THE NORTH CAROLINA STATE BAR

JOURNAL

SUMMER 2011

IN THIS ISSUE

Reexamining Inactive Attorneys *page 8*
The ABCs of the DHC *page 15*
The Selma Cyclepaths *page 20*

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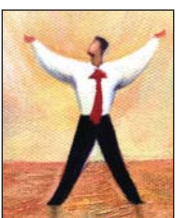
Contents

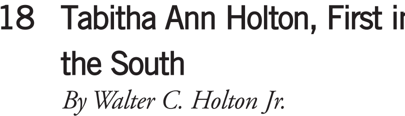
FEATURES



8 Reexamining Inactive Attorneys
By Margaret M. Hunt

10 Getting Paid, Avoiding Conflicts, and Supervising Staff: Fee Agreements, Multi-party Representation, and Delegation of Duties
By Judge John M. Tyson

15 The ABCs of the DHC
By Martin B. (Marty) McGee



18 Tabitha Ann Holton, First in the South
By Walter C. Holton Jr.

20 The Selma Cyclepaths
By Robert W. Bryant Jr.

22 WARNING: The Information You Are About to Read...Is Disturbing
By Peter G. Bolac

Continued on page 4.

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Contents

DEPARTMENTS

5 President's Message
24 Lawyer Assistance Program
28 Profile in Specialization
29 IOLTA Update
30 Legal Ethics
31 Paralegal Certification
32 The Disciplinary Department
34 Featured Artist
35 Proposed Ethics Opinions
40 Rule Amendments

BAR UPDATES

33 In Memoriam
45 Law School Briefs
47 Distinguished Service Award
48 Client Security Fund
49 Bar Exam Applicants

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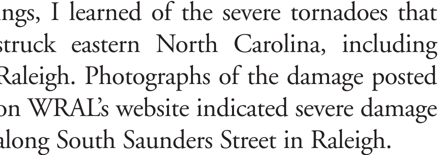
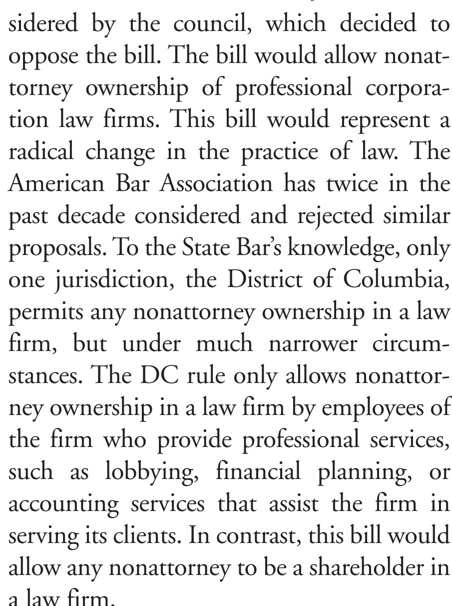
April and the General Assembly in Raleigh

BY ANTHONY S. DI SANTI

Being from the mountains of western North Carolina, since April 2000 I have eagerly anticipated the April quarterly meeting of the council in Raleigh. In the mountains, we are approximately a month behind the full blossom of spring one finds in Raleigh, a time when the city is in its most beautiful state. On Saturday, April 16, 2011, as I planned to be in Raleigh the next week, ominous warnings were being broadcast of dangerous storms within our state. As I monitored the warnings, I learned of the severe tornadoes that struck eastern North Carolina, including Raleigh. Photographs of the damage posted on WRAL's website indicated severe damage along South Saunders Street in Raleigh.



Knowing that South Saunders Street is the approach to the Marriott Raleigh Center City where the meetings of the council are conducted, I became concerned the Marriott had sustained damage which might preclude the council's ability to meet the next week. I was able to contact our executive director, Tom Lunsford, Sunday morning, and I was pleased to learn that his family and he were safe, as were the other members of the State Bar's staff who are so vital to the work of the council, and that the Marriott, while being close to severe damage in Raleigh, escaped damage from the storm. I was equally concerned that members of the council, or their communities, especially in eastern North Carolina, might be so affected by the storms that they could not attend the council meeting. However, as North Carolinians have always done in times of turmoil, we concluded that it was important to continue the work of the council. I contacted the members of the council and advised them that if they or their community had sustained damage from the storm, they should address their needs or their community's needs instead of traveling to Raleigh for the meeting. The council met as planned to address its mission to protect the public charged to it in 1933 by the General Assembly, although in a much more somber mood.



With the General Assembly in session during our meeting, the council monitored the progress of legislation which would have an impact on the State Bar's mission to protect the public. House Bill 832 and Senate Bill 254 were considered by the council, which decided to oppose the bill. The bill would allow nonattorney ownership of professional corporation law firms. This bill would represent a radical change in the practice of law. The American Bar Association has twice in the past decade considered and rejected similar proposals. To the State Bar's knowledge, only one jurisdiction, the District of Columbia, permits any nonattorney ownership in a law firm, but under much narrower circumstances. The DC rule only allows nonattorney ownership in a law firm by employees of the firm who provide professional services, such as lobbying, financial planning, or accounting services that assist the firm in serving its clients. In contrast, this bill would allow any nonattorney to be a shareholder in a law firm.

There has long been a prohibition in North Carolina against corporations practicing law. N.C.G.S. 84 5; *State v. Carolina Motor Club*, 209 N.C. 624 (1936). This is because the fiduciary obligation of a corporation to maximize profits conflicts with a lawyer's professional responsibility to put the client's interests ahead of all others. If a corporation were charging a contingent fee, it may want to settle quickly with a minimum investment of time and money while the client may not want to settle because the offered compensation is inadequate. If a corporation were charging an hourly fee, the goal of maximizing profits could motivate it to provide unnecessary legal services.

People, not corporations, are licensed to practice law. Regulation of the profession, and therefore protection of the public, depends entirely upon the obligation of each individual owner of a law firm, all of whom must be lawyers, to comply with the Rules of Professional Conduct. A nonattorney investor in a law firm by definition would not have a law license and could not be sanctioned for violating the Rules of Professional Conduct. A nonattorney investor's business decisions would not necessarily be made with reference to the interests of the client. The provision of this bill limiting nonattorney ownership to 49% does not eliminate this problem. It would only take the vote of one lawyer member, joined with the votes of the nonattorney members, to assume control of a law firm. If up to 49% of the ownership of a law firm were not bound by the Rules of Professional Conduct, the lawyer owners' independence and ability to serve clients could easily be compromised.

Nonattorney ownership in law firms creates another irreconcilable conflict. The bill provides that the firm need not address conflicts of the personal interests of a shareholder who owns less than 5% of the outstanding shares. Under the Rules of Professional Conduct, any conflict of any lawyer in the firm must be addressed, typically by disqualifying the firm from participating in the representation.

Other problems created, but not resolved, by the proposed legislation include:

• Protecting client confidences from nonattorney investors;

• Assuring that *pro bono* and other professional responsibilities to the public are not

CONTINUED ON PAGE 6

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President's Message (cont.)

jeopardized because of financial pressures from minority shareholder interests;

- Assuring that nonattorney investors in one law firm cannot invest in a competing law firm; and
- Assuring that a law firm cannot invest in a competing firm to create disqualifying conflicts.

