 2018).
3. N.C. Gen. Stat. §14-159.13 (2017) (second degree trespass), N.C. Gen. Stat. §14-444 (2017) (intoxicated and disruptive) and N.C. Gen. Stat. §14-160 (2017) (injury to personal property).
4. *UNCG Police Help Nab 2 Men in Connection to Shooting Incident at Convenience Store*, News & Record, bit.ly/2NRngON (last visited May 22, 2018).
5. N.C. Gen. Stat. § 15A-534(b) (2017) ("The judicial official in granting pretrial release must impose [non-monetary bail conditions] unless he determines that such release will not reasonably assure the appearance of the defendant as required; will pose a danger of injury to any person; or is likely to result in destruction of evidence, subornation of perjury, or intimidation of potential witnesses....and must record the reasons for so doing in writing to the extent provided in the policies or requirements issued by the senior resident superior court judge pursuant to G.S. 15A-535(a).").
6. N.C. Gen. Stat. § 14-34.1 makes it a Class E felony to discharge a firearm into occupied property. The offense is elevated to a Class D felony, requiring a mandatory active prison sentence, if the property is an occupied store such as is charged in this case.
7. *Administrative Office of the Courts Form AOC-CR-226*, bit.ly/2Lhi0Wj (last visited May 22, 2018).
8. *Bail, Fines, and Punishments*, NC Const. art. I, § 27 ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted.").
9. *United States v. Salerno*, 481 U.S. 739, 755 (1987).
10. *Bearden v. Georgia*, 461 U.S. 660, 665 (1983).
11. *Pugh v. Rainwater*, 572 F.2d 1053, 1057 (5th Cir. 1978) (en banc).
12. *See, e.g., Rodriguez v. Providence Cmty. Corr., Inc.*, 155 F. Supp. 3d 758, 768 (M.D. Tenn. 2015) (granting class-wide preliminary injunction based on "the equal protection principles articulated by Pugh and its progeny"); *Pierce v. City of Velda City*, 2015 WL 10013006, at *1 (E.D. Mo. 2015) ("No person may, consistent with the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, be held in custody after an arrest because the person is too poor to post a monetary bond."); *see also Williams v. Farrior*, 626 F. Supp. 983, 985 (S.D. Miss. 1986) ("For the purposes of the Fourteenth Amendment's Equal Protection Clause, it is clear that a bail system which allows only monetary bail and does not provide for any meaningful consideration of other possible alternatives for indigent pretrial detainees infringes on both equal protection and due process requirements.").
13. *Jones v. City of Clanton*, No. 215CV34-MHT, 2015 WL 5387219, at *2 (M.D. Ala. Sept. 14, 2015), bit.ly/2NRGEvj (last visited May 22, 2018).
14. 42 U.S.C. § 1983, Civil action for deprivation of rights allows people to sue the government for alleged civil rights violations. The statute applies when someone acting "under color of" state-level or local law is alleged to have deprived a person of rights created by the US Constitution or federal statutes.
15. *Odonnell v. Harris Cty.*, 882 F.3d 528, 534-35 (5th Cir. 2018).
16. *Id* at 536.
17. *Id.*
18. *Id.* at 537.
19. *Id.* at 540 (quoting *Ky. Dep't of Corr. v. Thompson*, 490 US 454, 460 (1989)).

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A New Approach: Jury Instruction on the Decreased Reliability of Cross-Racial Identifications[1]

By Alyson A. Grine

In an Alamance County courtroom, Jennifer Thompson, a young white woman, was 100% certain as she identified Ronald Cotton, an African American man, as the person who had raped her at knifepoint. After all, she was a straight "A" college student, and had studied every feature of the stranger who had broken into her home and attacked her, determined to make him pay if she survived. The jurors were swayed by this powerful testimony. Cotton was convicted and sentenced to life plus 54 years in prison. The problem: DNA would later prove that Ronald Cotton was not the rapist. He served ten years in prison for a crime he did not commit, aging him prematurely and depriving his family of much-needed support. In the meantime, Bobby Poole, the actual perpetrator, was left free to wander the streets and violently assault other women.[2]

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Eyewitness Identification is Prone to Error

Thompson's mistaken eyewitness identification is disturbing, but far from unique. Experts believe that "eyewitness error is the leading contributing factor in wrongful convictions in the United States."[3] Hundreds of convictions have been overturned as a result of DNA testing since 1989, and misidentification played a role in approximately three-quarters of these cases.[4] In North Carolina, eyewitness misidentification has contributed to numerous wrongful convictions. In six of these cases, DNA later proved the innocence of the individuals who had been convicted: Joseph Abbitt, Knolly Brown Jr., Dwayne Allen Dail, Lesly Jean, and Leo Waters, in addition to Ronald Cotton.[5] Eyewitness error was a factor in the wrongful convictions of six additional North Carolina cases that did not involve DNA evidence: Erick Daniels, Terence Garner, Willie Grimes, Shawn Massey, Horace Shelton, and Steven Snipes.[6] As with the Cotton case, these exonerations represent irreparable damage to the lives of innocent people; perpetrators left at large to commit additional crimes; millions of tax payer dollars wasted on court proceedings, imprisonment, and compensation of innocent parties; and an erosion of faith in the North Carolina criminal justice system.

Five decades ago, the United States Supreme Court observed, "the annals of criminal law are rife with instances of mistaken identification."[7] In a groundbreaking 2014 report, the National Academy of Sciences (NAS) described the fallibility of memory, which is at the heart of many wrongful convictions.[8] Memories are not like photographs stored in a safe, the report cautions. Instead, "the fidelity of our memories for real events may be compromised by many factors at all stages of processing, from

encoding through storage, to the final stages of retrieval. Without awareness, we regularly encode events in a biased manner and subsequently forget, reconstruct, update, and distort the things we believe to be true."[9]

In the Cotton case, Jennifer Thompson's memory was altered to the point that, when she was confronted with the actual perpetrator in one court hearing, she felt not even a spark of recognition. "From description, to creating an Identikit, to reviewing a photo array, to identifying the wrong man in a lineup and in court—each step unconsciously became a process of picking the individual most resembling the prior step, not most resembling the perpetrator."[10] To this day, she sees Ronald Cotton's face in her nightmares about the attack.[11]

Cross-Racial Identification is Less Reliable than Same-Race Identification

Adding yet another layer to the hazards of misidentification, studies have shown that people have greater difficulty in accurately identifying members of a different race than in identifying members of their own race.[12] According to the NAS Report, "[r]ecent analyses revealed that cross-racial (mis)identification was present in 42% of the cases in which an erroneous eyewitness identification was made."[13] A meta-analysis of cross-racial identifications concluded that people are 1.56 times more likely to falsely identify the face of a person of another race than they are to falsely identify a member of their own race.[14] This phenomenon has figured in North Carolina cases. For example, Dwayne Dail, Willie Grimes, Lesly Jean, and Horace Shelton were exonerated after having been misidentified by witnesses of a different race. The majority of these cases involved White eyewitness mistakenly identifying black individuals.[15]

Jurors Overestimate the Reliability of Eyewitness Identifications Generally and of Cross-Racial Identifications in Particular[16]

Scholars have found that jurors tend to overestimate the reliability of eyewitness testimony.[17] As one court observed, "while science has firmly established the inherent unreliability of human perception and memory, this reality is outside the jury's common knowledge, and often contradicts jurors' commonsense understandings. To a jury, there is almost nothing more convincing than a live human being who takes the stand, points a finger at the defendant, and says, 'That's the one!'"[18] In 2004, researchers surveyed nearly 1,000 potential jurors in the District of Columbia about eyewitness identification. They concluded that survey members often underestimated the difficulties eyewitnesses experience in making cross-racial identifications, the impact of stress on memory, and the ways in which police procedures may undermine eyewitness accuracy.[19] According to Justice Sotomayor, "jurors routinely overestimate the accuracy of eyewitness identifications; [they] place the greatest weight on eyewitness confidence in assessing identifications even though confidence is a poor gauge of accuracy."[20] In particular, scholars have found that many jurors lack knowledge of the unreliability of cross-race identification.[21] According to one survey:

> [N]early two-thirds of jurors demonstrated significant misunderstanding about the risk of error in cross-racial identification when asked to compare the reliability of a same-race identification with that of a cross-race identification. Nearly half the respondents believed cross-race and same-race identifications are equally reliable, while many others either did not know the answer or believed cross-racial identifications were more reliable.[22]

Other Jurisdictions Have Adopted Jury Instructions to Protect Against Convictions Based on Mistaken Identifications

In 2012, jurors in New York convicted Otis Boone of two counts of robbery in the first degree for taking cell phones from two individuals.[23] The first robbery lasted about one minute; the second robbery even less. No physical evidence tied Boone to the crimes. For each count of robbery, the only evidence against Boone, a black man, was the testimony of one white man identifying him as the robber. At trial, Mr. Boone's attorney argued that the victims had mistakenly identified him. The attorney asked that the trial judge instruct the jurors about the inaccuracy of cross-racial identification, but the judge denied his request. On December 14, 2017, the highest court in New York found that the trial judge erred, and stated that "the risk of wrongful convictions involving cross-racial identifications demands a new approach."[24] The court held that "when identification is an issue in a criminal case and the identifying witness and defendant appear to be of different races, upon request, a party is entitled to a charge on cross-racial identification."[25]

In a few other states—New Jersey and Massachusetts—the highest courts have held that jurors must be instructed on the topic of cross-racial identification.[26] Appellate courts have authorized such an instruction in additional states, including California, Hawaii, and Utah.[27] Most state appellate courts have yet to address this issue. In North Carolina, the court of appeals recently upheld the trial judge's refusal to give such an instruction in *State v. Watlington* on the basis that counsel had not introduced any evidentiary support to warrant such an instruction.[28] This opinion leaves open the possibility of such an instruction where counsel presents evidence on the decreased reliability of cross-racial identifications at trial.

Potential Benefits of a Jury Instruction on Cross-Racial Identification in North Carolina

While a jury instruction on cross-racial identification is not a magic bullet that will eliminate errors,[29] it is one practical reform that North Carolina can accomplish, and, as other jurisdictions have recognized, one that carries a number of benefits. For example, jury instructions do not cost a dime. They are concise statements that are simple to read to jurors. An instruction might read: "Research has shown that people may have greater difficulty in accurately identifying members of a different race or ethnicity. You should consider whether the race or ethnicity of the witness and the defendant may have influenced the accuracy of the witness's identification." Jury instructions carry weight with jurors since they come from the judge. Having received the instruction, jurors may feel they have been granted "permission" to discuss whether race played a role in the identification, whereas, without the instruction, they might fear that they would be perceived as racist if they broached the topic. "[A]s a society, we do not discuss racial issues easily. Some jurors may deny the existence of the cross-race effect in the misguided belief that it is merely a racist myth...while others may believe in the reality of this effect, but be reluctant to discuss it in deliberations for fear of being seen as bigots. That, however, makes an instruction all the more essential."[30]

Notably, the American Bar Association has recommended that there should be a jury instruction on cross-racial identification if it is an issue in the case.[31]

A jury instruction would be most effective when paired with other trial tools, such as an effective cross-examination of the eyewitness regarding his or her ability to perceive and remember the perpetrator, as well as expert testimony regarding the nature of memory, and factors that affect memory, such as the presence of a weapon. Relying on cross-examination alone, however, would produce uneven results depending on the skill of the trial attorney. Cross-examining a witness, who may be traumatized, about the sensitive topic of race and whether it played a role in the identification, without alienating the jurors, requires skills that even experienced trial attorneys may lack. In any event, eyewitnesses are often so convinced about the accuracy of their identification, they remain unflappable even in the face of the most effective cross-examination.[32] Unfortunately, studies have shown that such confidence does not correlate with higher levels of accuracy.[33] With regard to expert testimony, while it would certainly benefit jurors in every case in which identification is at issue, the reality is that experts on memory, and on cross-racial identification in particular, are not readily available. Also, they cost money. Judges may be reluctant to grant a request for funds to obtain an expert, or may rule such testimony inadmissible. For example, Ronald Cotton, and at least one other wrongfully convicted North Carolina man, Terence Garner, were both denied the opportunity to introduce expert testimony in their trials on the unreliability of cross-racial eyewitness identification, and in both cases the rejection of such testimony was upheld on appeal.[34] When an expert is unattainable, jury instructions can serve at least to bring the issue to jurors' awareness without any associated costs.[35]

Conclusion

Following Ronald Cotton's exoneration, he and Jennifer Thompson have partnered to advocate for reforms to prevent wrongful convictions on the basis of unreliable eyewitness identifications, protect the innocent, and convict the guilty. Together, they have played a powerful role in achieving reforms including the passage of the Eyewitness Identification Reform Act and the creation of the North Carolina Innocence Inquiry Commission. These reforms have been important, but North Carolina can do more to prevent wrongful convictions on the basis of cross-racial identifications. A jury instruction on cross-racial identification would cost North Carolina nothing, and would further the aim of making our criminal system a more equitable one. A new or revised pattern jury instruction would be an effective way of ensuring that these concepts are conveyed to jurors. Absent a pattern instruction, attorneys should seek a cross-racial eyewitness identification instruction on the basis of competent evidence in cases involving cross-racial eyewitness identifications, and North Carolina trial judges are empowered to give such instructions. North Carolina should join the ranks of other states, such as New York, that have concluded that "the risk of wrongful convictions involving cross-racial identifications demands a new approach."[36] ■

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Endnotes

1. A. Grine & E. Coward, *Raising Issues of Race in North Carolina Criminal Cases* (2014) (Chapter 3 of this manual deals generally with eyewitness identifications and section 3.6E of the chapter deals specifically with jury instructions), unc.live/2N7mcWC.
2. Jennifer Thompson, *Miscarriages of Justice Caused by Mistaken Identification: The Case of Ronald Cotton* (March 2, 2018) (lecture at the UNC School of Government for the North Carolina Racial Equity Network; conference title: Cross-Racial Eyewitness Identification).
3. *See* Elizabeth F. Loftus et al., *Eyewitness Testimony: Civil and Criminal* § 1-2 (5th ed. 2013); *see also* Edward Connors et al., National Institute of Justice, *Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial* (1996); C. Ronald Huff et al., *Guilty Until Proved Innocent: Wrongful Conviction and Public Policy*, 32 Crime & Delinquency 518 (1986); Innocence Project, *DNA Exonerations in the United States*, bit.ly/2yJC1w7 (last visited June 12, 2018).
4. *Perry v. New Hampshire*, 565 U.S. 228, 263 (2012) (Sotomayor, J., dissenting) ("[A] staggering 76% of the first 250 convictions overturned due to DNA evidence since 1989 involved eyewitness misidentification.").
5. The National Registry of Exonerations, Browse Cases, bit.ly/1JVXTF3 (last visited June 12, 2018).
6. *Id.*
7. *United States v. Wade*, 388 U.S. 218, 228 (1967).
8. National Academy of Sciences, *Identifying the Culprit: Assessing Eyewitness Identification* (2014), bit.ly/2zQR6A7.
9. *Id.* at 60.
10. Joseph F. Savage Jr. & James P. Devendorf, *Conviction After Misidentification: Are Jury Instructions a Solution?*, The Champion, June 2011, at 30, n.7 (discussing factors contributing to Jennifer Thompson's misidentification of Ronald Cotton).
11. Thompson, *supra* note 2.
12. *See, e.g.*, Radha Natarajan, *Racialized Memory and Reliability: Due Process Applied to Cross-Racial Eyewitness Identifications*, 78 N.Y.U. L. REV. 1821, 1822–23 (2003) (concluding that "[w]hile all eyewitness identifications are prone to error, cross-racial eyewitness identifications are more often wrong than same-race identifications"); *see also* Gary L. Wells & Elizabeth A. Olson, *The Other-Race Effect in Eyewitness Identification: What Do We Do About It?*, 7 Psychol. Pub. Pol'y & L. 230, 230 (2001); American Bar Association, *American Bar Association Policy 104D: Cross-Racial Identification*, 37 SW. U. L. REV. 917, 924 (2008) ("The purpose of a specific jury instruction on cross-racial identification is to permit juries to consider the increased possibility of misidentification in determining whether or not there is sufficient evidence of guilt.").
13. National Academy of Sciences, *supra* note 8, at 96.
14. Christian A. Meissner & John C. Brigham, *Thirty Years of Investigating the Own-Race Bias in Memory for Faces: A Meta-Analytic Review*, 7 Psychol. Pub. Pol'y & L. 3, 15 (2001).
15. The exonerees named who were the subjects of mistaken cross-racial identifications are black, with the exception of Dwayne Dail who is white.
16. For a more detailed discussion of this issue, see A. Grine & E. Coward, *supra* note 1, at sections 3.2 and 3.3.
17. *See, e.g.*, Tanja Rapus Benton et al., *Eyewitness Memory is Still Not Common Sense: Comparing Jurors, Judges and Law Enforcement to Eyewitness Experts*, 20 Applied Cognitive Psychol. 115 (2006); Richard S. Schmechel et al., *Beyond the Ken? Testing Jurors' Understanding of Eyewitness Reliability Evidence*, 46 Jurimetrics J. 177 (2006).
18. *United States v. Brownlee*, 454 F.3d 131, 142 (3d Cir. 2006) (quotations and citations omitted). *See also Phillips v. Allen*, 668 F.3d 912, 916 (7th Cir. 2012) (stating that "nothing is obvious about the psychology of eyewitness identification" and "most people's intuitions on the subject of identification are wrong").
19. Timothy P. O'Toole et al., *District of Columbia Public Defender Survey*, The Campion, Apr. 2005, at 28; *see also* Schmechel et al., supra note 17.
20. *Perry v. New Hampshire*, 565 U.S. 228, 264 (2012) (Sotomayor, J., dissenting) (internal citations omitted).
21. Brief of *Amicus Curiae* NAACP Legal Defense & Educational Fund, Inc. at 14, *People v. Boone*, 91 N.E.3d 1194 (N.Y. 2017) (No. 2012-07711) (citing Richard S. Schmechel et al., *Beyond the Ken? Testing Jurors' Understanding of Eyewitness Reliability Evidence,* 46 Jurimetrics J. 177, 200 (2006), and Roger B. Handberg, *Expert Testimony on Eyewitness Identification: A New Fair of Glasses for the Jury*, 32 Am. Crim. L. Rev. 1013, 1035 (1995)).

22. *Id.* (citing Richard S. Schmechel et al., *Beyond the Ken? Testing Jurors' Understanding of Eyewitness Reliability Evidence*, 46 Jurimetrics J. 177, 200 (2006)).
23. *People v. Boone*, 91 N.E.3d 1194 (N.Y. 2017).
24. *Id.* at 1196.
25. *Id.*
26. *State v. Henderson*, 27 A.3d 872, 299 (N.J. 2011); *Com. v. Bastaldo*, 32 N.E.3d 873, 883 (2015).
27. *See People v. Palmer*, 203 Cal. Rptr. 474, 475 n.2 (Cal. Ct. App. 1984) (reversible error to reject defendant's proposed jury instruction that would have instructed jurors to "consider whether or not the witness is the same race as the individual he is attempting to identify. If they are not, you should consider the effect this would have on an accurate identification."); *State v Cabagbag*, 277 P.3d 1027 (Haw. 2012) (holding that trial courts "must give the jury a specific eyewitness identification instruction whenever identification evidence is a central issue in the case, and it is requested by the defendant[,]" including an instruction that one factor to be considered in evaluating identification testimony is the cross-racial nature of an identification); *State v. Long*, 721 P.2d 483, 494 n.8 (Utah 1986) (instruction that would satisfy the court's concerns instructs jurors to "consider whether the witness is of a different race than the criminal actor. Identification by a person of a different race may be less reliable than identification by a person of the same race."); *State v. Brink*, 173 P.3d 183, 185 n.1 (Utah Ct. App. 2007) (discussing with approval an instruction providing in part that "a witness identification of a person of a different race may be less reliable").
28. *State v. Watlington*, 234 N.C. App. 580 (2014). North Carolina courts also rejected proposed jury instructions on cross-racial impairment in several cases in the early 80s. *See State v. Allen*, 301 N.C. 489 (1980); *State v. Miller*, 69 N.C. App. 392 (1984). Less scientific evidence of cross-racial impairment was available at that time. *See* A. Grine & E. Coward, *supra* note 1, at 3-33 to 3-34 (discussing cross-racial jury instructions in North Carolina).
29. In fact, in the second trial of Ronald Cotton, the trial judge briefly instructed jurors "to consider whether it is more difficult to identify one who is a member of another race," but the jurors were persuaded to convict by the "certain and largely unimpeached" identification by Thompson. *State v. Cotton*, 99 N.C. App. 615, 620–22 (1990), aff'd on other grounds, 329 N.C. 764 (1991).
30. *Boone*, 30 N.Y.3d 521, 532 (quoting brief of former judges and prosecutors as amici curiae at 8).
31. American Bar Association, *supra* note 12 ("The purpose of a specific jury instruction on cross-racial identification is to permit juries to consider the increased possibility of misidentification in determining whether or not there is sufficient evidence of guilt.").
32. *Boone*, 30 N.Y.3d 521, 531 ("[A]s scholars have cautioned, most eyewitnesses think they are telling the truth even when their testimony is inaccurate, and because the eyewitness is testifying honestly (i.e., sincerely), he or she will not display the demeanor of the dishonest or biased witness. Instead, some mistaken eyewitnesses, at least by the time they testify at trial, exude supreme confidence in their identifications" (quoting *State v Henderson*, 27 A.3d 872, 889 (N.J. 2011)) (internal quotation marks, brackets and citation omitted)).
33. Loftus et al., supra note 3, at § 3-12; Brian L. Cutler & Steven D. Penrod, *Mistaken Identification,* 218, 95 (1995).
34. *Cotton*, 99 N.C. App. at 621–22 (affirming exclusion of expert witness on ground that the effects of stress, cross-racial factors, priming of memory, and confidence malleability were commonly known to jurors, among other factors; *State v. Garner*, 136 N.C. App. 1, 7–10 (1999).
35. *See* Derek Simmonsen, *Teach Your Jurors Well: Using Jury Instructions to Educate Jurors About Factors Affecting the Accuracy of Eyewitness Testimony*, 70 MD. L. Rev. 1044, 1079-80 (2011) ("Jury instructions are the best method for educating jurors about eyewitness identification issues for a variety of reasons. Judges are already familiar with instructions and comfortable using them. Instructions can easily be incorporated into a trial and are compatible with already existing instructions. They cost little to implement and are efficient. Instructions also avoid the adversarial nature of dueling experts and allow for a continuing debate within the legal community. Trial judges retain discretion to modify them as needed for the facts of any particular case. Finally, they offer a uniform and neutral means of educating jurors."); Brief of *Amicus Curiae* NAACP Legal Defense & Educational Fund, Inc. at 22 n.89, *People v. Boone*, 91 N.E.3d 1194 (N.Y. 2017) (No. 2012-07711) (citing Simmonsen).
36. *Boone*, 30 N.Y.3d 521, 526.

History and Comparison of Judicial Selection Processes

By Judge John M. Tyson

This article provides a brief history of North Carolina's judicial selection and elections, recurring issues, and recent developments in judicial elections laws. It will also explore the judicial selection processes in the sister states of Virginia and South Carolina, the federal courts, and identify relevant issues and opportunities.

I. North Carolina Judicial Selection

In North Carolina after independence, judicial selection originated and rested with the General Assembly's appointing of judges and justices to office, as mandated by the North Carolina Constitution of 1776. These appointments were not subject to term limitations or mandatory retirement in the Constitution. This practice remained in place for over 90 years, until the enactment of the 1868 post-Civil War Constitution.