The State Bar is deeply concerned that this bill offers no known benefit to the public, but creates significant and unavoidable dangers to consumers of legal services.

House Bill 714 and Senate Bill 706 would allow nonprofit corporations operating as professional or trade organizations or as business leagues to provide legal services to their members. The council decided to oppose this bill. As noted above, there has long been a prohibition in North Carolina against corporations practicing law. The reasons for this prohibition are compelling. The mission of a nonprofit corporation may also conflict with the client's interests. The client may want to settle to obtain needed compensation while the corporation prefers to reach a public resolution to promote an economic or political agenda. The corporation may want to settle because the proposed settlement promotes the corporation's agenda or because the corporation does not want to invest more resources in the litigation while the client does not want to settle because the offered compensation is inadequate. The lawyer charged with promoting the client's best interests has a direct conflict with the interests of his or her employer.

A nonprofit corporation cannot have a law license and therefore could not be sanctioned for failing to comply with the Rules of Professional Conduct. Its business decisions are not made with reference to the requirements of the Rules of Professional Conduct. However, the continued employment of a lawyer employed by a corporation to provide legal services to its members would be dependent upon the lawyer's obedience to the corporation's officers and directors. The lawyer's independence and ability to serve the client's interests could easily be compromised.

For these reasons, the prohibition against the practice of law by corporations, both for-profit and nonprofit, is virtually universal. To the State Bar's knowledge, Pennsylvania is the only jurisdiction in the United States that has adopted legislation similar to the proposed legislation. 42 Pa.C.S. § 2524 (2010).

North Carolina statutes already contain the only two exceptions dictated by the public's interest: legal services organizations and public interest law firms. These exceptions arise from a line of United States Supreme Court decisions beginning with *NAACP v. Button*, 371 U.S. 415 (1963). The Supreme Court held that civil rights and union organizations have a First Amendment right to provide legal services to their members so that their members have meaningful access to the courts. The *Button* exceptions are narrowly drawn to provide access to the courts to pursue shared legal interests by members who otherwise could not obtain legal representation. In contrast, the proposed legislation would permit any corporation exempt from tax under 26 USC 501(c)(5) or (6) to provide, and charge fees for, legal services even when the legal issues involved are not related to a shared political agenda. The First Amendment requires no such exception. There is no reason to believe that all or even a majority of members of corporations exempt from taxation under 26 USC 501(c)(5) and (6) lack access to legal representation. Any exception to the prohibition against the practice of law by corporations must promote a compelling public purpose and be narrowly drafted. Granting the privilege of practicing law to any corporation tax-exempt under 26 USC 501(c)(5) and (6), which includes any labor, agricultural, horticultural, trade association, or business league, regardless of purpose, is simply too broad and serves no public purpose. The proposed legislation would establish a system in which the interests of clients could be subordinated to the interests of third parties who are beyond the state's regulation.

House Bill 690 will require that residential real estate closings and settlements under the Good Funds Settlement Act be supervised by attorneys licensed in this state and will require that interest earned on real estate settlement funds held in trust and escrow accounts be paid into the North Carolina State Bar's Interest on Lawyers' Trust Account Fund. The council decided to support this bill. A special committee of the council is reviewing Authorized Practice Advisory Opinion 2002-1 as a result of the harm that has been caused to the public due to real estate lay closings and mortgage fraud as evidenced by the collapse of the real estate market in 2008. This issue has also caused a reduction in funds available for the State Bar's IOLTA program, which is a major funding source for legal services to our most vulnerable citizens. This bill is consistent with the State Bar's mandate to protect the public from harm caused by the unauthorized practice of law.

I wish to recognize and thank the State Bar's Deputy Counsel, David Johnson, for his assistance in providing support for the council's opposition to the bill which would allow nonattorney ownership of professional corporation law firms and the bill which would allow nonprofit corporations operating as professional or trade organizations or business leagues to provide legal services to their members. The staff and council of the North Carolina State Bar will continue to monitor these bills and other issues that may impact the State Bar's mission to protect the public while they work diligently to prepare for the next meeting of the council which will be held in Blowing Rock in July. It is my hope that the beauty of mountains in the summer will be consistent with the beauty of Raleigh in the spring, and that our nation and state will not again endure the tragedy caused by the severe storms so prevalent this year. ■

Anthony S. di Santi is a partner with di Santi Watson Capua & Wilson in Boone.

Depression, stress, career issues, and addictions. Believe it or not, this is an uplifting story.

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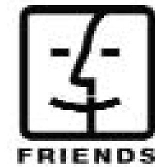

FOR THE ISSUES OF LIFE IN LAW

Reexamining Inactive Attorneys

BY MARGARET M. HUNT

In 2009, then-State Bar President John McMillan appointed the Program Evaluation Committee to review certain State Bar programs and the programs' governing rules to determine if changes were necessary or appropriate to assist the State Bar in its statutory responsibility to regulate the legal profession. As part of this review, the Administrative Subcommittee of the Program Evaluation Committee was asked to determine whether the rules governing the reinstatement of attorneys from inactive status and from administrative suspension ensure the competency and fitness of attorneys who return to active status.

SIS/Paul Vismara

As a result of the recommendations of the Administrative Subcommittee, the State Bar Council recently published and adopted significant changes to 27 N.C.A.C. 1D Rules .0902 and .0904 governing reinstatement of attorneys from inactive status and from administrative suspension. These rule revisions were approved by the North Carolina Supreme Court and became effective on March 10, 2011. Rule .0902 governs reinstatement from inactive status, and Rule .0904 governs reinstatement from administrative suspension.

Inactive status is granted when an attorney submits a written petition pursuant to Rule .0900 and the State Bar Council enters an order transferring the attorney to inactive status. An attorney may go inactive for any reason and thereby be relieved of the duty to pay dues and fulfill the CLE requirements. An attorney is administratively suspended by the council upon failure to fulfill one or more of the obligations of membership in the State Bar, including: (a) failure to pay the annual membership fee, Client Security Fund assessment, judicial surcharge, mandatory judicial district bar dues, or any late fees; (b) failure to pay the costs of a disciplinary or other proceeding of the State Bar; or (c) failure to complete the annual CLE requirements or failure to file the Annual Report form for CLE.

Disciplinary suspensions are ordered by the Disciplinary Hearing Commission for violations of the Rules of Professional Conduct. Reinstatement from disciplinary suspension is pursuant to the order of the Disciplinary Hearing Commission. Disciplinary suspensions and reinstatements are not discussed in this article.

Rule .0902 sets out the procedure for reinstatement from inactive status. Because

the rule revisions for reinstatement from inactive status contain significant new requirements, the Administration Subcommittee felt that it would be unfair to impose these new requirements on attorneys on inactive status at the time the revisions take effect because these attorneys may have gone inactive and remained inactive in reliance on the prior standards for reinstatement. Therefore, these revisions apply only to those attorneys who are transferred to inactive status on or after March 10, 2011.

The rule revisions impose the following new reinstatement requirements for attorneys granted inactive status on or after March 10, 2011:

1. If more than one but less than seven years have elapsed between the date of the inactive status order and the date the petition for reinstatement is filed, the attorney must complete 12 hours of approved CLE for EACH YEAR the attorney was inactive. For each 12-hour requirement, four hours may be taken on-line; two hours must be in the areas of ethics and or professionalism; and five hours must be in practical skills. However, if an attorney maintains active status in another jurisdiction and complies with mandatory CLE requirements in the state where licensed, those CLE credit hours may be applied to the requirements under this provision.

2. The total number of required hours must be completed within two years of filing a petition to resume active status.

3. If seven or more years have elapsed between the date of the inactive status order and the date the petition for reinstatement is filed, an attorney seeking to return to active status must obtain a passing grade on a regularly scheduled North Carolina bar examination. However, when calculating the seven years, an attorney seeking reinstatement from inactive status may offset one year of inactive status in North Carolina for each year of active licensure in another state.

The requirements for attorneys already on inactive status prior to March 10, 2011, the effective date of the rule revisions, who later petition for reinstatement, will be governed by the rule in effect prior to these revisions. Therefore, those attorneys will be required to complete 15 hours of CLE credit within one year of filing a petition for reinstatement to active status if they have been inactive for two years or more. Regardless of the number of years of inactive status, these attorneys will not be required to obtain a passing grade on a regularly scheduled North Carolina bar examination.

Another new provision of Rule .0902 allows the secretary of the State Bar to reinstate an attorney upon petition if the inactive attorney has fulfilled all the requirements for reinstatement and there are no issues relating to character or fitness. Previously, attorneys could be reinstated only by order of the Council. Reinstatement by the secretary is discretionary. If the secretary declines to reinstate, the attorney's petition will be reviewed by the council's Administrative Committee at the next quarterly meeting of the council. Since the State Bar Council only meets quarterly, this new provision may shorten the period between filing the petition and the order for reinstatement.

Attorneys on administrative suspension who seek reinstatement under Rule .0904 are required to complete the same revised

CONTINUED ON PAGE 14

Getting Paid, Avoiding Conflicts, and Supervising Staff:

Fee Agreements, Multi-party Representation, and Delegation of Duties

Judge John M. Tyson

Getting Paid and Fee Arrangements

The legal profession is heavily regulated by the North Carolina Legislature, the Judicial Branch, and the North Carolina State Bar ("State Bar"). While most private compensation contracts are free of regulatory oversight, the State Bar issued Rule 1.5[1] regulating fees, under the authority granted by North Carolina General Statute § 84-23:

(a) A lawyer shall not make an agreement for, charge, or collect an illegal or clearly excessive fee or charge or collect a clearly excessive amount for expenses. The factors to be considered in determining whether a fee is clearly excessive include the following:[2]

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

(b) When the lawyer has not regularly represented the client, the scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation.

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in a writing signed by the client and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

SIS/Image Zoo

(d) A lawyer shall not enter into an arrangement for, charge, or collect:

(1) a contingent fee for representing a defendant in a criminal case; however, a lawyer may charge and collect a contingent fee for representation in a criminal or civil asset forfeiture proceeding if not otherwise prohibited by law; or

(2) a contingent fee in a civil case in which such a fee is prohibited by law.

(e) A division of a fee between lawyers who are not in the same firm may be made only if:

(1) the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation;

(2) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and

(3) the total fee is reasonable.

(f) Any lawyer having a dispute with a client regarding a fee for legal services must:

(1) make reasonable efforts to advise his or her client of the existence of the North Carolina State Bar's program of fee dispute resolution at least 30 days prior to initiating legal proceedings to collect the disputed fee; and

(2) participate in good faith in the fee dispute resolution process if the client submits a proper request.

The State Bar and the courts have interpreted the application of this Rule in many factual scenarios. In *O'Brien v. Plumides*,[3] the court of appeals held that an attorney discharged by his client is entitled to recover the reasonable value of the services already rendered.[4] The reasonable value of such services is determined by the totality of the circumstances of each case.[5] In *Redevelopment Comm'n v. Hyder*,[6] the court of appeals held that reasonable attorney's fees may be determined in part by the amount of the verdict obtained in a condemnation proceeding when compared with the amount of offers made in proposals to the client prior to his employment of the attorney.[7] The results obtained through the attorney's reputation, skill, and expertise are legitimate considerations in determining the amount of the fee.[8]

The State Bar ruled in CPR 37[9] that an attorney may charge interest on delinquent accounts,[10] and later in CPR 129[11] ruled that it is ethical for an attorney to offer credit card services to clients for the payment of fees charged for services rendered.[12]

In 2007 Formal Ethics Opinion 13,[13] the State Bar ruled that an attorney must:

(1) establish a reasonable hourly rate for his services and for the services of his staff to ensure honest billing predicated on hourly charges; (2) disclose the basis for the amounts charged; (3) avoid wasteful, unnecessary, or redundant procedures; and (4) ensure the total cost to the client is not clearly excessive.

In RPC 107,[14] the State Bar ruled that an attorney and client may agree to employ alternative dispute resolution procedures to resolve fee or other disputes between themselves.[15]

Rule 1.5(f) is a recent addition to the State Bar's Rules regarding fees. Any lawyer having a dispute with a client regarding a fee for legal services must make reasonable efforts to advise the client of the existence of the North Carolina State Bar's Fee Dispute Resolution Program at least 30 days prior to initiating legal proceedings to collect the disputed fee.[16] Notification must be given "not only when there is a specific issue in dispute, but also when the client simply fails to pay."[17] However, the fee is not disputed and notification to the client is not necessary "when the client expressly acknowledges liability for the specific amount of the bill and states that he or she cannot presently pay the bill."[18] When a client requests resolution of a disputed fee, participation in the North Carolina Fee Dispute Program is mandatory.[19]

In making reasonable efforts to advise a client of the existence of the Fee Dispute Resolution Program, the State Bar prefers the attorney to mail or send written communication to the client at the client's last known address.[20] If the current address of the client is unknown, "the lawyer should use reasonable efforts to acquire the current address of the client."[21] If the client requests fee dispute resolution, "the lawyer must participate in the resolution process in good faith."[22]

The State Bar Fee Dispute Resolution Program uses mediation to resolve fee disputes as an alternative to litigation.[23] The lawyer is required to cooperate "with the person who is charged with investigating the dispute and with the person appointed to mediate the dispute."[24] The lawyer should fully set forth and support his or her position with appropriate documentation.[25] The attorney cannot ethically charge an additional fee to the client for participating in the Fee Dispute Resolution Program.[26]

The United States District Court for the Eastern District of North Carolina refused to issue a temporary restraining order where the lawyer, engaged in a fee dispute with the client, failed to follow the procedures of former Rule 2.6(e) (superseded by Rule 1.5(f)) and a state court action was pending.[27]

The old maxim that work always takes longer, costs more, and will not be performed in the way originally envisioned applies to attorney fee agreements. The State Bar places the burden on the attorney to explain in advance the amount of fees or billing rates to be charged, and limits the methods of enforcement and collection an attorney may use to get paid.