For the past 150 years, North Carolina has required all judicial appointees and candidates to stand for popular election. Article IV, Sections 26 and 27 of the 1868 North Carolina Constitution abolished judicial selection by legislative appointment and required popular elections to be held for all North Carolina judicial offices.[1] Appellate justices and judges and superior court judges run for office, serve eight-year terms, and are required to "be elected by qualified voters of the State, as is provided for the election of members of the General Assembly."[2] This new constitutional provision shifted judicial selection from General Assembly appointments to partisan elections.[3]

Gubernatorial appointment to vacancies occasioned from newly created judgeships, resignations, retirements, and deaths, without formal legislative input or confirmation, led to one-party dominance of the judiciary. Vacancies would be filled by creating another vacancy in a lower court judgeship. Being appointed to office allowed the appointed judge to run for election as the "incumbent" in the following general election.

Partisan judicial selections and elections remained the exclusive process of maintaining the bench for well over a century, despite multiple attempts to amend.[4] In 1974 and 1977, members of the General Assembly introduced bills to establish a "merit selection" process.[5] Despite support from the judiciary and Bar, both bills failed.[6]

Notwithstanding the failure of both bills, then-Governor James Hunt created a "merit selection" panel through an executive order; he filled vacancies through panel "recommendations" until he left office in 1985.[7] This panel was criticized as requiring the candidate to belong to the same political party as the governor as the threshold "merit." This "merit selection" panel ended with the expiration of his second term.[8]

Despite apparent support for changing the judicial selection process, most amendment efforts in the 1990s failed.[9] In 1991, a bill establishing a merit selection process with confirmation by the General Assembly passed in the Senate, but failed in a House committee.[10] Likewise, a 1995 bill proposed appointment by the governor, legislative confirmation, and retention elections for appellate judges. This proposal passed the Senate, but failed in the House of Representatives.[11]

Another major attempt at changes failed in 1999. The 1999 bill would have established merit selection and retention elections for appellate judges. Once again, the Senate approved the measure, but the House of Representatives did not concur.[12]

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However, a major breakthrough occurred in 1996. The North Carolina Republican Party ("Republican Party"), hobbled by a large disadvantage in the partisan, statewide superior court elections, sued the State Board of Elections in *Republican Party of North Carolina v. Martin*.[13]

The Republican Party alleged voters' rights under the First and Fourteenth Amendments were violated by the then-current statewide judicial election process for superior court judges.[14] The suit was initially dismissed by the United States District Court, which ruled the suit failed for lack of a justiciable question.[15] The United States Court of Appeals for the Fourth Circuit overturned, holding the Republican Party had

asserted a justiciable claim and cited *Davis v. Bandemer*.[16] In *Davis*, the Supreme Court of the United States held vote dilution claims filed by political parties were justiciable.[17] After remand, in which the district court ordered a preliminary injunction before the 1994 superior court elections, the suit settled, with three republican superior court judges being appointed.[18]

In reaction to this lawsuit, the legislature amended the statute for partisan judicial elections for superior court judges, and established a non-partisan primary and general elections for these judges.[19] Further, superior court judges were no longer elected by voters statewide, but by voters within the judges' individual geographical districts.[20] These changes took effect in 1998.[21]

Republican appellate judicial candidates dominated the statewide elections in 1998, 2000, and 2002. The democratic majority in the General Assembly responded with similar legislation in the early-to-mid-2000s to implement non-partisan elections for district court judges, court of appeals judges, and justices of the Supreme Court. In 2002 the legislature amended the law governing the elections of all appellate court judges to make those elections non-partisan, beginning with the 2004 elections.

Also beginning in 2004, appellate judicial candidates could opt to receive public finance funding, after raising sufficient "qualifying private contributions." Candidates were further limited on the amount and number of private contributions they were allowed to solicit or retain.[22] However, public financing was repealed by N.C. Session Law 2013-360 after the Supreme Court of the United States declared similar public financing plans in Arizona as unconstitutional.[23]

In 2011, then-Governor Beverly Perdue established a "merit selection panel" through executive order.[24] She garnered criticism when, at the very end of her term, she bypassed this panel to appoint appellate judges into office to prevent her successor, Pat McCrory, from filling those vacancies with his own appointments.[25] Moreover, in 2011 the legislature attempted to amend the Constitution by passing Senate Bill 458, which would have established judicial merit selection.[26] The proposed amendment read:

> An act to amend the North Carolina Constitution to replace the present practice of selecting justices and judges of the appellate division and judges of the superior court generally by gubernatorial appointment, followed by elections, with a method by which (1) two candidates for justice and judge will be nominated by a judicial nominating commission, the governor will appoint one of them, and at the next election the voters will choose in a nonpartisan election between the two persons, (2) at the end of the term of a justice or judge who has successfully won an election, the question of the justice's or judge's retention in office is submitted for approval or disapproval by nonpartisan vote of the people, (3) provision is made for the case of withdrawal of a candidate before the election, and (4) provision is made for appointment of the chief justice from among the associate justices.[27]

This proposed amendment never made it onto a state-wide ballot for a vote.

II. Recent Changes

In 2015 the North Carolina General Assembly enacted legislation for incumbent Supreme Court justices to retain or vacate their seat through retention elections. N.C. Gen. Stat. § 7A-4.1 provided, "[a] justice of the Supreme Court who was elected to that office by vote of the voters who desires to continue in office shall be subject to approval by the qualified voters of the whole state in a retention election at the general election immediately preceding the expiration of the elected term."[28]

A retention election occurs "where a justice runs against his own record. Similar to constitutional changes, voters have the ability to vote for or against a justice's ability to stay on the court."[29] In procedure, the name of a sitting justice is placed on a ballot, and voters are asked whether the judge should be retained on the bench. 2016 was intended to feature North Carolina's first retention election.[30]

A prospective Supreme Court candidate filed a suit, alleging the retention law violated the North Carolina Constitution, imposed an additional qualification for a candidate for office, and barred her from running against an incumbent judge.[31] She argued the North Carolina Constitution required contested elections.[32] A three-judge lower court overturned the law; and their decision was appealed directly to the Supreme Court of North Carolina.[33] The Court's decision split 3-3 on the law's constitutionality due to the affected justice's recusal, rendering the lower court's decision undisturbed, but non-precedential.[34]

The 2016 Supreme Court judicial election returned to a traditional, unaffiliated contested primary, which narrowed the candidates from three to two, and led the general election.[35]

In early 2017, the North Carolina General Assembly returned all judicial elections, trial and appellate, to partisan races.[36] Overriding the governor's veto, the legislature passed a bill into law allowing judicial candidates to publicly affiliate with, and be certified by, political parties.[37]

Also in early 2017, the North Carolina legislature introduced a bill reducing the court of appeals from 15 judges to 12. Governor Cooper also vetoed the bill as an

unconstitutional attempt to "inject partisanship into our courts," but his veto was also overridden by the General Assembly. The bill became law and will effectively abolish the next three seats that become vacant on the court of appeals, whether due to death, removal, resignation, or retirement prior to the end of the judge's current term.[38] The same legislation provides an appeal of right directly to the Supreme Court of North Carolina from the trial divisions in cases regarding orders terminating parental rights as well as decisions concerning certification of class actions. The bill will become effective on or after January 1, 2019.[39]

In June 2017, Chief Justice Mark Martin proposed to change judicial selection to a non-election process. At the 2017 North Carolina Bar Association's Convention, he advocated replacing the current partisan election process with a merit selection process.[40]

Chief Justice Martin recommended for the General Assembly to establish a selection process with three main components: (1) a panel, appointed by the governor and General Assembly, tasked with evaluating candidates based upon objective and non-ideological criteria; (2) a governmental authority accountable to the people appoints judges; and, (3) retention elections held at regular intervals, ensuring North Carolina voters retain continual involvement in judicial selection.[41] This plan is most comparable to the "Missouri Plan" which is a:

> method of selecting judges that originated in the state of Missouri and subsequently was adopted by other US jurisdictions. It involves the creation of a nominating commission that screens judicial candidates and submits to the appointing authority (such as the governor) a limited number of names of individuals considered to be qualified. The appointing authority chooses from the list, and any one so chosen assumes the judgeship for a probationary period. After this period the judge stands for popular election for a much longer term, not competing against other candidates, but basing his candidacy on previous judgments. Under the Missouri Plan, voters decide whether or not to retain the judge in office.[42]

In June 2018 the General Assembly enacted Session Law 2018-118 to place on the ballot for the November 2018 general elections a constitutional amendment to change the process for filling judicial vacancies.[43] If voters approve the proposed amendment, it would change the process for filling vacancies of all North Carolina judicial seats.[44]

To replace the current process of the governor choosing and filling vacancies, the constitutional amendment establishes a nine-member Nonpartisan Judicial Merit Commission of members selected by the chief justice, the governor, and the General Assembly to evaluate candidates nominated by the "people of the state."[45] The commission ranks candidates as qualified or not qualified for the judicial position and forwards its evaluations to the General Assembly.[46] The General Assembly then recommends at least two nominees, deemed qualified by the commission, to the governor.[47] The governor then appoints the nominee the governor deems best qualified solely from the General Assembly's nominees.[48]

If the governor fails to appoint a nominee within ten days after the General Assembly presents the nominees, the General Assembly fills the vacancy.[49] The bill also provides that the chief justice could fill the vacancy if the vacancy occurs during a period in which the General Assembly is in adjournment, the General Assembly adjourns without presenting nominees to the governor or fails to elect a nominee, or the governor fails to appoint a nominee recommended by the General Assembly.[50]

Local commissions appointed by the chief justice, governor, and General Assembly would evaluate nominees for superior and district court vacancies under the same process described above.[51]

In light of the proposed constitutional amendment to fill judicial vacancies, it is also foreseeable that another amendment may be proposed to implement a different process for selecting judges or holding an election for judges.

III. Judicial Campaign Finance

A record level of in-state election spending was set in 2016: $33.1 million compared to the previous record of $14.5 million in 2012.[52] While most of this spending occurred in the governor's race,[53] a large amount was also spent on the state-wide judicial races.[54] A total of $5 million was spent on the 2016 North Carolina Supreme Court race, with $2.6 million for the incumbent and $2.4 million for the general election challenger.[55] Over $100,000 was also spent on each of the two court of appeals races, an amount that significantly exceeded recent expenditures for court of appeals races.[56] This increase in spending has occurred in part due to the growing involvement and outside expenditures of outside groups.[57] The 2016 judicial primary was similarly unusual. An excess of $500,000 was spent and most of the spending was by the incumbent.[58]

This expenditure record substantially increased the amount over the 2014 election spending, which at that time had established a new record.[59] In 2014, North Carolina ranked second in the country in spending on state judicial elections, behind Michigan.[60] More than $6 million dollars was raised for the four Supreme Court seats, of which $2.1 million was spent by outside spending groups.[61] The Supreme Court candidates received an average of $436,030.[62] Notably, this was the first judicial election after the General Assembly had removed the public financing system, which had been roundly criticized by candidates and incumbents of both political parties for providing wholly inadequate funding levels for a statewide campaign.[63]

IV. Judicial Election Outcomes

6 November 2018 Election

For the November 2018 general election, one Supreme Court seat and three court of appeals seats will be up for election.[64] This will be the first election since 1996 in which all judicial races—trial and appellate—will be listed on the ballot as officially partisan.[65] Session Law 2017-214, passed by the General Assembly in 2017, eliminated all judicial primaries for the 2018 election.[66] This law was upheld over a challenge in federal court.[67] The 2018 races for the Supreme Court seat and two of the court of appeals seats will be "winner-take-all" for the highest vote getter out of the three candidates, with no required minimum percentage of the vote and no runoff election required.

2016 Judicial Election

In 2016, of the 6,914,248 total eligible voters in North Carolina, 4,769,640 voted.[68] These were the first partisan court of appeals judicial elections in 14 years for five seats, or one-third of the composition of the court. In the Supreme Court election, the candidates still ran unaffiliated, but the challenger, a sitting trial court judge who was listed first on the ballot, won with 2,157,927 of the votes

(54.47%), against the well-regarded and experienced two-term incumbent, who garnered 1,803,425 votes (45.53%).[69]

All republican judicial candidates and incumbents for the five seats on the court of appeals were successful. In those five races, three of the 2016 court of appeals winners were also incumbents, appointed by the governor, with the exception of one open seat vacated by an interim gubernatorial appointee, who did not seek election. One previously elected incumbent was defeated.

The 2016 election—the first partisan court of appeals judicial election in 14 years—had by far the most voter participation. This high turnout was due to the election being a presidential year and a hotly contested US senatorial election, as well as the return to partisan elections for the court of appeals, which reduced the voter "drop off" in past non-partisan elections. The unique nature of the 2016 presidential and national election cycle was also a factor in the greatly increased voter turnout from all sides.[70]

4 November 2014 Election

In the 2014 general election, four Supreme Court seats were up for election. There were 2,939,767 out of 6,627,862 (44.35%) eligible North Carolina voters who participated.[71] All of these races were officially non-partisan. Two appointees and one incumbent won, one appointee lost, and one Supreme Court incumbent, who had been gubernatorially appointed as chief justice, was elected. A highly contested statewide United States Senate election, in which the incumbent was defeated, was also on the statewide 2014 ballot, which increased voter turnout.

Four court of appeals seats were also on the statewide ballot in 2014. One incumbent judge was uncontested, one gubernatorial appointee was elected, one election was for an open seat due to the retirement of the incumbent at the end of his term, and the last vacancy occurred after the primary deadline, which attracted 19 candidates in a winner-take-all election that included two former court of appeals judges and three trial judges. Two of these successful candidates in the head-to-head elections raised and spent over $400,000, outspending their opponents, who were both sitting trial judges, by nearly 10 to 1.

6 November 2012 Election

In the 2012 general election, one Supreme Court seat and three court of appeals seats were up for election. The races were all non-partisan. All of the winners, except one, were incumbents. A former court of appeals judge won with 1,821,562 votes (51.9%), defeating the re-appointed court of appeals judge, who received 1,688,463 votes (48.1%) and who had also been defeated in the 2010 general election in a bizarre, and since repealed, "instant runoff" election where voters had to list their first and second choices of candidates for the seat.

Presidential elections were held in 2012 and 2016. The number of raw votes in both of these election years dwarfed the voter turnout in 2014, a mid-term election year, with four North Carolina Supreme Court Justices and four court of appeals seats, all being non-partisan, but with a hotly contested statewide United States Senate seat on the ballot.

V. Virginia Judicial Elections

In reviewing the various methods of judicial nomination, selection, election, and retention, the prevailing practices in North Carolina's bordering sister states are also instructive.

The Commonwealth of Virginia uses a legislative appointment system for selecting its judges. The Virginia Constitution states:

> The justices of the Supreme Court shall be chosen by the vote of a majority of the members elected to each house of the General Assembly for terms of 12 years. The judges of all other courts of record shall be chosen by the vote of a majority of the members elected to each house of the General Assembly for terms of eight years.[72]

The Code of Virginia provides, "[t]he Supreme Court, by rule, shall establish and maintain a judicial performance evaluation program that will provide a self-improvement mechanism for judges and a source of information for the reelection process."[73]

Virginia uses the Judicial Performance Evaluation Program to determine if sitting judges should be re-elected to the bench. This evaluation program consists of numerous factors, which include a scaled performance, anonymous writing evaluations from attorneys who have come before a judge, and an observation from a retired judge in the courtroom. These evaluations are then sent to Virginia Commonwealth University's Survey and Evaluation Research Laboratory (VCU-SERL), which is an independent contractor that prepares the evaluation reports. Upon completion, the reports are presented to the Virginia General Assembly for their vote.

Currently, judicial selection in Virginia is facing some backlash to the election process. As one report notes, "many judges are getting negative remarks and not getting reelected. Performance reviews can make people nervous, and judges are no exception. They wonder just who is weighing in on their abilities and what weight their bosses give those reviews."[74]

However, Chief Justice Lemons of the Virginia Supreme Court stated the current selection process is here to stay.[75] The state acknowledges the evaluations are stressful, pointing out, "judges in their first term are evaluated three times: after the first year on the bench, mid-term, and during the year before re-election. During successive terms, a judge is evaluated mid-term and in the year before re-election."[76]

VI. Judicial Selection and Retention in South Carolina

South Carolina's judicial election and retention process is also fairly unique among the states, due to its usage of a merit selection process wholly controlled by the legislature. The legislature elects the state's judges, as mandated by the South Carolina Constitution.[77] Before the General Assembly votes upon a candidate, the candidate is vetted and approved by a merit selection panel called the Judicial Merit Selection Commission (JMSC).

The executive branch asserts no formal control in judicial selection, with the exceptions of magistrates, administrative law judges, and masters-in-equity. These judges are appointed by the governor.[78]

Because three legislators appoint the approving panel, and the candidates are voted on by the General Assembly, the legislature essentially retains "absolute control" over who enters into judicial office.[79] Under this system, *candidates must seek out legislators* to garner support. Some fear this practice renders legislatively-elected judges being beholden to politicians.[80] Despite criticism and accusations of corruption, no official changes have occurred.[81]

The JMSC's ten members are all selected by members of the legislature. Five are selected by the Speaker of the House; the Speaker must appoint three appointees from

the General Assembly and two from the general public.[82] The chair of the Senate Judiciary Committee selects three members, while the president pro tempore selects the remaining two.[83] Likewise, three commission members must come from the General Assembly, and two members are appointed from the general public.[84]

The panel reviews the candidate's legal qualifications and overall fitness for public office; "[n]o candidate determined to be unqualified for judicial office may be elected."[85] South Carolina law requires the JMSC to consider at least nine different areas: the candidate's constitutional qualifications, ethical fitness, professional and academic ability, character, reputation, physical health, mental stability, experience, and judicial temperament.[86]

After reviewing the candidate's qualifications and conducting an interview, the JMSC prepares a report, which is voted upon by the JMSC's members. The report indicates whether the candidate is qualified or unqualified.[87]

The JMSC nominates no more than three qualified candidates per position from the pool of candidates.[88] South Carolina's Supreme Court justices, court of appeals judges, and circuit trial judges are all selected by this process.[89]

Of South Carolina's current judges, one justice, four court of appeals judges, and nine circuit court judges are former legislators or legislative staff; which equals to 14 out of 61 judges, as identified on the SC judicial department website.[90] Critics of this process note that relatives of sitting legislators have commonly been elected as judges, in addition to former legislators with little or no experience on a bench.[91]

The chair of the JMSC also appoints citizens to committees with the duty of screening candidates for local judgeships in five different geographical regions of South Carolina.[92] Each regional committee conducts background investigations and interviews candidates for regional judgeships, as well as the candidates' friends and acquaintances.[93]

VII. Federal Judicial Appointments and Confirmation

Federal government judicial selection differs from most states, in that judges are not voted into judicial office. Nominees are appointed by the president and confirmed by the Senate.[94] Article III federal judges are appointed for life, endure no initial or retention elections, and can only be removed by impeachment.[95] However, this process is not immune from partisanship.

The first step in the federal trial and appellate selection process requires the president to nominate a candidate. Before a person is nominated, the Justice Department and the president's political staff must "vet" the person. This process seeks to determine whether the nominee is competent, experienced, possesses judicial temperament, and shares similar philosophical beliefs with the president.[96]

The president's nomination is then submitted to the United States Senate and referred to the Senate Judiciary Committee, which also reviews the nominee's qualifications and votes on whether to send the candidate's nomination to the full Senate for a floor vote.[97] At this juncture, the senators from the nominee's home state may formally weigh in on the nominee.[98]

The Senate retains a long-standing tradition called "blue slipping," by which the nominee's home state senators may express their displeasure with a nominee by not returning a "blue slip" mailed to them by the committee. The purpose of the slip is for senators to mark their support or opposition to the nominee, and then return the slip.[99] When a home state senator simply does not return the slip,[100] the chair of the Judiciary Committee extends that senator a courtesy and indefinitely refuses to hold hearings on the nominee's merits.[101]

This failure by the home state senator to return the blue slip essentially kills the district court nomination, regardless of the candidate's qualifications.[102] This "courtesy" is regularly extended to all senators, regardless of the party affiliation of the home senators, the chair, the nominee, or the president.[103] This process has routinely been used by both political parties to delay nominations, in order to give an incoming president more judicial vacancies to fill.[104]

Once a nomination is approved by the Senate Judiciary Committee, a nomination may still experience partisanship difficulties before the "advise and consent" vote by the full Senate.[105] The Senate confirmation process regularly experiences strong partisanship, which has intensified over time.[106]

There has been a sizable increase in the number of days a United States District Court nominee waits for confirmation. Under President Reagan, the average wait was 60 days.[107] This wait rose to 135 for President Clinton, 178 days for President Bush-43, and 223 days for President Obama in 2013.[108] Further, the average number of days a United States District Court vacancy existed under George W. Bush was 285.[109] In 2013 the average wait had risen over a year to 408 days.[110] By June 2018 there were 61 federal judicial positions that had been vacant for more than 250 days, and 20 federal judicial positions that had been vacant for more than 1,000 days.[111]

President Obama also experienced delays in confirming appellate judges. In President Obama's fifth year of his presidency, 2013, his rate of appellate confirmations took much longer and were less successful than President Bush-43's confirmation rates in his fifth year.[112]

Increasing partisanship, uncertainty, and difficulty in timely confirmation has caused a declining number of private practice attorneys to seek federal judgeships, and kept an increasing number of state judges, term-limited federal judges, and magistrates from seeking federal judgeships. These trends have grown steadily since the Eisenhower administration.[113]

When Donald J. Trump took office as president in January 2017, 88 district and 17 court of appeals vacancies existed.[114] As of June 2018, President Trump had obtained Senate confirmation for 15 appeals court nominees.[115] However, increasing partisanship has resulted in President Trump's nominees "fac[ing] a record amount of opposition," according to the Pew Research Center.[115] In spite of the opposition, the average number of days from nomination to confirmation under President Trump is 115, approximately 20 days shorter than in President Obama's first year.[117]

VIII. Conclusion

North Carolina has experienced designated-party affiliation in its judicial elections dating back 150 years to 1868. The back-and-forth struggles between the political parties led to calls for non-partisan elections. Although North Carolina experienced a brief period of non-partisan elections at all judicial levels between 2004 and 2014, partisan elections have returned in full force. In response, Chief Justice Martin advocated a system of judicial selection similar to that in Missouri in June 2017.

Virginia elects and re-elects judges

through its legislature. It also maintains an anonymous evaluation program in which judges are reviewed based upon their courtroom performance. A judge's re-election prospects are directly derived from the reviews. This process has been contentious and criticized by many frustrated judges. They argue the reviewers and weight of the review criteria are unknowable, amount to character assumptions/assignations, and thus are unfair and are unreliable indicators of judicial experience, temperament, and performance.

South Carolina's judges, like Virginia's, are also elected by the legislature, based upon formal recommendations prepared by the JMSC. The JMSC members are handpicked by three specific members of the legislature. This ensures the judiciary is answerable to the people through the elected members of the legislature, at least in theory. Many critics note the process gives the legislature complete control over the judicial selection process, forcing judicial candidates to curry favor with legislators. South Carolina's history of former legislators with limited prior judicial experience and legislator-relatives being appointed to the bench, evidences the possibility of strong partisanship and possible corruption occurring in the process.

On the surface, the federal nomination and selection process avoids politicization of the judiciary by eliminating elections and retention elections. However, the selection, nomination, and confirmation process itself, and the political entities partaking in it, render the federal judicial selection increasingly partisan, ideological, and fraught with enormous delays to give the most qualified candidates pause. Moreover, the presidential appointment process has also become increasingly partisan over time. Most federal judicial nominees are marched through an intensely partisan process to be vetted, nominated, recommended out of the Senate Judiciary Committee, and ultimately to be granted a Senate floor "advise and consent" vote.

In summary, North Carolina's history of judicial selection, along with an examination of Virginia's and South Carolina's judicial selection process, demonstrates the difficulty in establishing a process that identifies and selects potential judges, based upon judicial temperament, objective and proven experience, and merit, while retaining direct accountability to the people.