Conflicts of Interest

Parties to real property and business transactions often rely upon a single attorney to prepare and oversee the execution of documents. The attorney involved may maintain a prior or ongoing client relationship with one party. Non-represented parties may presume the attorney is under an ethical obligation to advise them and protect their interests. Even with full disclosure to the non-represented party, the attorney must be very careful not to violate disciplinary rules, which prohibit conflicts of interest. The attorney should limit the expectations of the non-represented party and clearly recommend for the non-represented party to seek their own counsel.

An attorney bears an ethical and professional responsibility to his or her clients and to the courts in all representations. Frequently, one attorney will be retained by both parties to draft the transactional documents. Both parties may communicate with and seek advice from the attorney about the legal effect of provisions included in the documents. These discussions may raise ethical considerations of: (1) whether the attorney who drafted the documents may represent either party in a later proceeding based on the documents; and, if so, (2) what information must remain confidential and not be disclosed in later proceedings.

The general rule is that an attorney may not represent adverse parties.[28] Rule 1.7, however, provides exceptions:

Notwithstanding the existence of a concurrent conflict of interest..., a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve

the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.[29]

It is common for an attorney to represent multiple parties when drafting transactional documents. However, the attorney must obtain informed consent from all represented parties.[30] Informed consent is an "agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation appropriate to the circumstances."[31] The amount of disclosure required to obtain the client's informed consent depends upon the circumstances.[32] Information regarding "the implications of the common representation, including possible effects on loyalty, confidentiality and the attorney-client privilege, and the advantages and risk involved" must be disclosed.[33]

The attorney owes a duty of loyalty to each client. The attorney must disclose sufficient information to enable a client to provide informed consent. If the attorney's ethical responsibilities to another client prohibit full disclosure, the attorney cannot represent both parties.[34] Each client has the right to know all factors affecting the attorney's judgment on the case.[35] If one client asks the attorney not to disclose the "information relevant to the common representation," that request is an instant "deal breaker" to dual representation.

If the attorney is able to surmount the conflict of interest hurdles and represent both parties at the document negotiation and drafting stages, the attorney is not allowed to represent either party in litigation arising from the prior representation. Rule 1.7(b)(3) specifically prohibits the attorney from representing both parties "in the same litigation or other proceeding before a tribunal." Even with the clients' informed consent, this prohibition is not waivable.[36]

The attorney must be careful not to "reveal information acquired during the professional relationship with a client" in subsequent litigation. The client may give informed consent for confidential information to be disclosed.[37] As a practical matter, a client will not consent to allow the attorney to use confidential information, which is adverse to that client's interests. Any waiver is strictly scrutinized.

An attorney representing solely one party to the transaction should make it absolutely clear to the other party that the attorney is representing only his client. The non-represented party should be instructed not to rely on any statement made by the attorney representing solely one party, and advised to seek independent advice from another attorney.

Supervising Staff

Recent changes impact the closing and financing of residential real estate transactions. On December 14, 2001, the Federal Trade Commission wrote the North Carolina State Bar Ethics Committee and urged the State Bar to reconsider two ethics opinions requiring attorneys to be physically present at residential real estate closings.[38] In response, the State Bar issued an advisory opinion defining the role of non-lawyers during a real estate closing.[39] The advisory opinion states:

> Residential real estate transactions typically involve several phases, including the following: abstraction of titles; application for title insurance policies, including title insurance policies that may incorporate tailored coverage; preparation of legal documents such as deeds (in the case of a purchase transaction) and deeds of trust; explanation of documents implicating parties' legal rights, obligations, and options; resolution of possible clouds on title and issues concerning the legal rights of parties to the transaction; execution and acknowledgment of documents in compliance with legal mandates; recordation and cancellation of documents in accordance with North Carolina law; and disbursement of proceeds after legally-recognized funds are available. These and other functions are sometimes called, collectively, the "closing" of the residential real estate transaction. The North Carolina General Assembly has determined specifically that only persons who are licensed to practice law in the state may handle many of these functions.

The advisory opinion also states the following actions constitute the unauthorized practice of law, if performed by a non-lawyer: (1) providing a legal opinion on title to real property; (2) explaining the legal status of title to real estate or the legal effect of anything found in the chain of title; (3) explaining or giving advice concerning matters disclosed by a land survey about the rights or responsibilities of the parties; (4) providing a legal opinion in response to questions by any party regarding any legal rights; (5) advising a party how to take title in alternative ways or the legal consequences of taking title in those ways; (6) drafting a legal document or assisting a party to select a document among different forms having varying legal implications; (7) explaining or recommending to a party a course of action, if this advice requires a legal judgment; and (8) attempting to resolve a legal dispute between the parties.[40]

Non-Lawyer Roles

The State Bar does not consider overseeing the execution of residential real estate closing documents and receiving and disbursing closing proceeds as acts constituting the practice of law that require an attorney to be physically present.[41] A supervised non-lawyer assistant may identify to a client, who is a party to a residential real estate transaction, the documents to be executed, direct the client as to the correct place on each document to sign, and disburse proceeds, even though the lawyer is not physically present.[42] If any party asks any question regarding the legal rights or obligations of the parties, or the legal effect of the documents, a non-lawyer may not answer.[43]

In 2006, the State Bar brought an action against a company holding itself out to the public and accepting attorney's fees for preparing legal documents, title abstracts and opinions, and performing real estate closings.[44] Through a consent order, the superior court enjoined the unlicensed individuals and the company from engaging in the practice of law and performing residential real estate closings and any services associated with a closing.[45] The company did not admit any wrongdoing or violations of the law in the consent judgment.[46]

Delegation of Duties

An attorney may delegate his or her duties only when necessary, and must make reasonable efforts to ensure a non-lawyer's conduct is compatible with the professional obligations of the lawyer.[47] For example, a non-lawyer may deliver a message to the court holding calendar call, stating that the lawyer is unable to attend due to a legitimate reason.[48] A scheduling conflict in another

court is an example of a legitimate reason.[49]

Additionally, under certain circumstances, an attorney may delegate to a non-lawyer the signing of court documents and pleadings.[50] This signing should only be done if the attorney is unavailable and no other attorney in the firm is available to sign.[51] In order to comply with professional obligations, three criteria must be met: First, the signing must not violate any law, court order, local rule, or rule of civil procedure.[52] Second, the non-lawyer must be properly supervised under the circumstances.[53] Third, the signature must clearly disclose that another signed on the lawyer's behalf.[54]

Recent Cases involving an Attorney's Ethical Duties and Liability

1. Real Estate Closings: **Johnson v. Schultz**[55]

Facts: "This appeal presents the question of how North Carolina law allocates the risk of loss between a buyer and a seller when the closing attorney in a residential real estate transaction embezzles the sales proceeds." Vendors brought action for breach of contract against purchasers, closing attorney, and others, seeking rescission of deed and recovery of title, or, in the alternative, money damages after attorney misappropriated purchase money funds. After the attorney admitted vendors' allegations, purchasers and the remaining defendants filed motions for summary judgment. The superior court granted defendants' motions, and vendors appealed. The court of appeals, in a divided panel, reversed and remanded.[56] Defendants appealed as of right to the Supreme Court based upon the dissenting opinion.

Issue: Did buyers repose confidence in the closing attorney and were they required to bear the loss caused by their attorney's misconduct?

Holding: Yes, buyers who followed customary procedures for closing real estate transaction reposed confidence in their closing attorney (Parker) and were required to bear the loss caused by their own attorney's misconduct in embezzling sales proceeds deposited by bank into the attorney's escrow account.

> To determine which party reposed confidence in Parker, we must consider the customary procedures for closing real estate transactions in North Carolina. Although both parties in a residential real estate closing are free to hire their own attorney, "[t]he most common practice is for the closing attorney to represent the purchaser and lender while performing limited functions for the seller (such as the preparation of the deed)." Patrick K. Hetrick, Larry A. Outlaw & Patricia A. Moylan, N.C. Real Estate Comm'n, *North Carolina Real Estate Manual* 508 (2008-2009 ed.) (italics omitted) [hereinafter *North Carolina Real Estate Manual*]. In fact, the State Bar instructs that the closing attorney "may prepare the deed as an accommodation to the needs of her client, the buyer, without becoming the lawyer for Seller." N.C. St. B. Formal Ethics Op. 10 (July 14, 2005), reprinted in North Carolina State Bar 2008 *Lawyer's Handbook*, at 317 (2008)....Moreover, the buyer's attorney usually "handles or coordinates the closing, prepares the closing statement(s), and disburses funds." *North Carolina Real Estate Manual* 509.[57]
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> In summary, after considering the procedures customarily used for residential real estate closings and applying long-standing principles of equity, we hold that buyers must bear the loss caused by the misconduct of their own retained attorney. We stress that it is the buyer alone in most residential real estate transactions who is legally deemed to repose confidence in the closing attorney through the existence of the attorney-client relationship.

The court of appeals' majority opinion was affirmed.

2. Attorney Client – Fraud – Mortgages – Trusts: **Laws v. Priority Trustee Services**[58]

Facts: In March 2005, Priority Trustee Services (Trustee) served as substitute trustee under a deed of trust of the Laws (Debtor) property in connection with a mortgage loan from Equity One, Inc. (Creditor). After Plaintiff defaulted on the loan, Trustee initiated foreclosure proceedings. Plaintiff filed a Chapter 13 petition prior to the foreclosure sale. This filing automatically stayed the sale.

Creditor, represented by Morris, Schneider & Prior, LLC, (Law Firm), sought to lift the stay. A consent order was entered, which allowed the stay to remain in force as long as the Debtor made agreed-upon payments. After Debtor failed to make these payments, foreclosure proceedings resumed. Trustee facilitated the sale of the property to Creditor, the high bidder.

Debtor commenced this action in 2008 against Trustee and Law Firm. Debtor's claims alleged Law Firm served as both the substitute trustee in the foreclosure proceedings and as counsel for the Creditor. Law Firm collected fees in connection with their services in both these capacities. Law Firm moved to dismiss the complaint and asserted Plaintiff's claims were based entirely on purported violations of the North Carolina State Bar ethics opinions, which cannot be used as a basis for civil liability as a matter of law.

Issue: Whether Debtor's claims are based entirely on alleged violations of the North Carolina State Bar's ethics opinion, and if so, whether these violations are a basis for civil liability?

Holding: Debtor's complaint relies heavily on purported violations the NC Rules of Professional Conduct and corresponding ethics opinions. A careful reading of the Debtor's complaint reveals no recognized cause of action without use of or reliance upon ethics rules and their corresponding State Bar ethics opinions.

The Rules of Professional Conduct are not designed to be a basis for civil liability. Plaintiff's complaint fails to identify a formal legal duty that is independent of those articulated in the Rules or the corresponding State Bar ethics opinions. The NC Supreme Court has rejected the use of ethics rules to establish an attorney's liability.

Although the Debtor argues the case is about a breach of fiduciary duty, the Debtor expressly admitted in oral argument that the alleged breach of fiduciary duty is based solely on the "mere status" of serving as both trustee under deed of trust and counsel to the lender. The court ruled the Debtor's allegations were insufficient under NC law to state a claim upon which relief can be granted. Plaintiff's complaint was dismissed.

Summary

While most private compensation contracts are free of regulatory oversight, an attorney's fee agreement is subject to regulations, which may limit the amounts an attorney may charge for services and the enforcement procedures available to collect fees earned. An attorney representing parties in real property and business transactions must inform a non-represented party not to rely on that attorney to advise and protect his interests. Conflicts of interest may prevent an

attorney involved in the original transaction from continuing to represent either party if litigation occurs.

The State Bar is aggressive in pursuing individuals, corporations, and other entities who engage in activities, which constitute the unauthorized practice of law. Attorneys engaged in real estate transactions should carefully review their current office procedures. Delegation of the attorney's duties to office staff must be strictly supervised. When an attorney is not physically present or immediately available, non-lawyers cannot perform tasks that constitute the practice of law.

The attorney at a real estate closing typically represents the buyer and the lender, not the seller. As between buyer and seller, the buyer will bear the loss resulting from attorney misconduct. Violations of the Rules of Professional Conduct or ethics opinions do not *per se* establish civil liability for an attorney. ■

Judge John M. Tyson currently serves as a recall judge for the North Carolina Court of Appeals and as an emergency superior court judge. He served an eight-year elected term on the North Carolina Court of Appeals, and has more than 30 years of professional experience. Judge Tyson is a board certified specialist in Real Property Law: Business, Commercial, and Industrial Transactions, and is the only North Carolina judge so certified. He expresses his appreciation to Dominique "Missy" Koch, 2011 Campbell University Law graduate, and Andrew Seymour, Campbell University Law class of 2012, for editing and research assistance.