Future changes may include implementing districts (North Carolina proposed redistricting under House Bill 717) and proposed constitutional amendments to change the currently required party affiliated election by the voters to a method other than through direct election by the people. The pending constitutional amendment may implement changes for judicial vacancies.

Whether these changes, like others before them, will be successful or not, depends upon whether the people choose to relinquish their current constitutional right to directly elect the trial and appellate judges. Past and recent polling indicates a supermajority of voters want to retain their current rights to elect their judges.[118] ■

Judge John M. Tyson was elected statewide in 2014 and presently serves as a judge on the North Carolina Court of Appeals and as a commissioner on the Dispute Resolution Commission. Previously, he served as chair of the North Carolina State Ethics Commission. He also served as an elected judge on the North Carolina Court of Appeals from 2001 until 2009 and as a recall court of appeals judge and as special superior court judge from 2009 to 2013.

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As I Leave the Bench, What Troubles Me about Trial Lawyers

By The Honorable Donald W. Stephens

These remarks were delivered by Judge Donald W. Stephens shortly after his retirement from the bench at an event hosted by the Eastern North Carolina Chapter of the American Board of Trial Advocates on December 4, 2017, in Raleigh at which Judge Stephens was recognized for his years of service as a trial judge of the superior court.

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After 33 years on the North Carolina Superior Court bench and having reached the mandatory retirement age of 72, I retired on November 1, 2017.

I was licensed to practice law in 1970, 47 years ago. That was the year that the old Wake County Courthouse was dedicated and opened for business.

In 1970, there were about 500 lawyers in Wake County. Today, we have close to 6,000 lawyers in our Bar.

Many things have changed in the practice of law over the last 47 years. However, there has been one constant that has remained the same throughout all those years—the client. These are real people whose side of a real story may unfold in a courtroom in front of a jury of 12 citizens.

I asked Nick Ellis [the former president of the Eastern NC Chapter of ABOTA], what do you want me to talk about today, and what is my time allotment to speak? He advised me to talk about trying jury cases for about five to seven minutes. So, I need to compress the hundreds of significant jury trials that I have presided over during the last 33 years into five to seven minutes…I don't think that's possible.

Instead, I decided to talk to you about the things that worry me as I leave the trial bench. These are not the political things that are happening in the North Carolina legislature. They are the practical things happening to trial lawyers.

Just like all of you, my great passion has been the trial of jury cases, both as a lawyer and a judge. It is the essence of democracy. It is the grand stage on which lawyers strut, and fret, and perform to an audience of 12 disinterested strangers, selected randomly, who represent the moral conscience of their community, as they engage in a search for justice.

When I tried my first jury cases in the 1970s, citizens seemed to enjoy being on a jury. They accepted the jury summons as an opportunity to serve their community. They saw it as a responsibility of citizenship. They viewed jury service as an essential part of America. It was democracy in its purest form.

Very few summoned citizens asked to be excused. They were a different generation from today's juror, and we did not demand as much time of those jurors.

The first capital case I prosecuted in the early 1980s in Halifax County was tried in four days. Today, it would take two weeks to pick the jury and another four weeks to try that same case.

The first medical malpractice case I presided over as a judge in 1985 was completed in a week. Today, it would probably take three or four weeks to try that identical case.

The public at large simply does not have six to eight weeks to give you to try your malpractice case, or your personal injury case, or your complex business dispute.

How many of you could afford to take off six to eight weeks from your law practice to sit on a jury? Imagine the average citizen, just barely making ends meet, being required to take six weeks off from work to be paid no

more than $40 a day to sit on a jury.

At the time I retired, we had to summon 200 jurors in Wake County to be sure that 100 would show up. Of the ones who did show up, very few wanted to be there. And, if selected, they expected to serve only a day or two.

We need to find a way to streamline jury trials so that disputed issues of fact can be resolved without taking weeks and weeks to get that done. If we don't, we will all lament the demise of the jury trial—where no citizen can afford to serve, and where those who are compelled to serve greatly resent being there to the detriment of every lawyer and every party in the courtroom.

Just as I lament the potential demise of the jury trial, I lament the foreseeable passing of you, the trial lawyer.

I have presided over the trial of horrific criminal cases and of every form of civil dispute you can dream up—from medical malpractice cases and all the various forms of personal injury cases, including those from vehicle accidents, to coffee spills at Starbucks, and the slip and fall cases at the Winn-Dixie grocery stores.

Many of these cases were fascinating because they involved people—trauma and drama in the lives of real people. They involved the grist of what trial lawyers like each of you do. Trial lawyers are first and foremost great speech makers and storytellers. They are the great courtroom performers. The courtroom is your stage.

But you are a dying breed. Who will replace you? How will they learn how to be who you are? Who will train them? Where are the jury cases that they will need to try in order to become as good as you are?

Where will we get real trial lawyers in the future? Lawyers who are known for their self-discipline and self-restraint. Who are known for what they choose not to say, not to do, and not to ask. Who are stingy with words, but the words they choose to use are powerful and compelling. Trial lawyers who suffer fools poorly and do not constantly repeat themselves. Who do not talk for the mere sake of talking. When a witness is tendered, the trial lawyer who has the intelligence and courage to say, "no questions," because the witness has not hurt his client nor said anything relevant to the disputed issues of fact.

The lawyer who knows how to ask a competent question which will not be subject to any objection and will require the witness to state a fact or deny a fact. The lawyer who speaks less, but when he does speak, says far more than his verbose adversary can even contemplate or comprehend. The lawyer who wins all his motions because they all have merit or, otherwise, he would not have made them.

He is a lawyer who has great credibility, because he tries his cases on a higher plane, above the pettiness of personal attacks, and the silliness of technicalities. He does not waste time and prolong the burden of litigation that is already oppressively burdensome.

The trial lawyer who is not so blinded by the quest for money that he completely loses his objectivity. Nor is he one that takes risks that his clients can neither understand nor afford.

He is a lawyer who can control is own arrogance and his own ego, and sacrifice it for the good of his client. He is a lawyer who fully understands that the case belongs to the client, not to the lawyer. He is a lawyer who is truly honest with his client and with himself and with the court.

This is a lawyer who is a true professional. Who knows there is no case, no cause, no controversy, no client that is more important than his own honesty, his own integrity, and his own reputation.

He is a lawyer who knows that his character and his reputation are not for sale, no matter what amount of money is available to purchase it. He is a lawyer who knows that the greatest tool of advocacy is civility. It can be said about great trial lawyers that he or she was one of the toughest lawyers I ever faced in a courtroom, and one of the nicest people I ever met.

As each of you retire, where will the real trial lawyers come from? Who will replace you? Who will teach them?

I lament the rise of the litigator. He is not a trial lawyer. He is a legal technician. He knows all the local rules and rules of civil procedure. He loves discovery fights and motion hearings. He writes 100-page briefs and he builds a dandy record on appeal, because there will be an appeal.

He admits nothing and fights everything with all his legal tools until his client can no longer afford to fight or is too tired to fight.

He is not a trial lawyer. He is a litigator. He is a Rambo-gladiator. He will never be a trial lawyer.

As I leave the trial bench, I have a unique view from where I sit. I feel like the canary in the coal mine.

I fear that many great trial lawyers, like the people in this room, will be replaced by litigators who do not know how to tell their client's story to a jury.

I fear our jurors will no longer appreciate their role in this process and may refuse to show up. Those who do come will have very little enthusiasm for their responsibility as fact-finders.

I fear that everyday people will cease to have a champion—a true trial lawyer—to tell their story.

You have the obligation to train those who come after you to be true trial lawyers. You have an obligation to find a way to streamline our jury trials so jurors will again feel honored to serve. I leave these concerns in your capable hands.

If we have tried cases together, I hope that experience made you a better lawyer, because I am sure it made me a better judge. I am honored to have been invited to share my thoughts with you here today. ■

Judge Donald W. Stephens served as a superior court judge in Wake County, North Carolina, from December 31, 1984, until he retired on November 1, 2017, as the senior resident superior court judge for the 10th Judicial District. He earned his BS and JD degrees from the University of North Carolina at Chapel Hill in 1967 and 1970, respectively. After receiving his law license in 1970, he served as a trial lawyer and trial judge in the United States Marine Corps JAG Division, as a prosecuting attorney in Durham County and as chief of the Special Prosecution Division of the North Carolina Attorney General's Office.

The CJCP: Two Decades of Promoting the Shared Values of Professionalism

By Lisa M. Sheppard

On January 26, 2018, Chief Justice Mark Martin issued a proclamation declaring 2018 to be the "Year of Professionalism" in recognition of the 20th anniversary of the creation of the Chief Justice's Commission on Professionalism (CJCP). In doing so, he reminded us that the values described in Article I, Section 35 of the North Carolina Constitution, ("…A frequent recurrence to fundamental principles is absolutely necessary to preserve the blessings of liberty..."), are applicable with equal force to the study of professionalism because lawyers play a vital role in the preservation of civil society and are an important force in governing under law. *See e.g.*, North Carolina Rules of Professional Conduct, Preamble, A Lawyer's Responsibilities, 0.1 [17], adopted July 24, 1997.

It has been 32 years since North Carolina adopted a set of Rules of Professional Conduct (Rules) in a format recognizable to today's lawyers. Prior to that time, North Carolina lawyers were governed by a set of canons, disciplinary rules, and ethical considerations based on the American Bar Association's (ABA) 32 original Canons of Professional Ethics which, in turn, were adopted in 1908 and re-drafted in 1969 into the ABA Model Code of Professional Responsibility. From the vantage point of 2018, it is startling to learn that the Rules applicable to lawyers in North Carolina before 2003 were much the same as those studied by lawyers in 1836.

Widespread understanding among North Carolina lawyers of what professionalism means and how it is implicated in their practice has evolved since 1986 due to the expansion and refinement of the Rules to include a well-defined duty of professional conduct. Unlike specific rules of conduct embodied in ethics rules, the concept of professionalism refers to a broader set of unchanging behavioral norms encompassing the entirety of a lawyer's behavior, both in and out of the office. Professionalism norms are generally seen as aspirational and include the conduct, aims, or qualities that characterize or mark a profession or a professional person, which include the skill, good judgment, and polite behavior that is expected from a person who is trained to do a job well.

Over the years, the priority placed on the virtues of professionalism has been a hallmark of North Carolina practice, and the CJCP is a direct heir to this legacy.

The Origins of the CJCP and Modern Notions of Professionalism

It can be fairly stated that modern notions of professionalism and legal ethics in the United States grew out of the Watergate scandal in the early 1970s. At that time, legal ethics was an elective, one-quarter credit course in most law schools that focused on specific prohibited behaviors, such as lying, cheating, stealing from client accounts, and attorney advertising. As John Dean, White House counsel to Richard Nixon, has noted, "In 1972, legal ethics and professionalism played almost no role in any lawyer's mind, including mine. Watergate changed that—for me and every other lawyer."

Review of *North Carolina Bar Magazine* (now known as the NC State Bar *Journal*), reveals that North Carolina Bar leaders were concerned about the crisis in public confidence in government and the legal profession, as a self-regulating profession, arising from the revelation that 29 lawyers in the Nixon administration were implicated in misconduct or convicted of illegal activity. In response, State Bar President Ralph H. Ramsey Jr. noted in his inaugural column in 1973 that the State Bar was taking steps to improve the quality and availability of legal services in North Carolina. He sought "to build a better legal profession and to carry out our high calling as keepers and defenders of the liberties of the people."[1]

On a national level, the ABA reacted by forming a commission to evaluate whether existing standards of professional conduct provided comprehensive and consistent guidance for resolving the increasingly complex ethical problems in the practice of law. Known by the name of its chair, Robert Kutak, the Kutak Commission spent the next six years working on a complete restatement of the 1969 ABA Model Code of Responsibility, then in effect in some form in all states, including North Carolina.

The enormity of the task and the controversy surrounding the Kutak Commission's recommended changes to the 1969 ABA Model Code were based in part on the commission's approach—viewed as radical at the time—that lawyers have obligations to the system of justice above and beyond that which they owe their clients.

This notion of a higher duty was embodied in a series of recommended amendments to the 1969 Model Code, including a proposed disclosure rule permitting lawyers to disclose client confidential information about corporate officers or employees engaged in illegal activity. The Kutak Commission also proposed a duty of fairness in negotiations requiring disclosure of material facts and a requirement that lawyers engage in *pro bono publico* work. These proposals drew significant criticism and, as a result, were not included in the final version of the ABA Model Rules of Professional Conduct approved by the House of Delegates in August 1983.

However, the connection between the concept of lawyers having a higher duty to the rule of law and the "Watergate defense," infamously used by several of Nixon's lawyers—that their duty of confidentiality prevented them from disclosing illegal activity by their clients—is clear in hindsight.

Another result of the public disgrace of so many prominent lawyers was a proliferation of required training in legal ethics and professionalism in law school curricula and in CLE programs, as well as additional bar examination questions focused on ethics and professional conduct.

Throughout the 1980s and 1990s, various state and national Bar organizations continued the effort to clarify and strengthen the codification of the legal profession's ethical and professional responsibilities. Of relevance here, the Conference of Chief Justices resolved in 1996 to study and undertake action to address lawyer professionalism. The result of this effort was a report issued by the conference entitled *A National Action Plan on Lawyer Conduct and Professionalism*, which was adopted by the ABA on January 21, 1999. The report and the Action Plan were published and distributed to state chief justices, lawyer disciplinary agencies, and state Bar associations throughout the US.

The Action Plan specifically recommended that state judiciaries should establish "…a Commission on Professionalism or other agency under the direct authority of the appellate court of highest jurisdiction."

At this time there were six state-level professionalism commissions: Florida, Georgia, New Jersey, Ohio, Oregon, and Texas.

The CJCP was formed in 1998 against this backdrop.

Creation of the CJCP

In 1997, Bill King, then-president of the NC State Bar, and Jerry Parnell, the NC delegate to the ABA House of Delegates, were aware of the ABA Action Plan and brought the idea of forming a commission on professionalism in North Carolina to then-Chief Justice Burley Mitchell. Chief Justice Mitchell embraced the idea and created the CJCP by Order of the Supreme Court dated September 22, 1998:

> BY THIS ORDER, the Court issues to the commission the following charge: The commission's primary charge shall be to enhance professionalism among North Carolina's lawyers. In carrying out its charge, the commission shall provide ongoing attention and assistance to the task of ensuring that the practice of *law remains a high calling*, enlisted in the service of clients *and in the public good.* (Emphasis added).

The language italicized above in the order reflects the impact of the Watergate events and the subsequent evolution of the concept of professionalism in North Carolina in the reference to the practice of law as a "high calling," which directly tracks State Bar President Ramsey's words from 1973. It is also interesting to note that by 1998 the practice of law encompassed the notion of service to "the public good" in addition to the service of clients; this was one of the controversial concepts in the Kutak Report rejected by the ABA 15 years earlier.

Fast forward to 2011. As chair of the ABA Standing Committee on Professionalism, Melvin F. Wright Jr., then-executive director of the CJCP, guided the writing and publication of *A Guide on Professionalism Commissions* - August 2011 (*ABA Professionalism Commission Guide*). This document captures some of the history summarized above and details the origins of then-existing state professionalism commissions. In the section describing North Carolina's CJCP, the *ABA Professionalism Guide* states that the CJCP's mission is embodied in its Lawyer's Professionalism Creed:

> To my clients, I offer competence, faithfulness, diligence, and good judgement. I will strive to represent you, as I would want to be represented, and to be worthy of your trust.
>
> To the opposing parties and their counsel, I offer fairness, integrity, and civility. I will seek reconciliation and, if we fail, I will strive to make our dispute a dignified one.
>
> To the courts and other tribunals, and to those who assist them, I offer respect, truthfulness, and courtesy. I will strive to do honor to the search for justice.
>
> To the profession, I offer assistance. *I will strive to keep our profession a high calling in the spirit of* pro bono *and public service. To the public and our system of justice, I offer service. I will strive to improve the law and our legal system, to make the law and our legal system available to all, and to see the common good through the representation of my clients.* (Emphasis added).

Comparing the principles highlighted above in the Lawyer's Professionalism Creed and the order creating the CJCP, with those rejected in the Kutak Commission's proposed Model Rules in 1983, we can see further evidence of the maturation of the concept of professionalism in North Carolina over the intervening 28 years.

Today, North Carolina recognizes limited exceptions to the duty of confidentiality, such as to prevent the commission of a crime by the client (NCRPC 1.6(b)(2)), and specifically prohibits counsel from assisting a client in conduct that the lawyer knows is criminal or fraudulent (NCRPC 1.2(d)). It is no longer controversial to hold lawyers accountable for duties owed to the "public and our system of justice" or to expect them to devote time to *pro bono* service.

The creation of the CJCP brought togeth-

er all of the energy that had been focused by North Carolina Bar leaders on ethics and professionalism, as influenced by the ABA, other state Bars, as well as national political and social upheavals, and gave it a home.

The Contribution of the CJCP Since 1998

For the past 20 years, the CJCP has been developing programming and initiatives designed to promote understanding by North Carolina lawyers of what the duty of professionalism means and how to apply it in their practice. It has done that by offering training, and support for training offered by others, as well as a series of initiatives that recognize lawyers and judges who embody the highest ideals of professionalism, as well as guidance for those that fall short of expected standards of conduct.

Early activities of the CJCP include the adoption of the Professionalism Creed set forth above and, in 2000, the creation of a Historical Video Series, consisting of video interviews with distinguished lawyers and judges from across the state to preserve their thoughts and commentary on professionalism and its evolution throughout the years. These videos serve as historical memoirs and have been used for educational purposes in presentations and CLE programs given by the CJCP.

In 2001 the CJCP awarded the first Chief Justice's Professionalism Award to recognize lawyers who have exemplified principles of professionalism in all aspects of their careers. To date, 27 outstanding North Carolina lawyers and judges have received this prestigious award. Many recipients of the Chief Justice's Professionalism Award have been interviewed for the Historical Video Series.

From its inception, the CJCP has developed materials and offered presentations for CLE programs and law school professional responsibility classes. The CJCP also began offering assistance to other organizations through grant-making to support professionalism initiatives in 2003, and the first recipients were North Carolina law schools. Over the years, the CJCP has also made grants to the Equal Access to Justice Commission, the NC Bar Association, and local Bar organizations and their individual professionalism initiatives.

Seeking to provide assistance to North Carolina judges, the CJCP formed the Judicial Response Committee, which is available to respond to unwarranted attacks in the media on the judiciary. Another significant project undertaken by the CJCP was the formation of the Professionalism Support Initiative (PSI), which serves as a confidential peer intervention program to improve professionalism among lawyers and judges.

As part of its mission to serve all lawyers in North Carolina, the CJCP has also taken its programming on the road by sponsoring, in conjunction with Lawyer's Mutual, professionalism CLE and luncheon programs with the local North Carolina Judicial District Bars. Over the past 15 years, the CJCP has held these programs in 39 of North Carolina's 44 judicial districts, totaling 49 programs. In 2018 the CJCP is scheduled to sponsor six programs throughout the state in conjunction with the North Carolina Supreme Court's 200th Anniversary historic courthouse visits, from Asheville to New Bern.

Throughout the years, the CJCP has also participated in professionalism-related activities on a national level, representing North Carolina at conferences, boards, and programs, including at the ABA and its Center for Professional Responsibility.

Anniversary Celebration Activities in 2018

The CJCP kicked off a series of events celebrating its 20th anniversary with a press conference by Chief Justice Martin announcing his proclamation of the "Year of Professionalism." Throughout 2018, the CJCP has highlighted an event each month where its anniversary videos are screened and its mission and history are explained to audiences throughout North Carolina. The videos were produced to capture the history of the commission and its vision for the future, and they are available for viewing on its dedicated YouTube channel.

As part of the 20th Anniversary celebration, the CJCP has established a new program, the Law School Ambassador Program, in collaboration with North Carolina's law schools. The program offers a distinguished third year law student selected by each North Carolina law school the opportunity for engagement with and service on the commission as a non-voting participant. We look forward to this program becoming a prestigious and valuable opportunity for law students in the years to come.

Esse Quam Videri - The Fruits of a Frequent Recurrence to Fundamental Principles

Professional conduct by lawyers, judges, and law students is a foundational and integral part of all of the mundane aspects of the practice of law, in any practice area and at every stage of the legal process. We do not recognize it as such because it is so embedded in all that we do. It has been my observation that most North Carolina lawyers and judges recognize unprofessional conduct when they see it. I attribute this to the efforts of law schools to educate law students on the bounds of appropriate behavior; evolving CLE requirements and the widespread availability of training, including that provided by the CJCP; a consensus in local Bar associations of proper behavior; and, most importantly, active formal and informal mentoring in law firms and local Bars. All of these activities have contributed to the fact that professional conduct has become habitual among the majority of North Carolina lawyers.

As lawyers, we practice law in a wide range of environments: in solo practices and large, multinational law firms, in corporate counsel offices, government, and legal services organizations. We also practice in small towns, cities with large and small populations, in the mountains, the foothills, and the piedmont, in verdant farming towns and on the Atlantic coast and the Outer Banks. However, we all share a common understanding of the expectations of professional conduct as part of a larger community of shared values and behavioral norms.

In recognition of this shared value, the CJCP adopted the state motto, "*esse quam videri*" as its watchword in its re-branding efforts this year. You will see it on all CJCP materials, staff business cards, and stationery. Hopefully, the meaning of this phrase in this context is clear: it is a reminder to North Carolina lawyers to treat everyone with dignity and respect, in all aspects of their lives, when it is uncomfortable and difficult, as well as when it is convenient and expedient, to actually be professional, rather than to merely seem so.[2]

In closing, Justice Sandra day O'Connor summarized a lawyer's duty of professionalism well when she observed,

To me, the essence of professionalism is a commitment to develop one's skills to the

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Five Ways to Cultivate Creativity Alongside Practicing Law

By Heather Bell Adams

At recent signing events for my debut novel, people have remarked about how many lawyers seem to harbor a secret (or in some cases not so secret) desire to write fiction. This has struck me too, having long admired lawyer-writers such as Heather Newton (*Under the Mercy Trees* 2011) and Kim Church (*Byrd* 2014).

In fact, I think the desire to create goes well beyond writing fiction. At the end of a busy day at the office, many successful lawyers compose or perform music. Or write poems. They might sketch or paint. Or make pottery. Or any number of other fascinating pursuits.

Sometimes these creative endeavors serve as an escape—a hobby, wedged between client negotiations and dinner preparation. Sometimes they are in effect a second career. Either way, when lawyers talk about their desire to do something creative, an understandably common refrain is lack of time or inspiration. I don't pretend to have the answer. I often feel as though I'm "doing" a lot, but none of it well. Nonetheless, the conversation is absolutely worth having. Even in the midst of "busyness," what are some ways to nourish our creative side?

1. Cast Aside Expectations of Perfection

It's easy to fall into the "if only" trap. If only I had a dedicated painting studio. If only my kids weren't so loud. If only I could unearth that perfect pen I used to have, the one with the not-too-thick, not-too-thin tip.

Day-to-day reality can be a lot messier than our ideal scenarios. But why should we let that stop us? A free hour in a cushiony chair sipping hot tea by the fireplace would be awfully nice. But it's not necessary.

Once we cast aside our expectations of perfection, we make room for creativity to flourish in the midst of our messy everyday.

2. Work with What You Have

Maybe we can find ten minutes while in line to board a flight. What about when you're waiting for the after-hours printer repair service? Maybe try brainstorming ideas for your next project while commuting to the office. (Eyes on the road, of course.)

Working with what we have might mean cutting back on social media. It's tempting to check our accounts in every spare moment. When I'm on a writing deadline for an editor or agent, I delete the social media apps from my phone. Maybe next time I'll try not to be in such a rush to get them reinstalled.