Endnotes

1. N.C. St. B. R. Prof. Conduct 1.5 (Client-Lawyer Relationship) (2003).
2. N.C.G.S. § 84-23 (2010).
3. *O'Brien v. Plumides*, 79 N.C. App. 159, 339 S.E.2d 54, *cert. dismissed*, 318 N.C. 409, 348 S.E.2d 805 (1986).
4. *Id.* at 162, 339 S.E.2d at 55.
5. *Id.*
6. *Redevelopment Comm'n v. Hyder*, 20 N.C. App. 241, 201 S.E.2d 236 (1973).
7. *Id.* at 245, 201 S.E.2d at 239.
8. *Id.*
9. CPR 37 North Carolina State Bar *Lawyer's Handbook* 2010, §9-10 (2010).
10. *Id.*
11. CPR 129 (October 27, 1977); *see* 2009 Formal Ethics Opinion 4 (April 24, 2009) (discussing the use of credit card accounts that avoid the commingling of funds by depositing unearned fees into the law firm's trust account and earned fees into the law firm's operating account).
12. *Id.*
13. 2007 Formal Ethics Opinion 13, (January 25, 2008). "The Formal Ethics Opinions are identified by the last two digits of the year of initial publication in the State Bar *Journal* and are numbered serially. After the designation for each opinion is the date upon which the Council of the North Carolina State Bar adopted the opinion, a topical headnote, a short summary of the opinion, and the full text of the opinion itself."
14. "RPCs are ethics opinions promulgated under the now-superseded (1985) Rules of Professional Conduct (effective from January 1, 1986, until July 24, 1997). The ethics opinions adopted under the Revised Rules of Professional Conduct (effective July 24, 1997) follow the RPCs and are designated as 'Formal Ethics Opinions.' Each RPC bears the identifying number assigned to it at the time of its initial publication in the State Bar's quarterly publication." www.ncbar.gov/ethics/ last visited March 24, 2011.
15. RPC 107 (April 12, 1991).
16. Rule 1.5(f)
17. *Id*
18. *Id*
19. Rule 1.5, Comment 10.
20. *Id.*
21. *Id.*
22. Rule 1.5, Comment 11.
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.*
27. *Parker v. United States*, 948 F. Supp. 24 (E.D.N.C. 1996).
28. Rule 1.7
29. Rule 1.7(b).
30. Rule 1.0(f).
31. *Id.*
32. Rule 1.7, Comment 18.
33. *Id.*
34. Rule 1.7, Comment 19.
35. Rule 1.7, Comment 31; *see generally Nationwide Mut. Fire Ins. Co. v. Bourlon*, 172 N.C. App. 595, 604, 617 S.E.2d 40, 46-47 (2005) ("In North Carolina, our courts have previously recognized the common interest or joint client doctrine, noting that as a general rule, where two or more persons employ the same attorney to act for them in some business transaction, their communications to him are not ordinarily privileged *inter sese*." (Internal quotation omitted)), *aff'd*, 360 N.C. 356, 625 S.E.2d 779 (2006).
36. Rule 1.7, Comment 13.
37. *Id.*
38. *See* www.ftc.gov/opa/2001/12/ncstatebar.shtm.
39. North Carolina State Bar, Authorized Practice Advisory Opinion 2002-1 (January 24, 2003).
40. *Id.*
41. *Id.*
42. 2002 Formal Ethics Opinion 9 (January 24, 2003).
43. *Id.*
44. *See North Carolina State Bar v. The Closing Place, et al.*, (*Lawyers Weekly* (October 20, 2006) (No. 06-13-1161, pp. 18) (Donald W. Stephens, J.)).
45. *Id.*
46. *Id.*
47. *Id.*
48. 2000 Formal Ethics Opinion 10 (July 27, 2001).
49. *Id.*
50. 2006 Formal Ethics Opinion 13 (October 20, 2006).
51. *Id.*
52. *Id.*
53. *Id.*
54. *Id.*
55. *Johnson v. Schultz*, 364 N.C. 90, 691 S.E.2d 701 (2010).
56. *Johnson v. Schultz*, 195 N.C. App. 161, 671 S.E.2d 559 (2009).
57. *Id.*
58. *Laws v. Priority Tr. Servs.*, 610 F. Supp.2d 528 (W.D.N.C. 2009) *aff'd* 375 Fed.Appx. 345, 2010 WL 1712254 (April 28, 2010) (*Per Curiam*) (Unpublished). *See also McGee v. Eubanks*, 77 N.C.App. 369, 335 S.E.2d 178 (1985).

Reexamining Inactive Attorneys (cont.)

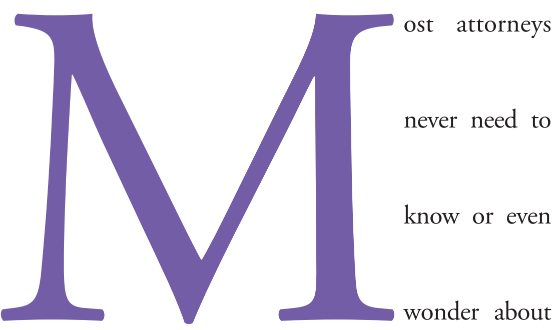
requirements as attorneys who petition for reinstatement from inactive status after the effective date of the rule revisions. However, these new requirements must be met regardless of the date of the attorney's suspension. The Administrative Subcommittee concluded that these attorneys failed to fulfill the requirements of membership leading to suspension and did not act in reliance on the reinstatement rules. Therefore, it is not unfair to require them to satisfy the new reinstatement requirements. Any attorney who now petitions for reinstatement from an administrative suspension must now complete 12 hours of CLE for each year of suspended status. If administratively suspended for seven or more years, the suspended attorney must take and pass a regularly scheduled North Carolina Bar examination.

The implementation of the rule revisions will help to ensure the public's confidence in the competency and fitness of attorneys returning to the practice of law after a period of inactive status or suspension. ■

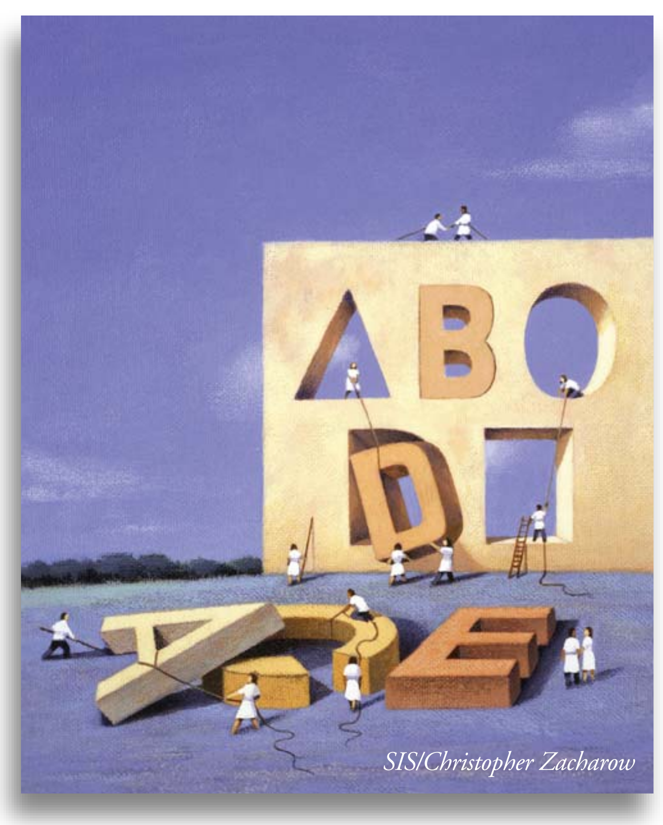
Margaret McDermott Hunt is the State Bar Councilor from District 29B and practices in Brevard. She graduated from Wake Forest University School of Law and was admitted to practice in North Carolina in 1975. She is a former member and chair of the Administrative Committee and was co-chair of the Program Evaluation Committee.

The ABCs of the DHC

BY SHARON B. ALEXANDER



Most attorneys never need to know or even wonder about the role of the Disciplinary Hearing Commission (DHC) in North Carolina or the process followed in proceedings before the DHC. Even fewer members of the public have reason to contemplate the purpose or even the existence of the DHC. This is not a bad thing. A regular part of every issue of the State Bar *Journal* is "The Discipline Department," which catalogues actions taken by the Grievance Committee, by the DHC, and, in some instances, by the superior court. While this regularly informs us about the results of the grievance process, an understanding of the process itself and the relationship between the State Bar and the DHC has not been addressed.