3. Experience Art as Well as Create It

When you're looking for inspiration, consider studying artistic photographs or listen—really listen—to a favorite song. For me, this can mean re-reading a passage from a novel I've recently enjoyed.

About a year ago, I was out of town for a deposition when the entire schedule got delayed. Since I'd already prepared for the deposition (and billed more than enough hours), I gave myself permission to wander around the Philadelphia Museum of Art. Not only did the brief excursion renew my energy, I also came away with a new story idea.

4. Spend Time with Others

Self-doubt can lead us to keep our creative aspirations to ourselves. But finding others who share our interests provides the opportunity to vent frustrations and exchange ideas. A single lunch with a friend—even if it's a quick bite on the courthouse steps—can fuel our creative energies for days to come.

5. Forgive Yourself

Let's say—hypothetically of course—that

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you spent your entire lunch break grumbling at the news feed on your phone. What now? No need to chastise yourself. Just as we deal patiently with clients and co-workers, we can treat ourselves with the same graciousness. Perhaps tomorrow you'll write the starting paragraph of your new novel or the opening notes of that song you've been humming.

By letting go of negativity and unrealistic expectations, by shifting our gaze to art and toward others traveling the same journey, we can encourage creativity to bloom. ■

Heather Bell Adams has practiced law in Raleigh for 20 years, focusing on financial services and antitrust litigation, including class action defense. Currently senior counsel at First-Citizens Bank & Trust Company, she is the author of various short stories and Maranatha Road*, an award-winning novel set in western North Carolina. You can find her at heatherbelladams.com.*

Grievance Committee and DHC Actions

Disbarments

Wallace Bradsher of Roxboro surrendered his law license and was disbarred by the Wake County Superior Court. Bradsher had been the elected district attorney for Person and Caswell counties. He was disbarred in connection with his conviction for felony obstruction of justice, misdemeanor obstruction of justice, misdemeanor willful failure to discharge duties, felony obtaining property by false pretenses, and aiding and abetting obtaining property by false pretenses.

Lawrence Wittenberg of Durham surrendered his law license and was disbarred by the Wake County Superior Court. Wittenberg acknowledged that he misappropriated at least $170,000 from his law firm employer.

Suspensions & Stayed Suspensions

Philip Adkins of Snow Camp violated multiple trust account rules, including not maintaining required trust account records, not performing required reconciliations, and not producing trust account records in response to a subpoena for random audit. Adkins was suspended by the Disciplinary Hearing Commission for two years. The suspension is stayed for two years upon his compliance with enumerated conditions.

The DHC found that **Gladys Nichole Clayton** of Durham violated multiple trust account rules, including not conducting monthly and quarterly reconciliations, not always identifying clients for whom cash deposits were made, and not always identifying clients on trust account checks. Clayton did not provide the reconciliation requested by the State Bar following a random audit and did not respond to all inquiries of the Grievance Committee. When Clayton later provided reconciliation documents, she used white-out tape to conceal the dates when the supporting documents she provided to the Grievance Committee were actually printed in an attempt to mislead the Grievance Committee about when she performed the reconciliations. Clayton made misrepresentations to the Grievance Committee about when the reconciliations were prepared and why white-out was applied to the documents. The DHC found significant mitigating circumstances. It suspended Clayton for four years. After serving six months of active suspension, she will be eligible to apply for a stay of the balance upon demonstrating compliance with enumerated conditions.

Jeffrey Dalrymple of Matthews violated multiple trust account rules, including not conducting required reconciliations, maintaining inaccurate client ledgers, and commingling his personal funds with entrusted funds. The DHC suspended him for three years. The suspension is stayed for three years upon his compliance with enumerated conditions.

Daniel Reid Fulkerson of Boone did not file and/or pay state and federal income taxes for the years 2010 through 2016. The DHC suspended him for two years. The suspension is stayed for two years upon his compliance with enumerated conditions. Fulkerson is currently on voluntary inactive status. The suspension will begin to run if he should successfully petition for return to active status.

Mark V. Gray of Greensboro did not file federal or state tax returns and did not pay federal or state income taxes from 1997 through 2005 and from 2008 through 2014. The DHC suspended him for four years. After serving 18 months of active suspension, he will be eligible to apply for a stay of the balance upon demonstrating compliance with enumerated conditions.

Cindy Huntsberry of Smithfield violated multiple trust account rules, including not performing monthly and quarterly reconciliations, not identifying clients on trust account checks, not maintaining ledgers, not escheating unidentified or abandoned funds, commingling her personal funds with entrusted funds, and disbursing more funds for a client than she held in trust for the benefit of that client. She also did not respond to the Grievance Committee. The DHC suspended Huntsberry for five years. After serving one year of active suspension, she will be eligible to apply for a stay of the balance upon demonstrating compliance with enumerated conditions.

Kenneth Jones of Smithfield violated multiple trust account rules, including not reconciling his trust account, not maintaining accurate ledgers, and not supervising his staff's efforts to monitor his trust account. The DHC suspended Jones for two years. The suspension is stayed for three years upon his compliance with enumerated conditions.

Michael Parker of Mocksville did not truthfully account for and timely pay over taxes withheld from employee paychecks, did not remit to a client all funds he collected for the client, and took on new legal work while he was administratively suspended. The DHC suspended him for five years. After serving two and one-half years of active suspension, he will be eligible to apply for a stay of the balance upon demonstrating compliance with enumerated conditions.

Julie Parker of Mocksville did not truthfully account for and timely pay over taxes withheld from employee paychecks. The DHC suspended her for five years. After serving 18 months of active suspension, she will be eligible to apply for a stay of the balance upon demonstrating compliance with enumerated conditions.

Scott Shelton of Hendersonville violated multiple trust account rules, including not reconciling his trust account; not identifying clients on checks, deposit slips, and electronic wire transfers; not providing written accountings to clients with funds on deposit for more than 12 months; not escheating unidentified or abandoned funds; not instructing his bank to notify the State Bar when an item was presented for payment against insufficient funds; and disbursing more funds for a client than were on deposit for that client. The DHC suspended Shelton for three years. After serving one year of active suspension, he will be eligible to apply for a stay of the balance upon demonstrating compliance with enumerated conditions.

Jeffrey D. Smith of Charlotte violated multiple trust account rules, including not conducting required monthly and quarterly

reconciliations, not promptly reimbursing a negative balance, not conducting required reviews for two quarters, not promptly depositing funds into the trust account, disbursing funds to a client for whom entrusted funds had not yet been deposited, improperly disbursing funds to himself on two occasions, not identifying the clients for whom he held funds, and not promptly disbursing entrusted funds. The DHC suspended Smith for two years. After serving one year of active suspension, he will be eligible to apply for a stay of the balance upon demonstrating compliance with enumerated conditions.

Christopher Watkins of Graham violated multiple trust account rules, including not reconciling his trust account, not maintaining accurate ledgers, and disbursing funds on behalf of a client for whom sufficient funds had not been deposited. The DHC suspended Watkins for three years. After serving six months of active suspension, he will be eligible to apply for a stay of the balance upon demonstrating compliance with enumerated conditions.

William Webb of Raleigh violated multiple trust account rules, including not reconciling his trust account, not maintaining accurate ledgers, and not supervising his staff's efforts to monitor his trust account. The DHC suspended Webb for two years. The suspension is stayed for two years upon his compliance with enumerated conditions.

Censures

The Grievance Committee censured **Ruth Allen** of Raleigh, **Rashad Blossom** of Charlotte, **Florence Bowens** of Durham, **Lloyd Brisson Jr.** of Fayetteville, **Richard L. Cannon** of Greenville, **Lynn Ellen Coleman** of Kernersville, **Roger Compton** of Fayetteville, **Christopher Lane** of Clemmons, **Robert Lefkowitz** of Winston-Salem, **Joshua Levy** of Raleigh, and **Lisa Perrillo** of Raleigh. While working for "Upright Law," a law firm based in Chicago, they did not supervise their out-of-state nonlawyer assistants in the provision of legal services and in handling their clients' entrusted funds.

Reprimands

Jerry B. Clayton, **Ronald G. Coulter**, **Robert D. McClanahan**, and **Robert W. Myrick** of Durham were reprimanded by the DHC. They did not ensure that their law firm's trust account was timely reconciled, despite notice that the lawyer to whom the firm had entrusted the responsibility was not performing the required reconciliations. They also made numerous inaccurate statements to the State Bar concerning reconciliations of the trust account based upon information submitted by the firm member responsible for the reconciliations without verifying the information. In addition to the reprimands, the DHC required them to complete continuing legal education on trust account reconciliation.

Corry J. Brannen of Charlotte was reprimanded by the Grievance Committee. Brannen's cousin, who was indicted in New York for attempted murder and other serious felonies, fled to North Carolina. Brannen made several false statements to the US Marshals Service in their fugitive investigation. The Grievance Committee concluded that a reprimand was appropriate because of mitigating circumstances.

The Grievance Committee reprimanded **John O. Lafferty Jr.** of Lincolnton. He did not file a required estate inventory, did not reasonably communicate with his client, and, in two grievance files, did not respond timely to the Grievance Committee.

The Grievance Committee reprimanded **Blair Pettis** of Lincolnton. Pettis did not meet with or communicate with a client despite numerous requests from the client and the client's family, did not act with reasonable diligence in the representation, did not withdraw when it was clear he could not provide the required legal services, and did not respond to the Grievance Committee.

The Grievance Committee reprimanded **Nichole Phair** of Sanford. After one judge continued the hearing on Phair's motion for an emergency custody order, Phair took the motion to a second judge. She did not inform the second judge that the motion had already been continued by another judge or that the opposing party was represented by counsel. The second judge rescinded the order the following day upon finding that Phair's conduct violated the local rules of the judicial district; that the order was obtained by misrepresentation, fraud, or other misconduct; and that the opposing party was prevented from having a fair trial.

The Grievance Committee reprimanded **Jeffrey Philogene** of Chicago. In working for Upright Law, a law firm based in Chicago, Philogene engaged in the unauthorized practice of law by providing legal advice and services to residents of states in which he is not licensed.

Sonya Whitaker of Rocky Mount was reprimanded by the Grievance Committee for making a false statement to the Administrative Committee of the State Bar. Whitaker filed a petition for reinstatement of her law license after an administrative suspension. In the petition she falsely represented that she had no disciplinary complaints, investigations, or actions pending before a professional licensing organization. In fact, Whitaker was aware of a pending investigation by the Grievance Committee.

Transfers to Disability Inactive Status

Susan R. Franklin of Chapel Hill was transferred to disability inactive status by the chair of the Grievance Committee. Tony Sami Botros of Raleigh was transferred to disability inactive status by the Wake County Superior Court.

Reinstatements from Disability Inactive Status

Heather Anne Shade of Fairview was reinstated from disability inactive status by the DHC.

Reinstatements from Suspension

Joel M. Bresler of Lakeland, Florida, was suspended for 91 days by order of reciprocal discipline effective January 11, 2018. The Supreme Court of Florida suspended Bresler for 91 days in January 2015. Bresler was a witness in the federal prosecution of his former employer and was granted immunity. Bresler drafted a false promissory note for the former employer, destroyed his own bank records at the direction of the former employer, and exaggerated to law enforcement the extent of his attorney-client relationship with the former employer. He was reinstated by the secretary on April 30, 2018.

Stays of Existing Suspensions

In June 2016 the DHC suspended **Sean David Soboleski** of Asheville for three years. He did not properly reconcile his trust accounts, did not maintain accurate client ledgers, and did not properly maintain and disburse entrusted funds. As a result, he 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 of active

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North Carolina Roots in Lawyer Wellness

By Laura Mahr

One of the most enjoyable aspects of authoring this column is the positive response from lawyers and judges around the state. It is inspiring to hear from readers that the content of the column resonates, and that the issue of lawyer wellbeing is galvanizing individual lawyers and organizations alike. I was thrilled to receive a call from one such reader, Charlotte attorney and former judge, Carl Horn III.

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In 2003 Judge Horn authored *LawyerLife: Finding a Life and a Higher Calling in the Practice of Law*. During our conversation, I asked him what motivated him to write *Lawyer Life* 15 years ago, and he responded, "I wanted to point out some troubling trends in the legal field, and to suggest some philosophical, practical, and spiritual steps lawyers can and should take to maintain balance and find professional fulfillment." My conversation with Judge Horn reminded me that while the issue of lawyer wellbeing is recently picking up momentum, the concern has been alive for many years. I so enjoyed our conversation, I interviewed Judge Horn for this quarter's column so that he can share with readers what shapes his perspective on maintaining balance in the legal field.

Laura: Who helped to shape your professional values and what initially sparked your interest in lawyers having a better quality of life?

Judge Horn: The seeds that shaped my professional values and priorities were first sewn by observing three lawyers in my own family: my great uncle (Guy Carswell, who practiced in Charlotte), my uncle (Judge Richard "Dick" Emmet who practiced in Montgomery, Alabama), and my father.

My Uncle Guy was a very successful trial lawyer (and astute investor) who made lots of money. During his life and at his death, he gave most of it away. Thanks to his generosity, there were many hundreds of men and women from less affluent families who were able to get college educations (beginning with the children of his mailman and a garbage collector with whom he became friends). My Uncle Dick, a progressive in the heart of the Jim Crow South, was also one of my heroes. I recall, for example, when the chief justice of the Alabama Supreme Court refused to swear in the first African American elected to the Alabama Legislature since Reconstruction. My uncle immediately stepped up and said he would be pleased and honored to do it.

While I admired and emulated much about my father, who finished his career as president and CEO of Duke Power Company, there were a few of his qualities I hoped to improve upon. Specifically, I hoped to forge closer and more fulfilling relationships with my children than he had the time to develop with his. And of course, you can't do that without intentionally striving for a healthy work-life balance, which was in the forefront of my mind each time I came to a fork in my career path.

Laura: You started practicing in 1976, but didn't publish your book until 2003. Were there changes in those 27 years that motivated you to write *LawyerLife*?

Judge Horn: By 2003 there was a growing consensus that law was a profession in crisis. Anecdotal evidence of lawyer unhappiness—including eight lawyer suicides in a seven-year period in Charlotte—was followed by a series of state and federal surveys to determine the scope and contours of the problem, and to develop effective ways to help lawyers who were struggling. One of the most extensive surveys was conducted by the NC Bar Association in 1989 and published in 1991. Report-

ing what was described as "a severe level of dissatisfaction with law practice among some attorneys, and lost dreams and idealism among many others," the statewide survey found that:

- 24% of the North Carolina lawyers who responded would not become attorneys if they could make the decision again;
- Only 54% wished to remain in law practice for the remainder of their careers; and
- Over 24% reported symptoms of depression "at least three times per month during the past year," with 11% reporting they had considered suicide at least once a month during the past year

Lawyer dissatisfaction with their professional lives—and the toll it was taking on their overall quality of life—was not unique to or more pronounced in North Carolina than elsewhere. ABA surveys in 1984 and 1990, for example, found a 20% drop during those six years alone in the number of lawyers describing themselves as "very satisfied." In the 1990 survey, 22% of all male partners and 43% of all female partners reported that they were dissatisfied with their professional lives. For solo practitioners, the reported dissatisfaction rate rose to 43% of all men and to an astounding 55% of all women.

These and other survey results were consistent with research at Johns Hopkins University reported in 1990. The Johns Hopkins study examined the prevalence of "major depressive disorder" in 104 different occupations (including the professions as "occupations"). The research found only five of the 104 occupations in which the occurrence of major depression exceeded ten percent—and lawyers topped even this list, suffering from major depression at a rate 3.6 times higher than nonlawyers with the same socio-demographic traits.

There were also scholarly books and articles written in the 1990s that caught my attention, beginning with Yale Law School Dean Anthony Kronman's *The Lost Lawyer*, subtitled *Failing Ideals of the Legal Profession*, published by Harvard University Press in 1993. In words usually reserved for the pulpit, Dean Kronman pronounced that what we were facing was a "spiritual crisis" in which "the profession now stands in danger of losing its soul." About the same time Sol Linowitz, chair of Xerox Corporation and an ambassador in several presidential administrations, expressed kindred concerns in *The Betrayed Profession*, as did lawyer/psychotherapist Benjamin Sells in *The Soul of the Law*, and Harvard Law School Professor Mary Ann Glendon in her 1994 book, *A Nation of Lawyers*.

Laura: That said, are you one of the 24% of lawyers who wouldn't become an attorney if you could make the decision again?

Judge Horn: Absolutely not; I remain proud to be a lawyer. I have truly enjoyed the various phases of my almost 42-year long legal career, and I would choose our profession again without hesitation. But I do believe there are steps we can take, practices and habits we can adopt, and practices and habits we should definitely avoid, if we hope to find satisfaction and fulfillment in the contemporary practice of law.

Laura: What is the first step you recommend to find fulfillment in the practice of law?

Judge Horn: The first step we can take is to be aware that there are choices for us to make—and that there are professional and personal consequences which flow from those choices. We can, for example, educate ourselves on—and even be inspired by—the noble roots of our profession, which saw itself as a calling to serve and help others and to seek truth and justice, or we can accede to the more recent and far less inspiring view of law as no more than a "value- free," dollar-driven business.

Laura: You quote the Yale Law School Dean's emphasis on lawyers adhering to certain values. Why do you think that's important?

Judge Horn: Dean Kronman suggested that "an older set of values" should be reinvigorated, including the pursuit of "wisdom about human beings and their tangled affairs." When was the last time, if ever, you have heard the word "wisdom" used in connection with the practice of law? I believe that we should care, as individuals and as a profession, more about justice and truth than about winning at any cost or doing anything and everything to maximize our bottom lines.

I would like all lawyers to ask themselves, "What do we individually and collectively value?" Is it those who are charitable with their time and resources? Those who are passionate about a cause and sacrifice to advance it? Those who transcend narrow self interest, reaching out helping hands or giving of their time and resources in a meaningful way to those who are less fortunate? Have we lost sight of the central importance of nurturing our families and close friendships and making our relationships a clear, high, and life-long priority?

Laura: What do you think will help lawyers to prioritize their relationships with family and friends?

Judge Horn: Sometimes we need a wake-up call before we understand the importance of the people in our lives. I recall a conversation in chambers with Keith Tart, then a partner in a large North Carolina firm who had a national toxic torts practice and had been admitted pro hac vice in over 30 state and federal courts, so you can imagine how much time he was spending at home. Keith told me that he got his wake-up call when his first-grade daughter was asked in school to draw a picture of her family. He wasn't in the picture! The family dog was, but he wasn't.

We take a major step in the right direction if we simply commit to applying the Golden Rule in our professional lives: treating others—including our clients, opposing counsel, and their clients—as we ourselves wish to be treated. It perhaps goes without saying that this implies civility, honesty, and unimpeachable ethics, including scrupulous honesty in our billing practices.

Laura: One of the chapters in *LawyerLife* is titled "Twelve Steps Toward Fulfillment in the Practice of Law." Can you briefly summarize the steps?

Judge Horn: I constructed what I call "the world's first 12-Step program exclusively for lawyers" partly tongue in cheek, although the recommendations are seriously intended. In a quick nutshell the "steps" or recommendations are: (1) Conduct a professional and personal self-evaluation; (2) Establish clear priorities; (3) Develop and practice good time management; (4) Implement healthy lifestyle practices (especially regular exercise); (5) Live beneath your means; (6) Don't let technology control your life; (7) Care about character—and conduct yourself accordingly; (8) "Just say no" to some clients; (9) Stay emotionally healthy; (10) Embrace law as a "high calling"; (11) Be generous with your time and money; and (12) Pace yourself for a marathon.

Many thanks to Judge Horn for sharing his words of wisdom with readers this month. If you are inspired to put into action any of his suggestions on finding fulfillment in the practice of law, try this:

1. Schedule a 20 minute break—find a time and place where you can focus.

2. Read Judge Horn's interview again, this time slowly.

3. As you read, circle the recommendation in Judge Horn's interview you found most compelling (i.e., his invitation to ponder what

it is that you value, or one of the "Twelve Steps Toward Fulfillment").

4. Set a timer for ten minutes. Free-write (i.e., write continuously without regard to grammar, spelling, or syntax) for ten minutes about ways you personally can respond to the circled call to action.

5. When your writing time is up, read what you wrote, then circle the most meaningful or compelling sentence in what you wrote.

6. Calendar an action step, or time to think more about, or share with someone else what you wrote.

If you would like to connect with other lawyers who are interested in lawyer wellbeing while cultivating your own resilience using mindfulness, join Laura as she presents at these upcoming NC events:

9/7/18: "What Every New/Young Lawyer Needs to Know about Building Resilience Using Mindfulness and Neuroscience," NCBA's YLD CLE, Cary (Co-sponsored by NCLAP and NCBA YLD)

9/18: "A Joyful Life: Finding Ease and Satisfaction in the Practice of Law" (on-going virtual program with Jeena Cho, jeenacho.com/career)

9/21/18: "Mindfulness and Neuroscience for Building Resilience to Stress," 30th Judicial District CLE, Waynesville (sponsored by NCLAP)

10/4/18: "Mindfulness for Lawyers to Build Resilience to Stress" (one hour online CLE) (consciouslegalminds.com/register)

10/11-11/1: "Mindfulness for Lawyers: Building Resilience to Stress Using Mindfulness, Meditation, and Neuroscience" (four week online course, consciouslegalminds.com/register)

10/12/18: Resilience Retreat for Immigration Lawyers and Support Staff, Asheville (consciouslegalminds.com/register)

11/14/18: "Mindfulness and Neuroscience for Building Resilience to Stress," 10th Judicial District CLE, Raleigh (co-sponsored by NCLAP) ■

Laura Mahr is a NC lawyer and the founder of Conscious Legal Minds LLC, providing mindfulness-based coaching, training, and consulting for attorneys and law offices nationwide. Laura's cutting edge work to build resilience to burnout, stress, and vicarious trauma in the practice of law is informed by 11 years of practice as a civil sexual assault attorney, two decades of experience as an educator and professional trainer, 25 years as a student and teacher of mindfulness and yoga, and a love of neuroscience. She is an advisory member of the 28th Judicial District's Wellness Committee and the author of the Mindful Moment column in the North Carolina Lawyer Assistance Program's quarterly newsletter. Find out more about her work at consciouslegalminds.com.

Disciplinary Department (cont.)

suspension, Soboleski was eligible to apply for a stay of the balance upon showing compliance with enumerated conditions. The DHC reinstated him on April 26, 2018.

Dismissals

It was alleged that **Joe S. Major III** of Charlotte misappropriated fiduciary funds and obtained real property through constructive fraud. It was also alleged that, in an unrelated matter, Major did not maintain proper records, did not properly account for estate assets, and disbursed funds pursuant to a power of attorney that had been revoked by the principal's death. He was enjoined from handling entrusted funds. In April 2018 the DHC found probable cause to believe Major was disabled and instructed the State Bar to file a complaint alleging disability. The disciplinary proceeding was stayed and Major was ordered to undergo evaluation. Major died on June 13, 2018. The State Bar filed a notice of voluntary dismissal of the disciplinary and disability matters.

Notices of Intent to Seek Reinstatement

In the Matter of David Shawn Clark

Notice is hereby given that David Shawn Clark intends to file a Petition for Reinstatement before the Disciplinary Hearing Commission of the North Carolina State Bar. On September 14, 2012, Clark pled guilty in Catawba County to two counts of misdemeanor communicating threats in violation of NC Gen Stat 14-277.1 and in Catawba County to one count of common law obstruction of justice. The guilty pleas stemmed from allegations that Clark engaged in a sexual relationship with a current client and threatened the client and his secretary if they divulged their knowledge of the relationship. Clark was a candidate for district attorney of the 25th judicial district at the time. Clark provided false representations to the Bar after the grievance was filed. On October 30, 2013, an Order of Discipline was entered disbarring Clark from the practice of law.

In the Matter of Robin Nicole Knight Krcelic

Notice is hereby given that Robin Nicole Knight Krcelic of Charlotte intends to file a petition for reinstatement before the Disciplinary Hearing Commission of The North Carolina State Bar. Knight was disbarred effective January 31, 2005, and surrendered her license on January 26, 2005. The complaint was that while operating the law practice, client funds received from real estate closings were misappropriated. Subsequent findings after surrender of her law license and disbarment found that a nonlawyer assistant in her law office embezzled client funds.

In the Matter of Geoffrey H. Simmons

Notice is hereby given that Geoffrey H. Simmons of Durham intends to file a petition for reinstatement before the Disciplinary Hearing Commission of the North Carolina State Bar. Simmons was disbarred effective April 15, 2013, after a hearing before the Disciplinary Hearing Commission. The DHC found that Simmons failed to properly maintain entrusted funds in violation of Rule 1.15.2(a) , failed to properly disburse client funds in violation of Rule 1.15.2(m), engaged in criminal conduct reflecting adversely on his honesty, trustworthiness, or fitness as a lawyer in violation of Rule 8.4 (b), and engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation in violation of Rule 8.4(c).

Individuals who wish to note their concurrence with or opposition to these petitions should file written notice with the secretary of the North Carolina State Bar, PO Box 25908, Raleigh, NC, 27611, before November 1, 2018 (60 days after publication).

IOLTA Grantee Helps Students Find Safety, Security, Stability, and Opportunity

A few months ago, Peter Bolac, the State Bar's legislative liaison, was dusting off historical State Bar Council meeting minutes. He came across minutes from the council meeting in 1981 when the late Robinson O. Everett, serving as chair of the Special Committee on Interest on Trust Accounts, made a report to the council recommending the adoption of the IOLTA program in North Carolina. As Mr. Everett reported at the time, other efforts of the legal profession to improve the administration of justice require a significant commitment on the part of lawyers—of their time, money, or both. Conversely, Mr. Everett emphasized the ability, with the creation of IOLTA, to simply take advantage of an innovative concept for the benefit of the public and the administration of justice in the state of North Carolina.

Mr. Everett may not have imagined that the profession would still today have the opportunity to generate funds in this way. Certainly recent economic conditions and the low interest rate environment have impacted the IOLTA program in a way that likely was not anticipated in 1981. However, the core principle at the founding of the IOLTA program remains—to support programs improving the administration of justice for the public's benefit.

Charlotte Center for Legal Advocacy, previously known as Legal Services of Southern Piedmont, is a long-time grantee of the IOLTA program. The organization opened its doors in 1967. Today, Charlotte Center for Legal Advocacy provides a wide range of civil legal assistance. Over the course of the organization's 50 year history, the program has developed deep roots and partnerships within the community to respond to the changing needs of low-income clients. Through individual advice and representation, community education and outreach, representation of groups, self-help remedies, collaboration with other agencies, community economic development, legislative and administrative advocacy, and impact litigation, Charlotte Center for Legal Advocacy pursues justice for those in need.

Last year an attorney from Charlotte Center for Legal Advocacy met Janessa. A few years ago, Janessa, 21, found herself hanging out with the wrong friends and making bad decisions that resulted in misdemeanor charges for larceny and drug possession. These charges were ultimately dismissed, but they remained on her criminal record. "I thought everything was fine because they were dismissed," Janessa says. She had no idea that these mistakes would follow her into her adult life. It wasn't until she started applying for jobs that she realized she had a criminal record.

She remembers interviewing for a local retail position and sailing through the three interviews necessary for the job. "I was the perfect candidate for that job, but then it came down to them asking if I had any problems with them running a background check," Janessa says. "I knew what they would find, so I told them about the charges." She didn't get the job. Every time she filled out a job application, the necessary background check was her barrier—to employment, to a stable income, to opportunity.

Last fall Janessa walked into the Single Stop office at Central Piedmont Community College where she had been taking courses in the hopes of earning an associate's degree to put her on a better path. A friend told her about the legal assistance Charlotte Center for Legal Advocacy offers to students through the Single Stop program. She met with an attorney, and she was surprised to learn she was eligible to have the dismissed charges removed from her record by applying for an expunction.

With the help of her attorney, she applied and waited six months for a decision from the state. In April, a few weeks before graduation,

Janessa—Single Stop Expunction client

she got the answer that would ultimately open the door to opportunity. Her application had been approved, and she no longer had charges listed on her criminal record. "This was the only thing holding me back,"

CONTINUED ON PAGE 37

IOLTA Update

- Income received in the first five months of 2018 from participating financial institutions increased by 18% compared to last year.
- NC IOLTA continues to work with banks across the state to review all bank products and the rate and policies related to IOLTA accounts to ensure compliance with State Bar rules.
- The 2019 grant application will open in early August.
- NC IOLTA continues to administer state funding for legal aid on behalf of the State Bar. In 2017-2018, NC IOLTA distributed $1,060,596 in domestic violence state funds and $100,000 for veterans' legal services.

Delores Todd, Board of Legal Specialization Public Member

By Lanice Heidbrink, Executive Assistant of Legal Specialization

The North Carolina Plan of Legal Specialization requires the specialization board to include three public members. Public members contribute fresh views of the program which helps the board to make good decisions regarding how to best protect the public. Public members represent consumer interests and also bring with them years of experience in their professions and have extraordinary personal and career accomplishments under their belts. One such person is Delores "Dee" Todd.


Todd

Dee has been a trailblazer throughout her career. She has consistently risen above the barriers in her path, all the while making history. Growing up in Camden, New Jersey, Dee always loved sports, even when the common notion at that time was that girls didn't play sports. The self-confessed tomboy wanted to be a veterinarian until she found out she would need to practice on large animals as well as small. She never set out to take the academic sports world by storm, but she admits that, "it fell in my lap and I went with it!"

Early in her career, Dee was a sought-after model, including recognition as Chicago's top African-American model for five consecutive years. She modeled for well-known companies such as Fashion Fair Cosmetics, Bell Telephone, Soft Sheen, Natalie Cole Wigs, Kodak, and Dr. Scholl's. Little did Dee know that the modeling would change her life significantly.

Dee was a track coach at Thornridge High School in South Holland, Illinois, when the opportunity of a lifetime came along. In 1980, when the United States boycotted the Olympics, Kellogg was in need of a strong, influential person to grace its Corn Flakes cereal box. The Kellogg company went to Dee's agent and inquired whether Dee would be willing to pose for the box. She gladly accepted and became the first African-American woman to be featured on a Kellogg's cereal box.

Dee's career as an intercollegiate athletics executive allowed her to use her expertise at many influential institutions and organizations including North Carolina A&T State University, Georgia Institute of Technology, Northwestern University, and the Atlantic Coast Conference (ACC).

Throughout her career, Dee has passionately fought for the equality of women and minorities in sports. She became a strong advocate for the advancement of women and minorities through her work with the Urban Education Institute, US Women's Track Coaches Association, and as a life member of the Delta Sigma Theta Sorority. Dee made history when she was appointed in 1996 by US Olympic Committee president to head the US Olympic Committee Minorities in Sports Task Force, becoming the first African-American woman to hold the position. Dee currently coaches track at Heritage High School in Wake Forest.

Dee's six-year term on the specialization board ended in July of this year. I had the opportunity to talk with her about her career accomplishments, her service on the board, and what she's doing when she's not out changing the world.

Q: You just finished your term on the Board of Legal Specialization. What will you miss most about service on the board?

I will miss learning about the various processes that go into becoming a legal specialist in the different specialty areas. I will miss serving on the certification and recertification applicant appeals. I'll miss saying "second" to motions. I will miss the board, committee members, and staff the most; they taught me a great deal about understanding the specialization program.

Q: From the perspective of a former board member, finish this sentence: "I'm excited about the future of legal specialization because..."

As a society, we are changing how we do business in the world. As new areas of law are introduced, and existing areas are more in demand, the need for specialists continues to grow. The board has been very proactive in identifying the growth and the need to continue adding new specialty areas and improving the process for existing certifications and recertifications.

Q: Do you feel your career and personal accomplishments prepared you for service on the board?

Most definitely! As a long-time assistant commissioner for the ACC, my job was to organize and direct championships in 23 sports. Although the basics of each of the championships were the same regarding planning and execution, each sport had different elements, very in line with how the specialization program works. Being involved in the creation of specialty areas for juvenile delinquency law, utilities law, trademark law, and privacy and information security law (the only such specialty in the nation) was as fulfilling an accomplishment as when I started eight different championships during my tenure at the ACC.

Q: What do you think is the importance of legal specialization to the public?

Legal specialization is important to consumers because it helps them to identify qualified lawyers. I equate it with an internal medicine doctor who has knowledge of illnesses, but cannot treat specific illnesses that need a specialist like for diabetes or

heart disease.

Q: What's something personal that most people don't know about you?

I love trivia and animals, and, when I'm not working, I'm happiest watching TV game shows. ■

For more information on how to become certified, visit our website at nclawspecialists.gov.

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Is It Ethical for Lawyers to Accept Bitcoins and Other Cryptocurrencies?

By James M. McCauley, Sharon D. Nelson, and John W. Simek

The Ethics Committee recently received an inquiry regarding the ethical implications of a lawyer receiving cryptocurrency (Bitcoin) as payment for legal fees or as payment for the benefit of a client or a third party. The inquiry was referred to a subcommittee for further review. Nebraska is currently the only jurisdiction that has issued an opinion on the ethical issues implicated by the multifaceted nature of cryptocurrency. The Virginia State Bar recently published an article referencing the Nebraska opinion and noting their concerns about the implications of cryptocurrency on a lawyer's professional responsibility. With permission from the authors and the Virginia State Bar, that article is republished here for our members' contemplation.

Cryptocurrency Baseline

Bitcoins are digital currency, and yes, lawyers are beginning to accept them from clients. They are also known as virtual currency or cryptocurrency since cryptography is used to control Bitcoin creation and transfer. They use peer-to-peer technology with no central authority or banks. The issuance of bitcoins and the managing of transactions are carried out collectively by the network.

Cryptocurrencies are created by a process called mining—by becoming a miner of cryptocurrencies, you make money (not much unless you are a major league miner). We won't go into all of the technology that is used to create and verify the transactions since it will probably make your head hurt. Mining is accomplished by executing complicated mathematic operations that take a lot of processing power. Hence the new phenomenon of cryptojacking in which miners hijack the computing resources of unknowing victims so they can mine cryptocurrencies. And yes, your network could be victimized and there is little chance you would know unless so much power is used that your network slows down.

Today there are a lot of different cryptocurrencies. Bitcoin is still one of the most well-known and popular. However, other cryptocurrencies such as Ethereum, Bitcoin Cash, Monero, Litecoin, Ripple, Dash, and others are gaining in popularity. They promise to scale better than Bitcoin and to provide stronger anonymous protections. As of April 26, 2018, the amazing number of different cryptocurrencies is 1,759 according to investing.com's current list located at https://www.investing.com/crypto/currencies. With all the various "flavors" of digital currencies, we're sure you'll find one to your liking.

All cryptocurrency transactions are recorded in a computer file called a blockchain, which is synonymous to a ledger that deals with conventional money. Users send and receive Bitcoin and other cryptocurrencies from their mobile device, computer, or web application by using wallet software. You can even use cloud services to host and manage your wallet(s). Frankly, we prefer to have direct control and keep our wallet(s) stored on local devices. Of course, don't forget to back up your wallet(s).

We won't get into all the technical and legal issues surrounding cryptocurrencies. Suffice it to say that these virtual currencies are here to stay and have value, although they remain extremely volatile. In the US, cryptocurrencies are regarded as property rather than cash, with all the consequent tax implications.

Ethical Issues

Let's deal with some of the ethical issues concerning the acceptance of cryptocurrencies.

Nebraska is the only state we are aware of that has issued an ethical opinion specifically for Bitcoin usage. Nebraska's opinion states that lawyers may accept payments in digital currencies, but must immediately convert them into US dollars. Any refund of monies is also made in US dollars and not in digital currency.

It is well known that an attorney can't access client funds until they are earned, hence the existence of trust accounts. Also, an attorney can accept property as payment, but there must be a valuation for the property. This is where accepting digital currencies could get a little muddy. The Virginia rules require that a fee for legal services must be "reasonable." If attorneys receive digital currency, they should immediately convert and exchange it to actual currency AND put it in their escrow account. This effectively (and actually) puts a value on the cryptocurrency, which is exactly the process described in the Nebraska opinion. As part of the reconciliation and billing process, the lawyer would just note wording stating the number of bitcoins or other cryptocurrency and the market value at conversion. What the Nebraska opinion did not address is the handling of transaction fees, which can be rather substantial. The majority of lawyers will use an exchange to convert the cryptocurrency into cash. Who pays the fee for this conversion? And what if the client insists that the lawyer hold an advanced fee payment in Bitcoin instead of converting it to US currency? If Bitcoin increases in value, who gets the windfall—the lawyer or the client? Who bears the risk if Bitcoin drops in value?

Criminal defense lawyers, of course, can face potential ethical and even criminal issues if clients pay them with assets they are determined to have acquired through illegal conduct. And yet, almost invariably, when we hear about lawyers accepting Bitcoin as payment, the lawyers involved are criminal defense attorneys. For all the talk of "privacy" and the frequent inability to prove the connection between illegal conduct and Bitcoin, it is clear that federal authorities believe the

bitcoins are used to keep criminal activities financially untraceable. On the other hand, many legitimate businesses in the United States and Europe accept Bitcoin, including Dish Network, Overstock.com, and Expedia.

Holding Cryptocurrencies

What if the lawyer wants to keep the cryptocurrency for their own use? Can they just keep the cryptocurrency in their own electronic wallet and deposit cash in the trust account on behalf of their client? The answer to this question depends on whether the Bar considers bitcoins "funds" or "property" that a client entrusts to the lawyer. *See* Rule 1.15. Client "funds" belong in a trust account, but client "property" must be kept safe by the lawyer. Since a lawyer cannot deposit bitcoins in a trust account, describing it as "funds" is a problem.

When a client gives a lawyer bitcoins, it is "property," not actual currency, but Rule 1.15 requires a lawyer to safeguard client property. This means making sure your digital "wallet" is secure and backed up. If the lawyer wants to keep the bitcoins and give the client the equivalent value in cash, those funds must go into the trust account if the bitcoins were payment of an advanced fee. This would require the client's consent and would be subject to the business transaction rule under Rule 1.8(a), requiring that the terms of the transaction be fair and reasonable, confirmed in writing, and that the client be advised to seek independent counsel before entering into the agreement.

One legal ethicist, the late Professor Ronald D. Rotunda, disagreed with the Nebraska Bar's Ethics Opinion 17-03 that says the lawyer must convert the cryptocurrency immediately into US currency. *See, Bitcoin and the Legal Ethics of Lawyers*, dated November 6, 2017, on *Justia's* Verdict blog at bit.ly/2OzOFoT. Professor Rotunda correctly explains how Bar opinions have allowed that, subject to certain requirements, lawyers may accept from their clients' stock and tangible property in lieu of cash for payment of legal fees even if the stock or property might fluctuate in value after the lawyer has accepted it. In Rotunda's view, bitcoins are like gold in the sense that it is worth whatever people are willing to pay for them.

The Nebraska opinion requires that lawyers "mitigate the risk of volatility and possible unconscionable overpayment for services" by not retaining the digital currency and by converting it "into US dollars immediately upon receipt." To Rotunda, it is a business decision rather than an ethics decision if the client wants to shift the risk of volatility to the lawyer. If a client and lawyer agree to pay the lawyer with stock in lieu of currency, and the original value is reasonable at the time the parties contracted, the fact that the stock goes up or down in value does not make the acceptance of the stock unethical. The Bar opinions "look back" to the time that payment was accepted to determine whether the payment was "reasonable," and the lawyer may suffer a loss or a windfall, as the case may be. These opinions do not require that the lawyer sell the stock immediately to convert it to cash. In some initial public offerings, there may be "blackout periods" in which the lawyer is prohibited from selling the stock. That Bitcoin might drastically drop in value, resulting in the lawyer being underpaid, is not an ethics issue either, according to Rotunda. Lawyers are educated adults and can make the call to sell or keep the bitcoins and accept that risk.

Rotunda may have a point if the client pays the lawyer in bitcoins for past legal services. In that case, the lawyer has earned the fee and the bitcoins becomes the property of the lawyer. The lawyer can accept risk with respect to his or her own property. That the bitcoins cannot be deposited into a bank account is not an ethics issue if the bitcoins are payment toward an earned fee. Even if the client paid the fee in cash, a lawyer cannot deposit an earned fee in a trust account because that would be commingling. The ethics rules do not require the lawyer to deposit an earned fee in an operating account either. The lawyer could deposit the cash directly into a personal checking account.

If the client gives the lawyer bitcoins as an "advance fee," however, there are some problems. Rule 1.15 requires that a lawyer safe keep property that the client has entrusted to the lawyer. An "advanced fee" is property of the client until the lawyer has earned it, per Legal Ethics Opinion 1606. If Bitcoin plummets dramatically in value, and the client discharges the lawyer before the work is completed, the lawyer will not have kept safe sufficient funds or property to make a refund of the unearned fee as required by Rule 1.16(d); or, if the lawyer accepts Bitcoin in settlement of a client's claim, and Bitcoin loses value, the lawyer is unable to pay the client or to discharge third-party liens as required by Rule 1.15(b). The lawyer may discharge these obligations with other funds or property, but in doing so the lawyer would be making payments "out of trust" and not in compliance with the rules.

Another problem arises out of the fact that the Bar's regulation of trust accounts and recordkeeping has not kept pace with technology and does not contemplate cryptocurrency. Lawyers are required to keep records of trust account transactions that are auditable and verified through an approved financial institution's records and statements. No regulatory Bar is currently equipped to audit Bitcoin transactions and storage.

The Future

Unless some serious security measures are built into Bitcoin, we wouldn't recommend that you invest any serious wealth with the virtual currency. Certainly some virtual currencies are better protected than others, but you still might want to think long and hard about accepting Bitcoin or other cryptocurrency as lawyers. The bulk of people we know regard Bitcoin as "shady money," and they may well regard lawyers accepting Bitcoin as "shady lawyers." Will Bitcoin be legitimized one day in the eyes of average Joes and Janes? Maybe—but not soon. ■

Jim McCauley is the ethics counsel for the Virginia State Bar where he has been employed for almost 29 years, and teaches professional responsibility at the T.C. Williams School of Law in Richmond, Virginia. Sharon Nelson is the president and John Simek is the vice-president of Sensei Enterprises, Inc., a legal technology, cybersecurity, and digital forensics firm based in Fairfax, Virginia. (703) 359-0700, senseient.com.

IOLTA Update (cont.)

she says. "Now I have more opportunities. I have a clean slate."

After graduation, Janessa hopes to continue her education at UNC-Charlotte studying business and human resources. After years of trying to put her mistakes in the past, Charlotte Center for Legal Advocacy helped Janessa find a fresh start as she heads out into the world with her degree in hand and a determination to succeed. ■

The Control Enthusiast

By Cathy Killian

The Lawyer Assistance Program holds support groups across the state for lawyers who are actively engaged in a recovery process (recovery from all kinds of issues, not just drug or alcohol problems). Often these meetings are topic driven, providing lawyers an opportunity to uncover, examine, explore, and share their attitudes, thoughts, beliefs, and experiences on the given topic. It is always so interesting to hear how thinking, reactions, self-understanding, and self-mastery have evolved as these lawyers practice putting new recovery-based tools to use. The LAP sometimes sends out an article in advance of a meeting (our "Monday Article"), allowing the group participants an opportunity to reflect on the topic for that week before they meet to discuss it. We decided to publish this Monday Article because we received so much positive feedback on it, as it resonated with many of our clients and volunteers.

Actor Patrick Warburton, who bears a striking resemblance to Clark Kent/Superman, (in the neurotic world of *Seinfeld* he was the only mechanic that could maintain Jerry's Saab), is the latest spokesperson for National Car Rental. He swaggers through the airport saying that some folks refer to him as a control freak, but he prefers to think of himself as a "Control Enthusiast." He is happy to be able to go straight to his car, and not to have to talk to any humans unless he wants to—and he doesn't want to.

National Car Rental is highlighting its "commitment to providing time-sensitive frequent airport travelers with unmatched control throughout their rental experience" because people want to "be in charge at all times." In our world that moves faster than ever, the ideal of control is difficult to resist.

Controlling people have extremely high expectations, rigid routines and schedules, and their obsessive behaviors can border on being pathological. They have to plot and plan everything. They expend a tremendous amount of energy trying to plan, predict, and prevent things that they cannot possibly plan, predict, or prevent.

This controlling behavior is likely innate, from an evolutionary standpoint—if we are in control of our environment we have a better chance of survival. Research has shown that most people believe they have control over certain aspects of or events in their lives, even when such control is impossible or doesn't exist. One of the best examples is that no matter how bad a driver someone may be, most people firmly believe they are less likely to be in a car accident if they are the one driving.

Controlling behavior is really about trying to manage fear and anxiety. Our emotions are fueled by insecurities and an absolute terror of being vulnerable. We cannot risk having any flaws or weaknesses exposed, whether real or imagined. We are attached to a specific outcome. We believe we can protect ourselves by staying in control of every aspect of our lives and creating a rigid sense of order. "The irony is that often those that feel the most need for control, are themselves the ones being controlled by their own fears, insecurities, and doubts," says Carlos Felfoldi.

At our core, the "control enthusiast" in us believes we can never let our guard down or relax our vigilance. Our insecurities and fear keep us from trusting others, both on a practical and emotional level. The downside of that is, if we have no trust in others on an emotional level, we can't open up and we continually keep people at arm's length. Life is always a struggle and a fight, and our lives become very restricted, very draining, and often very lonely.

We emotionally walk on eggshells as we struggle to deal with the substantial anxiety that accompanies this outlook. Seeking control becomes an anxiety management tool utilized to try and ward off feelings of helplessness and inadequacy. It isn't necessarily a very effective tool, but it becomes our "go to" just the same, especially if we are subject to increasing stress.

We can move through the world in this

way as a result of growing up in a chaotic, dysfunctional, and/or abusive environment. We become hypervigilant, always on high alert, always anticipating bad things. We develop the belief that there must be something wrong with us. That translates into very low self-worth.

As adults, this can create a lack of trust in others and ourselves, fear of abandonment, fear of failure, perfectionism, and the fear of experiencing painful emotions—or any emotions for that matter. It becomes a cycle—as these feelings increase, so does a need for the sense of control. We establish a pattern of controlling behavior and our world often rewards and reinforces these behaviors. We keep things consistent, complete tasks, and take care of things. We try to control our internal world (feelings) by controlling our external world.

We have specific emotional reactions when there is a perceived threat to our sense of control. As Dan Oestreich says, "These reactions are an effort to get things back in control as quickly as possible. I react with anger in order to restore the sense of safety and stability my control brings. I hold a grudge in order to avoid the unknown risks of trusting you again. I turn my back on you in order to regain the relationship the way it was

CONTINUED ON PAGE 49

Committee Publishes Proposed Opinions on Using an Online Review Solicitation Service and on Membership in a Marketing Company with a Misleading Title

Council Actions

At its meeting on July 27, 2018, the State Bar Council adopted the ethics opinions summarized below:

2018 Formal Ethics Opinion 1

Participation in Website Directories and Rating Systems that include Third Party Reviews

Opinion explains when a lawyer may participate in an online rating system and a lawyer's professional responsibility for the content posted on a profile on a website directory. The State Bar Council adopted 2018 FEO 1 after the Ethics Committee made non-substantive revisions to Opinion #6 at its meeting on July 26, 2018.