SIS/Christopher Zacharow

The most important characteristic we should all know about the DHC is that it is an independent body whose sole purpose is to hear lawyer disciplinary and disability cases. It is not a part of the State Bar. Attorneys from the Office of Counsel of the State Bar represent the State Bar as advocates in matters before the DHC. Attorneys who are respondents represent themselves or are represented by counsel of their choice.

Sharon Alexander of Hendersonville currently serves as the chairperson of the DHC, and Dottie Miani has served as the clerk of the DHC for longer than she would allow us to report. They answered some of the common questions received about the DHC process.

How does a case reach the DHC?

In most cases, the State Bar will initiate an investigation upon receipt of a complaint from a member of the public that an attorney has engaged in misconduct that violates the Rules of Professional Conduct. The results of this investigation are presented to the Grievance Committee of the State Bar. The Grievance

Fire Investigator available to conduct origin and cause, and other fire investigation services. Retired police fire investigator, certified, licensed, and insured. Visit my website at www.pyropi.com. Contact me at 919-625-8556 or scott.hume@nc.rr.com.

Committee may dismiss the case, take nondisciplinary action (such as a letter of caution or a letter of warning), or find probable cause that the attorney is guilty of misconduct justifying disciplinary action. If the Grievance Committee finds probable cause and the need for a hearing, the Office of Counsel files a complaint on behalf of the State Bar with the DHC. In addition, the Grievance Committee may find probable cause but believe that a hearing is not necessary. In those cases, the Grievance Committee may choose to impose certain levels of discipline. If the Grievance Committee imposes discipline or sends a letter of warning, the respondent attorney may reject the Grievance Committee's determination and, essentially, appeal this determination to the DHC. When a decision of the Grievance Committee is rejected by an attorney, the Office of Counsel files a complaint with the DHC. Although there are other paths by which a matter may reach the DHC, the filing of a complaint and issuance of summons is always the beginning of the disciplinary process in the DHC.

What should I do if I am served with a complaint filed by the Office of Counsel?

Answer the complaint! A significant mistake often made by attorneys who are served with a summons and complaint from the Office of Counsel is to ignore the complaint. As in almost every civil action, the complaint and summons are notice that an action has been filed and that allegations are deemed admitted if not answered within the allocated time (20 days). The DHC has, unfortunately, entered a number of default orders, imposing discipline on attorneys who may have had a defense or evidence that would have justified lesser discipline. Also, anyone who is a respondent attorney should give serious consideration to hiring counsel to represent them. I have frequently been reminded of that old saying about a *pro se* lawyer having a fool for a lawyer ***and*** a fool for a client. If you are involved in a hearing before the DHC, this process is most likely going to push all of your buttons. It becomes very difficult to make good decisions as either a client or a lawyer in this situation.

What are the rules of procedure?

Once a complaint is filed by the Office of Counsel, the procedures set out in the regulations at 27 North Carolina Administrative Code .0114 apply. These regulations (and more) are a part of the annual *Lawyer's Handbook*. The North Carolina Rules of Civil Procedure also apply to most aspects of the process before the DHC.

Who holds hearings?

The DHC consists of 20 individuals: 12 members of the North Carolina Bar and eight non-lawyers. All of the lawyer members are appointed by the council of the State Bar. Four of the non-lawyer members are appointed by the governor, and the balance are appointed by the General Assembly. Members are appointed for three-year terms, and no member may serve more than seven years, with an exception which allows the chairperson of the DHC to serve an additional three-year term in that capacity. Hearings are held by panels of three members of the DHC, two lawyers and one non-lawyer member. One of the lawyer members serves as the chair of each panel. The individual panels are appointed by the chairperson of the DHC within 20 days after the respondent attorney has been served with the complaint and summons. Every effort is made to appoint members of each panel who do not have any involvement in or knowledge about the underlying circumstances that are the subject of the complaint or the people involved.

How much time does DHC business take for a typical member?

Most members average a hearing each month, and most hearings take a full day. In addition, some cases involve pre-trial hearings or post-trial hearings. Sometimes, the parties will settle all issues prior to the hearing, and the members of the panel must approve a consent order. This approval process often involves a telephone conference among the panel members. Without taking travel time into consideration, most members of the DHC devote an average of ten to 15 hours each month to DHC business. I was on the DHC for close to a year before I actually attended a hearing. During other periods of time, I have been in Raleigh most every Friday during the month. The attorneys who represent the Office of Counsel and the attorneys who appear before the DHC representing respondent attorneys do a phenomenal job of sharpening up the issues, preparing their cases, and presenting the evidence clearly and succinctly.

What are duties of the chairperson of the DHC?

The chairperson assigns individual members of the DHC to panels and appoints a member to chair each panel. The chairperson also serves on panels and must serve as the chair of any such panel. The time and date of each hearing is set by the chairperson. The chairperson enters consent orders of disbarment and orders of temporary suspension when an attorney is convicted of a serious crime. Traditionally, chairpersons have assigned themselves to the more difficult cases when the difficulty is foreseeable. Although not a duty assigned by the administrative rules, the chairperson has typically been a resource to all members of the DHC when they have needed to talk through a procedural or conflict issue.

When are hearings held?

The hearing in each individual case must be scheduled no less than 90 and no more than 150 days from the date when the respondent-attorney is served with the complaint. Most hearings can be completed within one day and are scheduled on Fridays. Traditionally, panels have completed hearings on Saturday when they could not do so on Friday. Lately, many more hearings have required two days or more to complete, and more hearings are being scheduled to begin on Thursday.

Where are hearings held?

Hearings are usually held in one of the courtrooms located in the State Bar office building on Fayetteville Street in Raleigh. We have been allowed to trespass in the court of appeals building and have other venues in Raleigh available when multiple hearings are scheduled at the same time.

What does the hearing process look like?

Although these hearings are slightly less formal than bench trials, procedural and evidentiary rules are followed as in any judicial proceeding. Testimony is taken under oath, and all

witnesses are subject to cross-examination. A court reporter is always present to keep an accurate record. The chairperson of each panel rules on evidentiary and procedural questions that arise during the course of the hearing. Hearings are held in two phases. The only issue during the first (adjudicatory) phase is whether the respondent-attorney has violated the Rules of Professional Conduct. If a violation is found, the second (disciplinary) phase is necessary, during which the issue is what discipline should be imposed. The panel deliberates privately after each phase and announces the decisions during the hearing. Decisions are memorialized in written orders, which are filed with the clerk of the DHC as soon as possible.

Are the proceedings before the DHC open to the public?

Yes. After a complaint is filed with the DHC, the record and the proceedings, except the deliberations of the panel, are open to the public. The pleadings and orders are available on the State Bar's website as soon as they are filed. This website also contains a calendar of all cases currently pending, with information about the hearing dates and panel members. The hearings themselves are certainly open to the public. I would encourage anyone with an interest in the process or in a specific matter to attend a hearing. During my experience, the crowd in the courtroom has ranged from only the parties, counsel, and witnesses to a packed courtroom and television cameras that were broadcasting the hearing to a national audience.