2018 Formal Ethics Opinion 2

Duty to Disclose Adverse Legal Authority

Opinion rules that a lawyer has a duty to disclose to a tribunal adverse legal authority that is controlling as to that tribunal if the legal authority is known to the lawyer and is not disclosed by opposing counsel.

2018 Formal Ethics Opinion 3

Use of Suspended Lawyer's Name in Law Firm Name

Opinion rules that the name of a lawyer who is under an active suspension must be removed from the firm name within a reasonable period of time.

2018 Formal Ethics Opinion 6

Shifting Cost of Litigation Cost Protection Insurance to Client

Opinion rules that, with certain conditions, a lawyer may include in a client's fee agreement a provision allowing the lawyer's purchase of litigation cost protection insurance and requiring reimbursement of the insurance premium from the client's funds in the event of a settlement or favorable trial verdict.

Ethics Committee Actions

At its meeting on July 26, 2018, the Ethics Committee withdrew proposed 2017 Formal Ethics Opinion 6, Participation in Platform for Finding and Employing a Lawyer, due to the discontinuation of the online service at issue in the inquiry. The committee sent Proposed 2018 Formal Ethics Opinion 5, *Ex Parte* Communications with a Judge Regarding Scheduling or Administrative Matter, back to subcommittee for further study based upon comments received about the proposed opinion during the prior quarter. The committee also received an inquiry concerning Bitcoin and other cryptocurrency and sent the inquiry to subcommittee for study. The committee approved two new opinions for publication, which appear below.

Proposed 2018 Formal Ethics Opinion 7
Online Review Solicitation Service
July 26, 2018

Proposed opinion rules that, subject to certain conditions, a lawyer may participate in an online service for soliciting client reviews that collects and posts positive reviews to increase the lawyer's ranking on internet search engines.

Repsight.com is an online service that offers to help lawyers accumulate more positive client reviews. Repsight contends that positive client reviews give law firms added credibility with potential customers and help increase search rankings in Google searches. For a monthly fee, Repsight will contact a client via text or email to solicit a review from the client. The number of contacts made by Repsight is based on the amount of the monthly fee.

After completing legal services for a client, the lawyer will log in to Repsight.com and enter the client's email address or phone number and presses the "send" button. Repsight then sends the client a text or an email thanking the client for the client's business and asks the client to click a button to rate the lawyer's services. The client then chooses between 1 and 5 stars, with 5 stars being the highest rating. If the client rates the lawyer 3 stars or less, Repsight redirects the client to a private feedback form. The lawyer will receive the client's comments, but the comments will not be posted on the lawyer's Google review page. If the client gives the lawyer a 4- or 5-star review, the client is redirected to the lawyer's Google review page (with 5 stars already populated) so that the client can leave the lawyer a positive review.

Inquiry #1:

May a lawyer participate in the Repsight service?

Opinion #1:

Yes, if certain conditions are met.

A client's name and contact information are confidential and may not be revealed unless the client gives informed consent. Rule 1.6(a). Before the lawyer may provide a client's contact information to Repsight, the lawyer must obtain the client's informed

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.

consent. "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation appropriate to the circumstances. Rule 1.0(f).

To obtain the client's informed consent and to avoid misrepresentation, the lawyer must explain to the client that the lawyer uses Repsight. The lawyer is also obligated to disclose Repsight's process, to wit: the lawyer pays a monthly fee for Repsight services; the lawyer will provide the client's name and contact information to Repsight after the representation has concluded; Repsight will contact the client regarding the review; only 4- and 5-star reviews will be posted on Google and other internet search engines; and 3 stars or less reviews will be shared with the lawyer, but will not be posted by Repsight or the lawyer anywhere on the internet. *See* Rule 1.4; Rule 8.4(c).

Inquiry #2:

If a lawyer obtains the client's informed consent to provide the client's contact information to Repsight, must the lawyer post or direct Repsight to post all reviews, including reviews of 3 stars or less?

Opinion #2:

No, provided the lawyer does not deceive the client about the treatment of negative reviews and adequately explains that reviews of 3 stars or less will not be posted on the internet. *See* Rule 8.4(c).

Inquiry #3:

When a client gives a lawyer a negative review, the lawyer may contact the client to address the client's concerns. If after the communication the client agrees to change the negative review and provide a 4- or 5-star review, may the lawyer direct Repsight to contact the client to obtain and post the revised review?

Opinion #3:

Yes, subject to certain conditions. There can be no quid pro quo for the revised review. *See* Rule 7.2(b). Also, the lawyer may not solicit, encourage, or assist in the posting of fake, false, or misleading reviews. *See* Rule 8.4(c). Finally, the lawyer may not threaten, bully, or harass the client to provide a positive 4- or 5-star review. *See* Rule 8.4, cmt. [5]. *See generally* 2018 FEO 1.

Proposed 2018 Formal Ethics Opinion 8
Advertising Membership in Marketing Company with Misleading Title
July 26, 2018

Proposed opinion rules that a lawyer may not advertise membership in an organization that designates members as "lawyers of distinction" if the organization does not have verifiable standards for admission.

"Lawyers of Distinction" describes itself as a private lawyer vanity and marketing company. A "Benefits of Membership" video on the marketing company's website states that "Lawyers of Distinction" is "a private organization that acknowledges lawyers in the United States who have demonstrated excellence in the practice of law." Advertising material for the company states that "membership is limited to the top 10% of attorneys in the United States." Nominees are selected through peer nomination, selection committee research, or self-nomination. Lawyers do not pay for the nomination.

Upon approval of his or her nomination, the lawyer may "accept" membership by paying a membership fee of $475 to $775 per year. With a payment of $475, the lawyer receives a customized rosewood plaque. With the payment of $775, the lawyer receives a personalized crystal statue. The plaques and statues display the "Lawyers of Distinction" logo, the year, the lawyer's name, and the statement "Recognizing Excellence in [area of law]." The member has the opportunity to purchase additional rosewood plaques at the cost of $100 per plaque or $175 per crystal statue. Either membership option entitles the lawyer to display the "Lawyers of Distinction" licensed logo on the lawyer's website and other promotional materials for the year. In addition, all members are included in the "Lawyers of Distinction" directory, and the company publicizes member names year-round through press releases and online announcements.

Pursuant to the company's website:

> Lawyers of Distinction members have been selected based upon a review and vetting process from our Selection Committee. Nomination does not guarantee membership. All prospective members are subject to final review after submitting their application before confirmation of membership. Lawyers do not pay for this nomination. These potential candidates who meet the criteria of our screening process have demonstrated a high degree of peer recognition and professional competence. Attorneys may nominate other peers they feel warrant recognition or self-nominate. These candidates undergo the same rigorous review process. Lawyers of Distinction uses its own independent criteria, including both objective and subjective factors, in determining if an attorney can be recognized as a Lawyer of Distinction in the United States in their respective field. This designation is based upon the proprietary analysis of the Lawyers of Distinction organization alone and is not intended to be endorsed by any of the 50 United States Bar Associations or The District of Columbia Bar Association. Lawyers of Distinction shall not confirm membership to more than 10% of attorneys in any given state. Any references to "excellent," "excellence," or "distinguished" are meant to refer to the Lawyers of Distinction organization and not to any named member individually.

A "selection process" video on the company website states: "Lawyers cannot simply pay to join. Members are selected through peer nomination, selection committee research, or self-nomination." In order to self-nominate, a lawyer need only enter his name, address, law firm website, email, and area of practice into an online membership application. The lawyer/applicant then immediately chooses and pays for a particular membership. The application form provides that in the event the Membership Committee rejects an application for any reason, the application fee will be refunded in full. The application form also states that, once a lawyer's application has been approved for a yearly membership, the member may continue to be a member without the need for a nomination in successive years. The membership is renewed annually unless the lawyer notifies Lawyers of Distinction of non-renewal. There are no qualification requirements for annual membership renewal.

Inquiry #1:

May North Carolina lawyers advertise their membership in "Lawyers of Distinction"?

Opinion #1:

No. Rule 7.1(a) prohibits a lawyer from

making false or misleading communications about himself or his services. A communication is misleading if it creates unjustified expectations about the results a lawyer can achieve or makes a comparison with the services of another lawyer that cannot be factually substantiated. *See* Rule 7.1(a)(2) and (3).

In 2007 FEO 14, the Ethics Committee considered the permissibility of lawyers advertising inclusion in lists with titles that imply that the named lawyers are "super," "the best," "elite," or a similar designation. The Ethics Committee concluded that an advertisement stating that a lawyer is included in a listing in a publication (such as *North Carolina Super Lawyers*) is not misleading or deceptive provided the relevant conditions from 2003 FEO 3 are satisfied. 2003 FEO 3 states that a lawyer may only advertise membership or participation in an organization with a self-laudatory name or designation (such as the Million Dollar Advocates Forum) if the following conditions are satisfied:

(1) the organization has strict, objective standards for admission that are verifiable and would be recognized by a reasonable lawyer as establishing a legitimate basis for determining whether the lawyer has the knowledge, skill, experience, or expertise indicated by the designated membership;

(2) the standards for membership are explained in the advertisement or information on how to obtain the membership standards is provided in the advertisement;

(3) the organization has no financial interest in promoting the particular lawyer; and

(4) the organization charges the lawyer only reasonable membership fees.

The Ethics Committee cannot identify any verifiable strict, objective standards for admission to Lawyers of Distinction in effect that would be recognized by a reasonable lawyer as establishing a legitimate basis for determining whether the lawyer has the knowledge, skill, experience, or expertise indicated by the designated membership. The company website includes a "selection process" page that appears to state objective standards for admission; these "indicators of professional achievement" purportedly independently investigated by the company include: experience, honors/awards, case results, specialty certifications, professional activities, educational background, *pro bono* and community service, scholarly lectures, and other outstanding achievement. However, it is unclear how the company selection committee can consider these factors based on the limited information provided by a self-applicant. Similarly, the selection process also purports to include an ethics review and background check. However, it is unclear how consent would be obtained from a peer nominated or selection committee nominated lawyer. In the case of self-applicants, the application process does not request consent from the applicant to either of these confidential inquiries. Accordingly, the Ethics Committee cannot conclude that "Lawyers of Distinction" satisfies the standards set out in 2003 FEO 3 and 2007 FEO 14. Therefore, advertising membership in "Lawyers of Distinction" is misleading and a violation of Rule 7.1.

Inquiry #2:

May North Carolina lawyers become members of the "Lawyers of Distinction" marketing company if they do not personally advertise their membership?

Opinion #2:

No. Advertising materials for the company state that it publicizes member names year-round through press releases and online announcements in *The New York Times*, *USA Today*, Fox News, CNN, Huffington Post, and on social media, including Facebook and Twitter. The advertising material also states that membership rosters are advertised nationally in print through the *New York Times*, Bar journals, *The National Bar Journal*, *Trial Magazine*, and numerous other outlets. Therefore, even if a lawyer does not advertise the membership in his or her own promotional materials, the lawyer will appear on membership rosters published by the company that identify the lawyer as a "Lawyer of Distinction," which is misleading as set out in Opinion #1. Furthermore, the company's disclosure statement that "designation is based upon the proprietary analysis of the Lawyers of Distinction organization alone and is not intended to be endorsed by any of the 50 United States Bar Associations or The District of Columbia Bar Association" and that "[a]ny references to 'excellent,' 'excellence,' or 'distinguished' are meant to refer to the Lawyers of Distinction organization and not to any named member individually" is insufficient to correct the misleading nature of the company's publication of a membership roster identifying the lawyer as a "Distinguished Attorney."

The company's advertising materials contain other misrepresentations. The company states that it "shall not confirm membership to more than 10% of attorneys in any given state." Based upon the company's promise to cut off membership once membership reaches 10% of the lawyers in a particular state, publications of the membership roster, as well as press releases prepared by the company, misleadingly state that the members represent the "top 10% of lawyers in the United States."

Because the company's advertising materials are misleading, a North Caolina lawyer may not participate in the company's marketing. ■

CJCP (cont.)

fullest and to apply that responsibly to the problems at hand. Professionalism requires adherence to the highest ethical standards of conduct and a willingness to subordinate narrow self-interest in pursuit of the more fundamental goal of public service. Because of the tremendous power they wield in our system, lawyers must never forget that their duty to serve their clients fairly and skillfully takes priority over the personal accumulation of wealth. At the same time, lawyers must temper bold advocacy for their clients with a sense of responsibility to the larger legal system which strives, however imperfectly, to provide justice for all."[3]

Lisa Sheppard is the executive director of the Chief Justice's Commission on Professionalism.

Endnotes

1. Message from the President, North Carolina State Bar Magazine, Vol. 20, No. 4, pp. 6-7 (1973).
2. The CJCP welcomes new ideas for projects and initiatives that enhance professionalism among NC lawyers, judges, and law students, as well as feedback on its existing programming. Please contact Lisa Sheppard, executive director, at lisa.m.sheppard@nccourts.org to share your thoughts.
3. Justice Sandra Day O'Connor, Court of Appeals of Maryland Professionalism Course, "Professionalism Above and Beyond Ethics," p. 15 (1992).

Amendments Pending Supreme Court Approval

At its meetings on April 20, 2018, and July 27, 2018, the North Carolina State Bar Council 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 and Summer 2018 editions of the *Journal* or visit the State Bar website.)

Proposed Amendments to the Rules on Election, Succession, and Duties of Officers

27 N.C.A.C. 1A, Section .0400, Organization of the North Carolina State Bar

A new rule is proposed that will specify what occurs when any of the State Bar's officers become temporarily unable to perform the duties of office. The replacement of the existing, less comprehensive rule is proposed.

Proposed Amendments to the State Bar Council's Rulemaking Procedures

27 N.C.A.C. 1A, Section .1400, Rulemaking Procedures

Proposed amendments to Rule .1401 allow future proposed amendments to be published for comment in a digital version of the *Journal*, the State Bar's official publication. The proposed amendments are necessary to accommodate those members who elect to receive the electronic version of the *Journal* exclusively. Proposed amendments to Rule .1403 specify when a proposed rule amendment or proposed rule takes effect.

Proposed Amendments to the Requirements for Reinstatement from Inactive Status and Administrative Suspension

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

The proposed amendments require a lawyer petitioning for reinstatement to complete the mandatory CLE hours for the year in which the lawyer went inactive or was administratively suspended if inactive or suspended status was ordered on or after July 1.

Proposed Amendments to the Annual CLE Requirements

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

The proposed amendments provide a definition of "technology training" and mandate that one of the 12 hours of approved CLE required annually must be devoted to technology training.

Proposed Amendments to the Rules Governing the Administration of the Continuing Legal Education Program

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

Proposed amendments to Rule .1522 specify that members may file their annual report forms online and allow the State Bar to email notice to the membership that the forms have been posted to members' online records in lieu of mailing the forms.

Proposed Amendments to the Certification Standards for the Elder Law Specialty

27 N.C.A.C. 1D, Section .2900, Certification Standards for the Elder Law Specialty

The proposed amendments clarify what constitutes elder law CLE for the purpose of satisfying the CLE standards for certification and for continued certification in elder law.

Proposed Amendments to Rules for the Paralegal Certification Program

27 N.C.A.C. 1G, Section .0100, The Plan for Certification of Paralegals

Proposed amendments to The Plan for Certification of Paralegals allow an additional one-year term for service as the chair of the certification committee and establish a vice chair position for the committee. Other proposed amendments eliminate the rights of an applicant to review a failed examination and to request a review by the board of a failed examination.

Proposed Amendments to the Rules Governing the Admission to the Practice of Law in North Carolina

NC Board of Law Examiners, Section .0500, Requirements for Applicants; Section .0600, Moral Character and General Fitness; and Section .1200, Board Hearings

Proposed amendments to the rules of the Board of Law Examiners provide a time period within which a general applicant is required to successfully complete the state-specific component of the Uniform Bar Examination, and require transfer applicants as well as general applicants to appear before bar candidate committees.

Highlights

· Council approves for transmission to NC Supreme Court rule amendments mandating that one of the 12 hours of approved CLE required annually must be devoted to technology training.
· Council publishes a proposed rule establishing a procedure to suspend the license of a lawyer who is not in compliance with requests of the Grievance Committee for information or evidence relating to a grievance investigation.
· Council republishes proposed amendments to Rule of Professional Conduct 5.4 expanding the exceptions to the prohibition on fee sharing with non-lawyers.

Proposed Amendments

At its meeting on July 27, 2018, the council voted to publish the following proposed amendments to the governing rules of the State Bar for comment from the members of the Bar:

Proposed Amendments to the Rules on Discipline and Disability of Attorneys

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

Proposed amendments to Rule .0113 establish a procedure for imposition of censures that is consistent with the procedures for imposition of reprimands and admonitions. Proposed new Rule .0135 establishes a procedure to suspend the license of a licensee who is not in compliance with demands of the Grievance Committee for information or evidence relating to a grievance investigation.

Rule .0113, Proceedings before the Grievance Committee

(a) **Probable Cause** - The Grievance Committee or any of its panels acting as the Grievance Committee with respect to grievances referred to it by the chairperson of the Grievance Committee will determine whether there is probable cause to believe that a respondent is guilty of misconduct justifying disciplinary action. In its discretion, the Grievance Committee or a panel thereof may find probable cause regardless of whether the respondent has been served with a written letter of notice. The respondent may waive the necessity of a finding of probable cause with the consent of the counsel and the chairperson of the Grievance Committee. A decision of a panel of the committee may not be appealed to the Grievance Committee as a whole or to another panel (except as provided in 27 N.C.A.C. 1A, .0701(a)(3)).

...

(j) **Letters of Warning**

...

(4) In cases in which the respondent refuses the letter of warning, the counsel will prepare and file a complaint against the respondent **at the commission** ~~**for a hearing pursuant to Rule .0114 of this subchapter**~~**.**

(k) **Admonitions, Reprimands, and Censures**

...

(l) **Procedures for Admonitions, ~~and~~ Reprimands, and Censures**

(1) A record of any **admonition, ~~or~~ reprimand, or censure** issued by the Grievance Committee will be maintained in the office of the secretary.

(2) A copy of the **admonition, ~~or~~ reprimand, or censure** will be served upon the respondent in person or by certified mail. A respondent who cannot, with due diligence, be served by certified mail or personal service shall be deemed served by the mailing of a copy of the **admonition, ~~or~~ reprimand, or censure** to the respondent's last known address on file with the NC State Bar. Service shall be deemed complete upon deposit of the **admonition, ~~or~~ reprimand, or censure** in a postpaid, properly addressed wrapper in a post office or official depository under the exclusive care and custody of the United States Postal Service.

(3) Within 15 days after service the respondent may refuse the **admonition, ~~or~~ reprimand, or censure** and request a hearing before the commission. Such refusal and request will be in writing, addressed to the Grievance Committee, and served upon the secretary by certified mail, return receipt requested. The refusal will state that the **admonition, ~~or~~ reprimand, or censure** is refused.

(4) ~~In cases in which the respondent refuses an admonition or reprimand, the counsel will prepare and file a complaint against the respondent pursuant to Rule .0114 of this subchapter~~. If a refusal and request are not served upon the secretary within 15 days after service upon the respondent of the admonition, ~~or~~ reprimand, **or censure,** the admonition, ~~**or**~~ reprimand, **or censure** will be deemed accepted by the respondent. An extension of time may be granted by the chairperson of the Grievance Committee for good cause shown. **A censure that is deemed accepted by the respondent must be filed as provided by Rule .0127(a)(3) of this subchapter.**

(5) In cases in which the respondent refuses an admonition, ~~or~~ reprimand, or censure, the counsel will prepare and file a complaint against the respondent at the commission. ~~pursuant to Rule .0114 of this subchapter~~.

~~(m) Procedure for Censures~~

~~(1) If the Grievance Committee determines that the imposition of a censure is appropriate, the committee will issue a notice of proposed censure and a proposed censure to the respondent.~~

~~(2) A copy of the notice and the proposed censure will be served upon the respondent in person or by certified mail. A respondent who cannot, with due diligence, be served by certified mail or personal service shall be deemed served by the mailing of a copy of the notice and proposed censure to the respondent's last known address on file with the NC State Bar. Service shall be deemed complete upon deposit of the notice and proposed censure in a postpaid, properly addressed wrapper in a post office or official depository under the exclusive care and custody of the United States Postal Service. The respondent must be advised that he or she may accept the censure within 15 days after service upon him or her or a formal complaint will be filed before the commission.~~

~~(3) The respondent's acceptance must be in writing, addressed to the Grievance Committee, and served on the secretary by certified mail, return receipt requested. Once the censure is accepted by the respondent, the discipline becomes public and must be filed as provided by Rule .0123(a)(3) of this subchapter.~~

~~(4) If the respondent does not accept the censure, the counsel will file a complaint against the defendant pursuant to Rule .0114 of this subchapter.~~

~~(n)~~(m) Disciplinary Hearing Commission Complaints - Formal complaints will be issued in the name of the North Carolina State Bar as plaintiff and signed by the chairperson of the Grievance Committee. Amend-

ments to complaints may be signed by the counsel alone, with the approval of the chairperson of the Grievance Committee.

[The following is an entirely new rule.]

Rule .0135, Noncompliance Suspension

(a) Noncompliant and Noncompliance defined. Failure to respond fully and timely to a letter of notice issued pursuant to N.C.A.C. 1B, .0112, failure to respond fully and timely to any request from the State Bar for additional information in any pending grievance investigation, failure to respond fully and timely to any request from the State Bar to produce documents or other tangible or electronic materials in connection with a grievance investigation, and/or failure to respond fully and timely to a subpoena issued by the chair of the Grievance Committee or issued by the secretary of the State Bar shall be referred to herein as "noncompliant" or "noncompliance."

(b) Petition for Noncompliance Suspension

If a respondent against whom a grievance file has been opened and who has been served with a letter of notice or who has been served with a subpoena issued by the chair of the Grievance Committee or issued by the secretary of the State Bar is noncompliant, the State Bar may petition the chair of the Disciplinary Hearing Commission for an order requiring the respondent to show cause why the chair should not enter an order suspending the respondent's law license.

(c) Content of Petition

(1) The petition shall be a verified petition, or shall be supported by an affidavit, demonstrating by clear, cogent, and convincing evidence that the respondent is noncompliant.

(2) The petition shall set forth the efforts made by the State Bar to obtain the respondent's compliance.

(3) Service of Petition

(A) The petition shall be served upon the respondent by mailing a copy of the petition addressed to the last address the respondent provided to the Membership Department of the State Bar pursuant to N.C. Gen. Stat. § 84-34 or addressed to any more recent address that might be known to the State Bar representative who is attempting service.

(B) Service of the petition shall be complete upon mailing.

(d) Order to Show Cause

(1) Upon receiving the State Bar's filed petition, the chair of the DHC shall issue to the respondent an order to show cause.

(2) The order to show cause shall notify the respondent that the respondent's noncompliance or failure to respond to the order to show cause may result in suspension of the respondent's law license.

(3) The order to show cause shall be served upon the respondent by mailing a copy of the order addressed to the last address the respondent provided to the Membership Department of the State Bar pursuant to N.C. Gen. Stat. § 84-34, addressed to any more recent address that might be known to the DHC, or addressed to the address where the State Bar served the petition.

(4) Service of the order to show cause shall be complete upon mailing.

(e) Response to Order to Show Cause

(1) The respondent shall respond to the order to show cause within 14 days of the date of service of the order upon the respondent.

(2) If the respondent responds to the order to show cause within 14 days of the date of service of the order upon the respondent, the chair of the DHC shall schedule a hearing on the order to show cause within ten days of the filing of the respondent's response and shall provide notice to the respondent and to the State Bar of such hearing.

(3) If the respondent does not file a response to the order to show cause within 14 days of the date of service of the order to show cause upon the respondent, the chair of the DHC may enter an order suspending the respondent's law license. Such order of suspension will remain in effect until the chair enters an order finding by clear, cogent, and convincing evidence that the respondent fully cured the noncompliance and reinstating the respondent's law license to active status.

(f) Hearing on Order to Show Cause; Burden of Proof

(1) The State Bar shall have the burden of proving the respondent's noncompliance by clear, cogent, and convincing evidence.

(2) If the chair of the DHC finds that the State Bar has met its burden of proof, the burden of proof shall shift to the respondent to prove one or more of the following by clear, cogent, and convincing evidence:

(A) That the respondent was and is fully in compliance;

(B) That the respondent has fully cured all noncompliance; or

(C) That there is good cause for the respondent's noncompliance.

(g) Entry of Order

If the chair finds that the State Bar has met its burden of proof; finds by clear, cogent, and convincing evidence that the respondent is noncompliant; finds that the respondent has not met the respondent's burden of proof; and fails to find by clear, cogent, and convincing evidence any of the circumstances listed in paragraph 6(b) above, the chair may enter an order suspending the respondent's law license. Such order of suspension shall remain in effect until the chair enters an order finding by clear, cogent, and convincing evidence that the respondent fully cured the noncompliance and reinstating the respondent's law license to active status.

(h) Wind Down

Any attorney suspended for noncompliance shall comply with the wind-down provisions for suspended attorneys as set forth in N.C.A.C. 1B .0128.

Comments

The State Bar welcomes your comments regarding proposed amendments to the rules. Please send your written comments to L. Thomas Lunsford II, The North Carolina State Bar, PO Box 25908, Raleigh, NC 27611.

The Process

Proposed amendments to the Rules of the North Carolina State Bar are published for comment in the *Journal*. They are considered for adoption by the council at the succeeding quarterly meeting. If adopted, they are submitted to the North Carolina Supreme Court for approval. Unless otherwise noted, proposed additions to rules are printed in bold and underlined; deletions are interlined.

(i) Reinstatement from Noncompliance Suspension

(1) Following entry of a noncompliance suspension order, the respondent may seek reinstatement by filing a verified petition with the chair of the DHC demonstrating by clear, cogent, and convincing evidence that the respondent has become, and is at the time of the petition, fully compliant. The respondent shall simultaneously serve a copy of the verified petition on the State Bar.

(2) The State Bar shall have five days from the date of receipt to file an objection to the respondent's petition. If the State Bar does not object, the chair may enter an order finding by clear, cogent, and convincing evidence that the respondent has become, and is at the time of the petition, fully compliant and reinstating the respondent to the active practice of law.

(3) If the State Bar objects to the petition, the chair shall schedule a hearing within ten days of the filing of such objection. It shall be the respondent's burden to prove by clear, cogent, and convincing evidence that the respondent has become, and remains at the time of the hearing, fully compliant.

(4) At the conclusion of the hearing, if the chair finds that the respondent has met her/his burden of proof and finds by clear, cogent, and convincing evidence that the respondent is fully compliant at the time of the hearing, the chair shall enter an order reinstating the respondent to the active practice of law.

(j) Subsequent Petitions for Noncompliance Suspension

The State Bar may file a petition under this rule on the first occasion when a respondent is noncompliant and may file a petition on any subsequent occasions when a respondent is noncompliant.

Proposed Amendments to the Minimum Standards for Continued Certification of Specialists and to the Recertification Standards for All Specialties

27 N.C.A.C. 1D, Section .1700, The Plan for Legal Specialization; Section .2100, Certification Standards for the Real Property Law Specialty; Section .2200, Certification Standards for the Bankruptcy Law Specialty; Section .2300, Certification Standards for the Estate Planning and Probate Law Specialty; Section .2400, Certification Standards for the Family Law Specialty; Section .2500, Certification Standards for the Criminal Law Specialty; Section .2600, Certification Standards for the Immigration Law Specialty; Section .2700, Certification Standards for the Workers' Compensation Law Specialty; Section .2800, Certification Standards for the Social Security Disability Law Specialty; Section .2900, Certification Standards for the Elder Law Specialty; Section .3000, Certification Standards for the Appellate Practice Specialty; Section .3100, Certification Standards for the Trademark Law Specialty; Section .3200, Certification Standards for the Utilities Law Specialty; and Section .3300, Certification Standards for the Privacy and Information Security Law Specialty

The proposed amendments reduce the number of peer references required for recertification as a specialist from ten to six for all specialties.

Rule .1721, Minimum Standards for Continued Certification of Specialists

(a) The period of certification as a specialist shall be five years…To qualify for continued certification as a specialist, a lawyer applicant must pay any required fee, must demonstrate to the board with respect to the specialty both continued knowledge of the law of this state and continued competence and must comply with the following minimum standards.

(1) …

(4) The specialist must comply with the requirements set forth in Rules .1720(a)(1) ~~and (4) of this subchapter~~.

(5) The specialist must make a satisfactory showing of qualification in the specialty through peer review. The applicant must provide, as references, the names of at least six lawyers or judges, all of whom are licensed and currently in good standing to practice law in any state and familiar with the competence and qualification of the applicant as a specialist. For an application to be considered, completed peer reference forms must be received from at least three of the references. All other requirements relative to peer review set forth in Rule .1720(a)(4) of this subchapter apply to this standard.

(b) …

Section .2100, Certification Standards for the Real Property Law Specialty

Rule .2106, Standards for Continued Certification as a Specialist

The period of certification is five years… each applicant for continued certification as a specialist shall comply with the specific requirements set forth below in addition to any general standards required by the board of all applicants for continued certification.

(a) Substantial Involvement - …

(b) Continuing Legal Education - …

(c) Peer Review - **The applicant must provide, as references, the names of at least six lawyers or judges, all of whom are licensed and currently in good standing to practice law in this state and familiar with the competence and qualification of the applicant as a specialist. For an application to be considered, completed peer reference forms must be received from at least three of the references. All other requirements relative to peer review set forth in** ~~The specialist must comply with the requirements of~~ Rule .2105(d) of this subchapter **apply to this standard**.

(d) Time for Application - …

Section .2200, Certification Standards for the Bankruptcy Law Specialty

Rule .2206 Standards for Continued Certification as a Specialist

The period of certification is five years… each applicant for continued certification as a specialist shall comply with the specific requirements set forth below in addition to any general standards required by the board of all applicants for continued certification.

(a) Substantial Involvement - …

(b) Continuing Legal Education - …

(c) Peer Review - **The applicant must provide, as references, the names of at least six lawyers or judges, all of whom are licensed and currently in good standing to practice law in this state and familiar with the competence and qualification of the applicant as a specialist. For an application to be considered, completed peer reference forms must be received from at least three of the references. All other requirements relative to peer review set forth in** ~~The specialist must comply with the requirements of~~ Rule .2205(d) of this subchapter **apply to this standard**.

(d) …

Section .2300, Certification Standards for the Estate Planning and Probate Law

Specialty

Rule .2306, Standards for Continued Certification as a Specialist

The period of certification is five years… each applicant for continued certification as a specialist shall comply with the specific requirements set forth below in addition to any general standards required by the board of all applicants for continued certification.

(a) Substantial Involvement - …

(b) Continuing Legal Education - …

(c) Peer Review - **The applicant must provide, as references, the names of at least six lawyers or judges, all of whom are licensed and currently in good standing to practice law in this state and familiar with the competence and qualification of the applicant as a specialist. For an application to be considered, completed peer reference forms must be received from at least three of the references. All other requirements relative to peer review set forth in** ~~The specialist must comply with the requirements of~~ Rule .2305(d) of this subchapter **apply to this standard**.

(d) Time for Application - …

Section .2400, Certification Standards for the Family Law Specialty

Rule .2406, Standards for Continued Certification as a Specialist

The period of certification is five years… each applicant for continued certification as a specialist shall comply with the specific requirements set forth below in addition to any general standards required by the board of all applicants for continued certification.

(a) Substantial Involvement - …

(b) Continuing Legal Education - …

(c) Peer Review - **The applicant must provide, as references, the names of at least six lawyers or judges, all of whom are licensed and currently in good standing to practice law in this state and familiar with the competence and qualification of the applicant as a specialist. For an application to be considered, completed peer reference forms must be received from at least three of the references. All other requirements relative to peer review set forth in** ~~The specialist must comply with the requirements of~~ Rule .2405(d) of this subchapter **apply to this standard**.

(d) Time for Application - …

Section .2500, Certification Standards for the Criminal Law Specialty

Rule .2506, Standards for Continued Certification as a Specialist

The period of certification is five years… each applicant for continued certification as a specialist shall comply with the specific requirements set forth below in addition to any general standards required by the board of all applicants for continued certification.

(a) Substantial Involvement - …

(b) Continuing Legal Education - …

(c) Peer Review - **The applicant must provide, as references, the names of at least six lawyers or judges, all of whom are licensed and currently in good standing to practice law in this state and familiar with the competence and qualification of the applicant as a specialist. For an application to be considered, completed peer reference forms must be received from at least three of the references. Each applicant also must provide the names and addresses of the following: (i) five lawyers and judges who practice in the field of criminal law and who are familiar with the applicant's practice, and (ii) opposing counsel and the judge in four recent cases tried by the applicant to verdict or entry of order. All other requirements relative to peer review set forth in** Rule .2505(d) of this subchapter **apply to this standard**.

(d) Time for Application - …

Rule .2509, Standards for Continued Certification as a Specialist in Juvenile Delinquency Law

The period of certification is five years… each applicant for continued certification as a specialist shall comply with the specific requirements set forth below in addition to any general standards required by the board of all applicants for continued certification.

(a) Substantial Involvement - …

(b) Continuing Legal Education - …

(c) Peer Review - **The applicant must provide, as references, the names of at least six lawyers or judges, all of whom are licensed and currently in good standing to practice law in this state, practice in the field of juvenile delinquency law or criminal law or preside over juvenile delinquency or criminal law proceedings, and are familiar with the competence and qualification of the applicant as a specialist. An applicant must receive a minimum of three favorable peer reviews to be considered by the board for compliance with this standard. All other requirements relative to peer review set forth in** ~~The specialist must comply with the requirements of~~ Rule .2508(d) of this subchapter **apply to this standard**.

(d) Time for Application – …

Section .2600, Certification Standards for the Immigration Law Specialty

Rule .2606, Standards for Continued Certification as a Specialist

The period of certification is five years… each applicant for continued certification as a specialist shall comply with the specific requirements set forth below in addition to any general standards required by the board of all applicants for continued certification.

(a) Substantial Involvement - …

(b) Continuing Legal Education - …

(c) Peer Review - **The applicant must provide, as references, the names of at least six lawyers or judges, all of whom are licensed and currently in good standing to practice law in this state and familiar with the competence and qualification of the applicant as a specialist. For an application to be considered, completed peer reference forms must be received from at least three of the references. All other requirements relative to peer review set forth in** ~~The specialist must comply with the requirements of~~ Rule .2605(d) of this subchapter **apply to this standard**.

(d) Time for Application - …

Section .2700, Certification Standards for the Workers' Compensation Law Specialty

Rule .2706, Standards for Continued Certification as a Specialist

The period of certification is five years… each applicant for continued certification as a specialist shall comply with the specific requirements set forth below in addition to any general standards required by the board of all applicants for continued certification.

(a) Substantial Involvement - …

(b) Continuing Legal Education - …

(c) Peer Review - **The applicant must provide, as references, the names of at least six lawyers, commissioners or deputy commissioners of the North Carolina Industrial Commission, or judges, all of whom are licensed and currently in good standing to practice law in this state and familiar with the competence and qualification of the applicant as a specialist. For an application to be considered, completed peer reference forms must be received from at least three**

of the references. All other requirements relative to peer review set forth in ~~The specialist must comply with the requirements of~~ Rule .2705(d) of this subchapter **apply to this standard**.

(d) Time for Application - …

Section .2800, Certification Standards for the Social Security Disability Law Specialty

Rule .2806, Standards for Continued Certification as a Specialist

The period of certification is five years… each applicant for continued certification as a specialist shall comply with the specific requirements set forth below in addition to any general standards required by the board of all applicants for continued certification.

(a) Substantial Involvement - …

(b) Continuing Legal Education - …

(c) Peer Review - **The applicant must provide, as references, the names of at least six lawyers or judges, all of whom are licensed and currently in good standing to practice law in a jurisdiction in the United States and are familiar with the competence and qualification of the applicant as a specialist. For an application to be considered, completed peer reference forms must be received from at least three of the references. All other requirements relative to peer review set forth in ~~The specialist must comply with the requirements of~~** Rule .2805(d) of this subchapter **apply to this standard**.

(d) Time for Application - …

Section .2900, Certification Standards for the Elder Law Specialty

Rule .2906, Standards for Continued Certification as a Specialist

The period of certification is five years… each applicant for continued certification as a specialist shall comply with the specific requirements set forth below in addition to any general standards required by the board of all applicants for continued certification.

(a) Substantial Involvement - …

(b) Continuing Legal Education - …

(c) Peer Review - **The applicant must provide, as references, the names of at least six lawyers or judges, all of whom are licensed and currently in good standing to practice law in this state and familiar with the competence and qualification of the applicant as a specialist. For an application to be considered, completed peer reference forms must be received from at least three of the references. All other requirements relative to peer review set forth in ~~The specialist must comply with the requirements of~~** Rule .2905(e) of this subchapter **apply to this standard**.

(d) Time for Application - …

Section .3000, Certification Standards for the Appellate Practice Specialty

Rule .3006, Standards for Continued Certification as a Specialist

The period of certification is five years… each applicant for continued certification as a specialist shall comply with the specific requirements set forth below in addition to any general standards required by the board of all applicants for continued certification.

(a) Substantial Involvement - …

(b) Continuing Legal Education - …

(c) Peer Review - **The applicant must provide, as references, the names of at least six lawyers or judges, all of whom are licensed and currently in good standing to practice law, have significant legal or judicial experience in appellate practice, and are familiar with the competence and qualification of the applicant as a specialist. For an application to be considered, completed peer reference forms must be received from at least three of the references. All other requirements relative to peer review set forth in ~~The specialist must comply with the requirements of~~** Rule .3005(d) of this subchapter **apply to this standard**.

(d) Time for Application - …

Section .3100, Certification Standards for the Trademark Law Specialty

Rule .3106, Standards for Continued Certification as a Specialist

The period of certification is five years… each applicant for continued certification as a specialist shall comply with the specific requirements set forth below in addition to any general standards required by the board of all applicants for continued certification.

(a) Substantial Involvement - …

(b) Continuing Legal Education - …

(c) Peer Review - **The applicant must provide, as references, the names of at least six lawyers or judges, all of whom are licensed and currently in good standing to practice law, have significant legal or judicial experience in trademark law, and are familiar with the competence and qualification of the applicant as a specialist. For an application to be considered, completed peer reference forms must be received from at least three of the references. All other requirements relative to peer review set forth in ~~The specialist must comply with the requirements of~~** Rule .3105(d) of this subchapter **apply to this standard**.

(d) Time for Application - …

Section .3200, Certification Standards for the Utilities Law Specialty

Rule .3206, Standards for Continued Certification as a Specialist

The period of certification is five years… each applicant for continued certification as a specialist shall comply with the specific requirements set forth below in addition to any general standards required by the board of all applicants for continued certification.

(a) Substantial Involvement - …

(b) Continuing Legal Education - …

(c) Peer Review - **The applicant must provide, as references, the names of at least six lawyers or judges, all of whom are licensed and currently in good standing to practice law, have significant legal or judicial experience in utilities law, and are familiar with the competence and qualification of the applicant as a specialist. For an application to be considered, completed peer reference forms must be received from at least three of the references. All other requirements relative to peer review set forth in ~~The specialist must comply with the requirements of~~** Rule .3205(d) of this subchapter **apply to this standard**.

(d) Time for Application - …

Section .3300, Certification Standards for the Privacy and Information Security Law Specialty

Rule .3306, Standards for Continued Certification as a Specialist

The period of certification is five years… each applicant for continued certification as a specialist shall comply with the specific requirements set forth below in addition to any general standards required by the board of all applicants for continued certification.

(a) Substantial Involvement - …

(b) Continuing Legal Education - …

(c) Peer Review - **The applicant must provide, as references, the names of at least six lawyers or judges, all of whom are licensed and currently in good standing to practice law in North Carolina or another jurisdiction in the United States; however, no more than three reference may be li-**

censed in another jurisdiction. References must be familiar with the competence and qualification of the applicant as a specialist. For an application to be considered, completed peer reference forms must be received from at least three of the references. All other requirements relative to peer review set forth in ~~The specialist must comply with the requirements of~~ Rule .3305(d) of this subchapter apply to this standard.

(d) Time for Application - …

Proposed Amendments to the Rules of Professional Conduct

27 NCAC 2, Rule 1.15, Safekeeping Property; Rule 3.5, Impartiality and Decorum of the Tribunal; and Rule 5.4, Professional Independence of Lawyer

Proposed amendments to the official comment to Rule of Professional Conduct 1.15, Safekeeping Property, and to the body of Rule 5.4, Professional Independence of Lawyer, were originally published for comment in the Fall 2017 edition of the *Journal* upon the recommendation of the Ethics Committee. At the October 2017 quarterly meeting, the committee asked that the proposed amendments not be submitted to the council for final consideration pending further action on a related proposed ethics opinion, Proposed 2017 FEO 6, concerning Avvo Legal Services (ALS), an online client-lawyer matching service. In June 2018, the owner of ALS advised the State Bar that it would discontinue ALS at the end of July. In light of this, the Ethics Committee withdrew proposed 2017 FEO 6 (see Ethics Opinions Article, page 39). The committee, however, recommended to the council that the proposed rule amendments be published again to solicit additional comments from the Bar. The proposed amendments to Rule 5.4 vary slightly from the version published in the Fall 2017 edition of the *Journal*.

The proposed amendments to the official comment to Rule 1.15 explain the due diligence required if a lawyer uses an intermediary (such as a bank, credit card processor, or litigation funding entity) to collect a fee. The proposed amendments to Rule 5.4 add an exception to the prohibition on fee sharing with a nonlawyer which would allow a lawyer to pay a portion of a legal fee to certain third parties if the amount paid is for administrative or marketing services and there is no interference with the lawyer's independent professional judgment.

Proposed amendments to Rule 3.5 correct a typographical error included in an amendment to the Rules of Professional Conduct approved by the North Carolina Supreme Court on April 5, 2018. They also revise the official comment to specify that gifts or loans to judges are only prohibited if made under circumstances that might give the appearance that the gift or loan was made to influence official action. The latter proposed amendment is consistent with the prohibition in the N.C. Code of Judicial Conduct.

Rule 1.15, Safekeeping Property

Comment To Rule 1.15 and All Subparts

[1] …

Prepaid Legal Fees

[12] …

[13] Client or third-party funds on occasion pass through, or are originated by, intermediaries before deposit to a trust or fiduciary account. Such intermediaries include banks, credit card processors, litigation funding entities, and online marketing platforms. A lawyer may use an intermediary to collect a fee. However, the lawyer may not participate in or facilitate the collection of a fee by an intermediary that is unreliable or untrustworthy. Therefore, the lawyer has an obligation to make a reasonable investigation into the reliability, stability, and viability of an intermediary to determine whether reasonable measures are being taken to segregate and safeguard client funds against loss or theft and, should such funds be lost, that the intermediary has the resources to compensate the client. Absent other indicia of fraud (such as the use of non-industry standard methods for collection of credit card information), a lawyer's diligence obligation is satisfied if the intermediary collects client funds using a credit or debit card. Unearned fees, if collected by an intermediary, must be transferred to the lawyer's designated trust or fiduciary account within a reasonable period of time so as to minimize the risk of loss while the funds are in the possession of another, and to enable the collection of interest on the funds for the IOLTA program or the client as appropriate. ***See*** **27 N.C.A.C. 1B, Sect. .1300.**

Abandoned Property

~~[13]~~ **[14]** …

[Renumbering remaining paragraphs.]

Rule 3.5, Impartiality and Decorum of the Tribunal

(a) A lawyer representing a party in a matter pending before a tribunal shall not:

(1) seek to influence a judge, juror, member of the jury venire, or other official by means prohibited by law; …

(b)…

(c) A lawyer shall reveal promptly to the court improper conduct by a juror or a member of the jury venire, and improper conduct by another person toward a juror, a member of the jury venire, **or** the family members of a juror or a member of the jury venire~~'s family~~.

(d) …

Comment

[1] Many forms of improper influence upon a tribunal are proscribed by criminal law…

[7] The impartiality of a public servant in our legal system may be impaired by the receipt of gifts or loans. A lawyer, therefore, ~~is never justified in making a gift or a loan to~~ **shall not give or lend anything of value to** a judge, a hearing officer, or an official or employee of a tribunal **under circumstances which might give the appearance that the gift or loan is made to influence official action**.

[8] All litigants and lawyers should have access to tribunals on an equal basis…

Rule 5.4, Professional Independence of Lawyer

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

(1) …

(4) …; ~~and~~

(5) …; **and**

(6) a lawyer or law firm may pay a portion of a legal fee to a credit card processor, group advertising provider, or online marketing platform if the amount paid is for payment processing or for administrative or marketing services, and there is no interference with the lawyer's independent professional judgment or with the client-lawyer relationship.

(b) …

Comment

[1] …

[2] A determination under paragraph (a)(6) of this rule as to whether an advertising provider or online marketing platform (jointly "platform") will interfere with the independent professional judgment of

a lawyer requires consideration of a number of factors. These factors include, but are not limited to, the following: (a) the percentage of the fee or the amount the platform charges the lawyer; (b) the percentage of the fee or the amount that the lawyer receives from clients obtained through the platform; (c) representations made to prospective clients and to clients by the platform; (d) whether the platform communicates directly with clients and to what degree; and (e) the nature of the relationship between the lawyer and the platform. A relationship wherein the platform, rather than the lawyer, is in charge of communications with a client indicates interference with the lawyer's professional judgment. The lawyer should have unfettered discretion as to whether to accept clients from the platform, the nature and extent of the legal services the lawyer provides to clients obtained through the platform, and whether to participate or continue participating in the platform. The lawyer may not permit the platform to direct or control the lawyer's legal services and may not assist the platform to engage in the practice of law, in violation of Rule 5.5(a).

[~~23~~] …

[Renumbering remaining paragraphs.]

In Memoriam

Thomas Ernest Cummings
Charlotte, NC

Charles Edgar Dobbin Sr.
Lenoir, NC

Harold Dean Downing
Fayetteville, NC

John Edwin Duke
Cary, NC

David S. Dunkle
Birmingham, AL

Harper Johnston Elam III
Greensboro, NC

Thomas Francis Ellis
Raleigh, NC

Richard W. Ellis Sr.
Candler, NC

Michael Gregory Ferguson
Asheville, NC

Nelson H. Graves
Diamond Bar, CA

Jeffrey Bennett Hargett
Charlotte, NC

William Paul Holt Jr.
Sylva, NC

Faye Dalton Ivey
Greensboro, NC

Harvey A. Jonas Jr.
Newton, NC

John Kenneth Lee
Greensboro, NC

Joe S. Major III
Charlotte, NC

Bryan Douglas Martin
Advance, NC

Samuel Martin Millette
Charlotte, NC

Warren Bickett Morgan Jr.
Marshville, NC

Joe Henderson Morris
Fayetteville, NC

Kara Brooke Ottesen
Cary, NC

Patrick Adam Pait
Lumberton, NC

Grady Siler Patterson Jr.
Raleigh, NC

Paul Jones Raisig Jr.
Sanford, NC

James A. Reno
Garner, NC

Theodore Reaves Reynolds
Raleigh, NC

James Russell Sugg Sr.
Durham, NC

Gerald Mark Swartzberg
Greensboro, NC

Minette Conrad Trosch
Charlotte, NC

R. Leslie Turner
Pink Hill, NC

Paul Vancil
Chapel Hill, NC

Chester E. Whittle Jr.
Boone, NC

Charles Watkins Wilkinson Jr.
Oxford, NC

Arthur Wayne Yancey
Durham, NC

LAP (cont.)

or to end the relationship while protecting my version of events. I console myself by reminding myself how smart or right I am. Reactions are a way of holding onto what was, even if that always was a fantasy or an illusion."

When we project an image like Patrick Warburton we exhaust ourselves. Inner peace does not depend on, nor can it be created by, external conditions.

We are better served focusing our energies on what we really have any control over, and that is ourselves. As Brian Kessler points out, "The closest to being in control we'll ever be is in that moment when we realize that we're not." We are always capable of controlling our attitudes and actions, and thus our thoughts and behaviors. Letting go of expectations, being present and in the moment, reserving judgments, and accepting life on life's terms, while difficult to achieve, is far easier than trying to micromanage the universe. To shift into this place of greater freedom requires a combination of surrender, acceptance, faith, and trust. It requires a firm belief that we will be OK no matter what. "It is after all, this internal control that has the power and influence to shape our life choices, decisions, actions and ultimate destiny." ■

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 or call: Cathy Killian (western areas of the state) at 704-910-2310, or Nicole Ellington (for eastern areas of the state) at 919-719-9267.

Client Security Fund Reimburses Victims

At its July 26, 2018, meeting, the North Carolina State Bar Client Security Fund Board of Trustees approved payments of $23,423.53 to 16 applicants who suffered financial losses due to the misconduct of North Carolina lawyers.

The payments authorized were:

1. An award of $175 to a former client of Adam Baker of Raleigh. The board determined that Baker was retained to get a client's larceny charge dismissed and expunged from his record. The charge was dismissed after the client got a deferred prosecution. Baker then filed the expunction petition, but failed to pay the filing fee he had received to the clerk. Baker was disbarred on February 13, 2017. The board previously reimbursed four other Baker clients a total of $15,000.

2. An award of $1,105 to a former client of Garey Ballance of Warrenton. The board determined that Ballance was retained to handle a client's divorce. Ballance prepared a complaint, but neglected the matter and failed to file it prior to the opposing party filing for divorce. Ballance failed to provide any meaningful legal services for the client for the fee paid. Ballance was disbarred on November 13, 2015. The board previously reimbursed 14 other Ballance clients a total of $20,646.

3. An award of $1,003.53 to a former client of Robert Chandler Jr. of Rocky Mount. The board determined that Chandler was retained to file a client's workers' comp claim and to bring a third-party tort claim for the client's injuries. After the comp carrier made indemnity payments to the client and paid the client's medical providers, Chandler notified the comp carrier that he was filing a third-party claim. Upon settling the third-party claim, Chandler deposited the funds into his operating account, then took his fee plus expenses, disbursed half of the balance to the client, and retained the remaining funds to pay lien holders. Chandler failed to pay the lien holders and embezzled those funds. Chandler was disbarred on July 11, 2016. The board previously reimbursed two other Chandler clients a total of $4,030.61.

4. An award of $6,800 to a former client of Christopher Greene of Charlotte. The board determined that Greene was retained to represent a client in filing for alien employment certification and later in filing an application for permanent status. Greene failed to provide the client with any meaningful legal services for either the labor certification or the permanent status application for the fees paid. Greene was disbarred on February 11, 2017. The board previously reimbursed seven other Greene clients a total of $15,635.

5. An award of $2,490 to a former client of Christopher Greene. The board determined that Greene was retained to represent a client and his son in filing for permanent status. Greene was disbarred before providing the client with any meaningful services for the fee paid.

6. An award of $3,000 to a former client of Christopher Greene. The board determined that Greene was retained to represent a client in filing for asylum. Although Greene filed an asylum claim for the client with the USCIS, it was meaningless because the client had previously been ordered to be removed from the country by an immigration court in Texas back in November 2005. Greene failed to file a motion to reopen the Texas matter; therefore, providing no meaningful legal services for the fee paid.

7. An award of $2,340 to a former client of Christopher Greene. The board determined that Greene was retained to file a client's U-Visa application. Greene never provided any meaningful legal services to the client for the fee paid.

8. An award of $2,360 to a former client of Christopher Greene. The board determined that Greene was retained to file citizenship applications on behalf of a client and the client's wife. Greene failed to remit the filing fees with the applications, so they were not accepted. After the applications were returned, Greene still failed to return them with the filing fees prior to his disbarment. Greene failed to provide any meaningful legal services to the client for the fee paid.

9. An award of $375 to a former client of Charles Gurley of Goldsboro. The board determined that Gurley was retained to handle a client's traffic matter. Gurley failed to provide any meaningful legal services to the client for the fee paid prior to being jailed and then suspended from the practice of law by a superior court judge due to his failing to provide the State Bar with records of his handling of clients' funds. Gurley was enjoined from practicing law on November 22, 2017. The board previously reimbursed one other Gurley client $1,125.

10. An award of $1,000 to a former client of Charles Gurley.The board determined that Gurley was retained to represent a client on a DWI charge. Gurley failed to provide the client with any meaningful legal services prior to being suspended from the practice of law.

11. An award of $400 to a former client of Charles Gurley. The board determined that Gurley was retained to represent a client on a DWLR charge. Gurley failed to provide the client with any meaningful legal services prior to being suspended from the practice of law.

12. An award of $375 to a former client of Charles Gurley. The board determined that Gurly was retained to represent a client on two traffic charges. Gurley failed to provide the client with any meaningful legal services prior to being suspended from the practice of law.

13. An award of $250 to a former client of Charles Gurley. The board determined that Gurley was retained to represent a client on an NOL charge. Gurley failed to provide the client with any meaningful legal services prior to being suspended from the practice of law.

14. An award of $375 to a former client of Charles Gurley. The board determined that Gurley was retained to represent a client on a speeding ticket. Gurley failed to provide the client with any meaningful legal services prior to being suspended from the practice of law.

15. An award of $1,000 to a former client of Charles Gurley. The board determined that Gurley was retained to represent a client on a

DWI charge. Gurley failed to provide the client with any meaningful legal services prior to being suspended from the practice of law.

16. An award of $375 to a former client of Charles Gurley. The board determined that Gurley was retained to represent a client on a speeding ticket. Gurley failed to provide the client with any meaningful legal services prior to being suspended from the practice of law.

Additional Charles R. Gurley Claims

Counsel provided the board with a memo and attachments relating to 65 additional claims pending against Gurley. The board authorized counsel to pay, with consent of only the chair, any Gurley claim that shows payment of a specific amount to Gurley for which Gurley failed to provide any meaningful legal services, such that the claim would have been on the Consent Pay portion if it reached a board agenda. ■

Christy Nominated as Vice-President

Greensboro Attorney Barbara R. Christy has been 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. At that time, Winston-Salem attorney G. Gray Wilson will assume the office of president, and Raleigh attorney C. Colon Willoughby will also stand for election to the office of president-elect.

Christy earned her BS *magna cum laude* from Appalachian State University, and her JD from the University of North Carolina School of Law.

A member of Schell Bray, her practice focuses on commercial real estate transactions.

Christy's professional activities include volunteering with Legal Aid of North Carolina's Lawyer on the Line initiative. She is also a North Carolina State Bar board certified specialist in real property law—business, commercial, and industrial transactions, a fellow with the American College of Real Estate Lawyers, and a member of the Piedmont Triad Commercial Real Estate Women. Additionally, Christy is involved with her community, serving on the Board of Directors for Southern Alamance Family Empowerment, Inc., and is a past member of the UNC Law Foundation, Inc. Board of Directors.

As a State Bar councilor, Christy has served as vice-chair of the Authorized Practice Committee, Grievance Committee, and Legislative Committee, and as chair of the Ethics Committee.

Christy and her family live on a small farm in the Snow Camp community where they raise beef cattle, honey bees, and fruit trees. She is a member of Saxapahaw United Methodist Church where she has been the long-time church pianist. ■

Freedom for Sale (cont.)

20. *Id.*
21. *Id.* at 543.
22. *Id.*
23. *Id.* (quoting the district court).
24. *Id.* (quoting *Carson v. Johnson*, 112 F.3d 818, 821-22 (5th Cir. 1997)).
25. *Id.* (quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 20 (1973)).
26. *Id.*
27. *Id.* at 545.
28. *See State v. Thompson*, 349 N.C. 483, 499 (1998).
29. *Id.*
30. *Id.* at 496.
31. *Id.* at 498.
32. *Id.* (quoting *Stack v. Boyle*, 342 U.S. 1, 4 (1951)).
33. *Id.* at 499-500 (quoting *Coffin v. United States*, 156 US 432 (1895)).
34. *Id.* at 500.
35. *Id.* at 503.
36. The system of bail used in North Carolina originated in England in the 13th century where a sheriff was required to consider the gravity of the offense charged, the weight of the evidence, and the character of the defendant prior to considering bail. If bail was made available, a friend or relative of the accused would be required to promise to forfeit a specified sum of money to the court if the defendant failed to appear. Loran L. Lewis, *Bail Bond Reform in Allegheny County*, 5 Juris: Duquesne L. Sch., News Magazine 10 (May, 1972), bit.ly/2LkdM0l.
37. Crystal S. Yang, *Toward an Optimal Bail System*, 92 NYU L. Rev. 1399 (2017).
38. *See* note 2, *supra*.
39. For example, a study in California's Santa Clara County found that pretrial service supervision cost less than 1/10 the cost of pretrial detention in jail ($15 per day vs. $159 per day in jail). Criminal Justice Policy Program, *California Pretrial Reform: The Next Step in Realignment* 7 (Oct. 2017), bit.ly/2uxDXHh.
40. Brent D. Troxell, *Understanding Pretrial Programs' Success and Their Effects on County Jails* (March 14, 2012), unc.live/2LdXKVG.
41. *Steps in Being Released to Pretrial Release*, bit.ly/2Jrd7oN (Last visited April 10, 2018).
42. Risk-assessment tools use scientific algorithms to make predictions about the risk posed by individual defendants. *See, e.g.*, John Clark, *Upgrading North Carolina's Bail System: A Balanced Approach to Pretrial Justice Using Legal and Evidence-Based Practices* 19 (Aug., 15 2017).
43. Troxell, *supra* note 60.
44. *Id.*
45. *Id.*
46. Chris Christie, *Save Jail for the Dangerous* (Apr. 27, 2015), bit.ly/1JOiZCI.
47. Sophie Tatum, Kamala Harris, *Rand Paul Back Fixes to Bail Process* (July 20, 2017), cnn.it/2uqT1X7 ("'Our justice system was designed with a promise: to treat all people equally,' Harris was quoted saying in a news release. 'Yet more than 450,000 Americans sit in jail today awaiting trial and many of them cannot afford "money bail." In our country, whether you stay in jail or not is wholly determined by whether you're wealthy or not—and that's wrong.'")

John B. McMillan Distinguished Service Award

George V. Hanna III

George V. Hanna III received the John B. McMillan Distinguished Service Award on May 3, 2018, at the Mecklenburg County Bar's annual Law Day luncheon. The award was presented by State Bar President John M. Silverstein and State Bar Councilor Robert C. Bowers.

Mr. Hanna has demonstrated a career-long commitment to *pro bono* service. He is the founding member of Moore & Van Allen's Public Service Committee. He was also instrumental in creating Moore & Van Allen's Housing Rights Project, which helps prevent homelessness and protects families from unsafe and unhealthy housing conditions. He is a long-term leader in the development and delivery of *pro bono* services to clients of Legal Services of Southern Piedmont and Legal Aid of North Carolina. He served as a member of the Legal Services of Southern Piedmont Board of Directors and also as the board's president. Mr. Hanna also served as the chair of the Mecklenburg County Bar's Volunteer Lawyer Program. He served for almost a decade on the North Carolina Bar Association's (NCBA) *Pro Bono* Planning committee, and has also served on the Chief Justice's Commission on Equal Access to Justice, the NCBA's Board of Governors, and the NCBA's 4All Task Force.

In recognition of his commitment to serving the public through his *pro bono* efforts and leadership, Mr. Hanna received the NCBA's I. Beverly Lake Public Service Award in 2010. He went on to receive the Distinguished *Pro Bono* Service Award in 2012. In 2014 he received the Citizen Lawyer Award and in 2015 he was honored with the Mecklenburg Bar Foundation's Ayscue Professionalism Award.

In addition to his dedication to *pro bono* services, Mr. Hanna has displayed a deep commitment to diversity and inclusiveness programs. He was the founding member and chair of Moore & Van Allen's Diversity Committee and the founding chair of the Mecklenburg County Bar's Committee on Diversity and Inclusion. In 2006, Mr. Hanna was recognized for his efforts by the Diversity Council of the Carolinas and was the 2007 recipient of the Charlotte YMCA's Will Stratford Diversity Award. In 2009 he was honored with the Julius L. Chambers Diversity Award.

David R. Teddy

Attorney David R. Teddy received the John B. McMillan Distinguished Service Award on June 17, 2018, at the North Carolina Advocates for Justice Convention in Wilmington, NC. State Bar President John M. Silverstein presented the award.

Mr. Teddy obtained his law degree from Campbell University. While at Campbell he was elected president of the Student Bar Association. In his final year at Campbell, the Student Bar Association created the "David R. Teddy Innovative Leadership and Service Award" as a result of his numerous contributions to the law school. The award is given annually to a Campbell student who demonstrates a commitment to leadership and service to the law school.

Mr. Teddy began his legal career as an associate with Michael S. Kennedy. In 1995 he formed a law firm with Ralph Meekins, which is now the firm of Teddy, Meekins & Talbert. Mr. Teddy is a certified specialist in North Carolina criminal law. He is the author of the *DWI Trial Notebook* and the *DWI Playbook* published by Lexis-Nexis, which are used by most criminal lawyers in the state of North Carolina.

Mr. Teddy was appointed to the Indigent Defense Services Commission in 2012. He has been very active with the North Carolina Advocates for Justice. He was appointed to the Political ACT Committee, was co-chair of the DWI Legislative Task force, and served as president of the NCAJ from 2012 to 2013.

Mr. Teddy is known throughout the western part of North Carolina for being a zealous advocate for all of his clients. He is universally respected by judges, prosecutors, and other defense attorneys.

Nominations Sought

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. Please direct questions to Suzanne Lever, SLever@ncbar.gov. ■

Speakers Bureau 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, 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 919-828-4630 or lheidbrink@ncbar.gov.

Law School Briefs

Campbell University School of Law

Campbell Law confers 123 degrees at 2018 commencement—Campbell Law School conferred 123 juris doctor degrees at its 40th annual hooding and graduation ceremony on May 11 at Memorial Auditorium at the Duke Energy Center for the Performing Arts. United States Deputy Attorney General Rod Rosenstein delivered the commencement address.

Campbell Law, Medicine to launch JD/DO dual degree program—Campbell Law School and Campbell Medicine are partnering to offer a unique dual degree opportunity. The new program allows students to pursue and obtain a Juris Doctor and a Doctor of Osteopathic Medicine simultaneously. Prospective students will be able to enroll in the fall of 2019.

The JD/DO program will create highly-credentialed professionals with the skill, expertise, and knowledge to practice in two respected and noble professions. Graduates will be poised to obtain significant positions of leadership, administration, and management and will be well equipped to serve as leaders in their professional and civic communities, working to make significant contributions at the intersection of the law and medicine. The program enables students to earn both degrees in six years of full-time study. Students must apply to, and be accepted by, both programs.

CPILSA, A.J. Fletcher Foundation award five grants for public interest work—The Campbell Public Interest Law Students Association (CPILSA) and The A.J. Fletcher Foundation (AJF) have awarded five grants to students for their upcoming work in public interest this summer. CPILSA will fund two $2,350 grants, while AJF will provide three grants of $2,000 each.

S. Elizabeth Stedman (Children's Law Center of Central NC) and Alexander Fowler (Maryland Office of the Public Defender) were awarded grants from CPILSA. AJF grants were received by M.C. Skinner (Polanco Law), Tatianna DeBerry (Wake County district attorney), and Sarah Sponaugle (NC Innocence Inquiry Commission).

Duke Law School

Karen "Kerry" Abrams began her tenure as the James B. Duke and Benjamin N. Duke dean of the Duke University School of Law on July 1. Her primary teaching and research interests are in the areas of citizenship law, immigration law, constitutional law, legal history, family law, and gender law. Her scholarship has explored the intersection of immigration law and family law, the history of immigration law, and the marriage equality movement. She previously was the vice provost for faculty affairs and professor of law at the University of Virginia.

Duke Law alumni and friends have contributed nearly $6 million to establish a distinguished professorship in law and judicial studies and the directorship of the Bolch Judicial Institute in honor of Professor David F. Levi, formerly the James B. Duke and Benjamin N. Duke dean of the School of Law. Levi became the inaugural Levi Family professor of law & judicial studies and director of the Bolch Judicial Institute on stepping down as dean on June 30. The endowment funds and the positions they support will be renamed for him upon his retirement or departure from Duke University.

Brandon L. Garrett, a highly influential scholar of criminal justice outcomes, evidence, and constitutional rights joined the Duke Law faculty on July 1 as the inaugural L. Neil Williams Jr. professor of law. He previously was the White Burkett Miller professor of law and public affairs and Justice Thurgood Marshall distinguished professor of law at the University of Virginia. He is the author of five books, including *End of its Rope: How Killing the Death Penalty Can Revive Criminal Justice* (Harvard University Press, 2017); *Too Big to Jail: How Prosecutors Compromise with Corporations* (Harvard University Press, 2014); and *Convicting the Innocent: Where Criminal Prosecutions Go Wrong* (Harvard University Press, 2011).

Elon University School of Law

Experienced legal educator joins Elon Law administration—Professor Wendy B. Scott has joined the Elon Law administration as associate dean for academic success and will direct the law school's academic and bar support programs. Prior to joining Elon Law, Scott led Mississippi College School of Law, serving from 2014-2016 as the first African-American to guide the school as dean. Scott secured her stature in the history of legal education as the first tenured African-American woman at Tulane Law School and the first African-American to serve Tulane as vice dean for academic affairs. She went on to teach at North Carolina Central University School of Law for eight years, serving as associate dean for academic affairs for three of those years.

Elon Law invited to UN event on immigration and refugees—Five Elon Law students and two faculty members traveled to New York City in June for the #JoinTogether Conference, a United Nations summit of higher education institutions from around the world gathered to discuss refugee and migrant issues. Assistant Professor Heather Scavone, director of Elon Law's Humanitarian Immigration Law Clinic, was part of the conference lineup as a panelist for "Using Diplomacy to Rise to New Global Challenges."

Accomplished double alum joins Elon Law Board of Advisors—A double graduate of Elon University has joined the Elon University School of Law Board of Advisors. Mark S. Jetton Jr., '06 L'09, a founding partner of Jetton & Meredith, PLLC in Charlotte, will work with other prominent North Carolina jurists, attorneys, and business leaders to help steer the direction of Elon Law as the school begins work on a strategic plan to guide its growth through the early part of the next decade. The Elon Law Board of Advisors is chaired by former presidential adviser David Gergen.

North Carolina Central School of Law

On June 22, 2018, North Carolina Central University Chancellor Johnson Akinleye announced the appointment of North Carolina Superior Court Judge Elaine Mercia O'Neal as interim dean of the university's School of Law.

While serving as the interim dean at the School of Law, Judge O'Neal will oversee daily activities of the school and ensure that the highest legal educational standards are upheld while the university undertakes a nationwide search for a permanent new dean.

A native of Durham, Judge O'Neal earned her undergraduate degree from North Carolina Central University in mathematics and her juris doctorate from NCCU School of Law. Judge O'Neal is an accomplished and seasoned attorney who began serving as a North Carolina District Court judge in 1994 and was elected to the superior court bench in 2011, where she serves in the 14th District. She worked as a solo legal practitioner before being elected to her first judgeship.

Judge O'Neal will begin her role as interim dean on July 16, 2018.

The North Carolina Central University School of Law Virtual Justice Project will offer more tele-law programs throughout the region using a new $499,000 grant awarded by the US Department of Agriculture.

The Virtual Justice Project, established in 2010 to provide legal information via telepresence and high-definition video conferencing capabilities, serves individuals in rural communities faced with financial and geographic obstacles to gaining legal information.

The expansion services include helping people learn more about certain areas of the law, including wills and estates, financial literacy, divorce, child custody, criminal law, and low-income taxpayer information.

The new grant will allow a total of 65 sites to offer teleconference capabilities in regional libraries and offices of Legal Services in the western part of the state. There are plans to eventually offer the service in all 100 North Carolina counties.

University of North Carolina School of Law

Carolina Law receives $1.53 million gift from the Kenan Trust for new Entrepreneurship Program—The clinical program will provide rigorous, hands-on training for the next generation of public-spirited lawyers while also filling gaps in North Carolina's entrepreneurship ecosystem. In addition, the state General Assembly appropriated $465,000 in recurring funds to support the program.

School raises $1.5M for annual fund—Making history for the third year in a row, the annual fund received more than $1.5 million for the 2018 fiscal year. This represents more than a 20% increase over last year's record. The generous gifts from alumni, faculty, staff, and friends go towards providing student scholarships, supporting faculty excellence, and strengthening experiential learning opportunities.

Five students selected for inaugural Summer Judicial Fellows Program—The Robinson O. Everett Sr. Judicial Fellows Program exposes students to litigation through working with judges in district and superior court. The summer jobs are funded by a gift from the Kathrine R. Everett Charitable Trust.

Law students against sexual and domestic violence recognized at UNC public service awards—The group was recognized by UNC Chancellor Carol Folt for its work to protect victims from their abusers through the Ex Parte Project, including its partnership with the Orange County Sheriff's Department.

Tax law expert Leigh Osofsky joins faculty—Osofsky comes to Chapel Hill from the University of Miami School of Law, and teaches Federal Income Tax, Partnership Tax, and Tax Law Research and Writing.

Six alumni recognized at NC Bar association meeting, Jackie Grant sworn in as president—Dan Green '79, Nicholas Long Jr. '81, and Robert B. Norris '76 received the Citizen Lawyer Award. Mike McIntyre II '81 received the I. Beverly Lake Jr. Public Service Award. Jacqueline D. Grant '95 was sworn in as president and LeAnn Nease Brown '84 is president-elect.

Wake Forest School of Law

Marie-Amélie George joined Wake Forest University School of Law in July 2018 as an assistant professor of law. After earning her JD from Columbia Law School in 2007, George worked as a prosecutor at the Miami State Attorney's Office and later as a litigation associate at Paul, Weiss, Rifkind, Wharton & Garrison in New York. She returned to academia for law fellowships at Columbia and Harvard universities as she pursued her Ph.D. in history at Yale University. George's research explores how the legal history of LGBT rights informs current legal debates and normative questions, examining family law, criminal law, employment anti-discrimination protections, and constitutional jurisprudence.

Raina Haque, a Winston-Salem lawyer and founding partner of Erdos Intellectual Property Law + Startup Legal, joined Wake Forest Law as a professor of practice in technology on July 1. Haque most recently co-taught the course, "Law 469: Technology and Modern Law Practice," as an adjunct professor for the law school along with alumnus Jon Mayhugh, who works with Haque at Erdos. In addition to continuing to teach the course on technology in the modern law practice, Haque will add a course in blockchain and smart contracts. Haque will teach a third course to law students, which may be open to non-Wake Forest students interested in executive education on technology. Haque will also continue her law practice.

Wake Forest Law alumnus Brad Wilson joined Wake Forest University as executive in residence with the School of Law and the School of Business on August 1. Wilson is the retired president and CEO of Blue Cross Blue Shield of North Carolina (BCBSNC). He joined BCBSNC in 1996. Before he became president and CEO in 2010, he served in a variety of leadership positions with the organization, including executive vice president, general counsel, and corporate secretary. ■

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