What is the level of proof required for the DHC?

The findings and conclusions made by every DHC panel must be supported by clear, cogent, and convincing evidence. The panel does entertain motions to dismiss at the end of the Plaintiff's evidence and at the end of all evidence, and such motions have been granted at times.

Is there any right to appeal a decision of the DHC?

Yes. Either party has a right to appeal a final order of the DHC to the North Carolina Court of Appeals. The procedures governing such an appeal are the same as those applicable to civil cases, and the appellate courts apply the whole record test. The court of appeals and the Supreme Court review DHC decisions critically and have both issued opinions that provide procedural and substantive guidance. For example, the Supreme Court held that disbarment was not justified in the absence of a finding of harm or significant potential harm to clients. That Court also disapproved a "proportionality" review of the discipline imposed on similar facts. As members of individual panels, we grapple with the application of precedent during our determination of appropriate discipline. We try to maintain some consistency in the decisions while being mindful of the unique facts and circumstances presented in each case. This often feels schizophrenic since most every case we hear has some compelling twist that distinguishes it from any other set of facts and circumstances.

Why are more hearings taking longer than one day?

This trend seems to be the result of several different factors. The cases being filed in the DHC are more complex, with a larger number of them involving numerous, serious violations of the Rules. The number of cases that involve voluminous documents seems to be increasing. The most distressing factor is the number of cases that involve respondent attorneys who appear but do not cooperate in the process, usually because they do not understand the process.

Conclusion

Without question, too many attorneys underestimate the gravity of the DHC process. Certainly, every member of every panel is very aware that our decisions can dramatically impact a human being's ability to make a living and that we have an obligation to protect the public and the profession. The respondent attorneys frequently do not seem to appreciate this and as a result, do not effectively participate in the process. I have to say that a close second mistake made by respondent attorneys is the failure to actually ***read*** the Rules of Professional Conduct! In order to enable DHC panel members to make the best decisions possible, everyone involved in the process would be well advised to educate themselves on the substance and procedure. ■

Sharon B. Alexander has practiced law in Henderson County since 1983 and has been with the same firm, now Prince, Youngblood & Massagee, PLLC, since 1984.

Leonard T. Jernigan, Jr., attorney and adjunct professor of law at NCCU School of Law, is pleased to announce that his 2010 supplement to Jernigan's *North Carolina Workers' Compensation: Law and Practice, with Forms* (4th edition) is now available from West, a Thomson Reuters business (1-800-344-5009).

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Tabitha Ann Holton, First in the South

By Walter C. Holton Jr.

In the aftermath of the Civil War, North Carolina became the sixth of the United States, and the first southern state, to admit women to practice law. The US Supreme Court ruled in 1872 that women did not have a constitutional right to join a profession, leaving the fate of the first female southern attorney in the hands of the NC Supreme Court.

Photo: North Carolina Collection, University of North Carolina at Chapel Hill Library.

The Honorable Richmond M. Pearson served on the state Supreme Court for 30 of the most critical years in our state's history. As a justice from 1849 to 1878, and as chief justice for the last 20 of those years, Pearson held the Supreme Court together through the Civil War, ruling in 1863 that the governor had no authority to use the state's militia to enforce Confederate conscription laws. Confederate civil and military authorities roundly criticized the ruling, but Governor Zebulon Vance upheld the law. At the conclusion of the war in 1865, the provisional military authority appointed Pearson to remain as chief justice. Once full civilian authority was restored, Justice Pearson was elected to retain the position. He presided over the impeachment proceeding of Governor William W. Holden in 1871 (the only impeachment proceeding in state history) and remained chief justice until his death.

Justice Pearson enjoyed one of the most storied careers in NC jurisprudence, including the start of a law school in 1848 that lasted for 30 years on his Yadkin County estate called "Richmond Hill." In 1873, President Grant signed the commission for Justice Pearson to replace the late Justice Salmon Chase on the US Supreme Court, but Grant's feet grew cold upon learning that Pearson was 68 years old. Grant withdrew the commission due to Pearson's age.

By January 1878, Justice Pearson's career spanned 42 years of unbroken service on the NC courts. But a new challenge awaited the Court in Raleigh. As Justice Pearson prepared to return to the Court from his home in Yadkin County at the start of the year, the bar applicants from across the state were descending on the capital as well for examination by the justices to determine their fitness to practice law—the first order of business for the Court's spring term.

The new group included Tabitha (ta - by´- tha) Ann Holton, age 23, who studied law with her brothers and decided to join her brother Samuel's request for admission to the bar. Descendents of an outspoken Methodist minister, Tabitha and Samuel were following the footsteps of their older brother Gene, already admitted. Younger brother John would soon travel the same path. All of these siblings were inspired and educated by their parents, Quinton and Harriet Holton.

Quinton studied the law vigorously, but at his mother's urging he chose instead to ride the circuit through central North Carolina as a Methodist minister. Quinton and Harriet were known to command up to eight languages between them, teaching several languages to each of their children, including Tabitha. Quinton lost popularity in the Methodist conference as an outspoken opponent of slavery before the Civil War. Following the war, he again parted from the conference as a result of his avid Reconstructionist views.

Following his wife's death in March 1871, Quinton and family settled into the Deep River area of Guilford County. Harriet's loss was a major blow to the family, but it did not deter Tabitha and her brothers' pursuit of legal training. While Quinton continued to travel, his children studied under the guidance of local Greensboro attorneys, including Albion Winegar Tourgée, then a superior court judge.

Tourgée was a carpetbagger from Ohio who had enlisted in the Union army in 1861. Tourgée suffered a severe back injury at the battle of Bull Run and was later captured during the Battle of Perryville, spending four months in a Confederate prison. Following the war, Tourgée and his wife settled in Greensboro where he became a champion for racial equality. Once elected as a superior court judge in 1868, Tourgée plunged into numerous indictments of Ku Klux Klan members. He lost reelection in 1874 largely due to his stands for racial justice. In 1876 Tourgée moved his family to Raleigh, having tired of the threats by the Klan in Greensboro.

By early January 1878, history was converging upon the Supreme Court in Raleigh. The US Supreme Court had held six years earlier that women had no federal constitutional right to pursue a profession or calling, delegating the choice of whether to allow women into the legal profession to the individual states. In the five states that allowed women to practice, the progress was due to legislative action. However, neither North Carolina nor any southern state had undertaken the admission of a female attorney prior to Tabitha's arrival in Raleigh.

On Saturday, January 5, as Tabitha and Samuel headed to Raleigh from Greensboro, Chief Justice Pearson set out as well by buggy from Yadkin County to open the Supreme Court's spring term. I cannot help but believe that the chief justice's presence on the Court was reassuring to Tabitha's mission. Having himself been denied a seat on the nation's top court due to his age, the chief justice was uniquely positioned to consider Tabitha's request to join the bar.

Due to her father Quinton's love of debating the law and the breadth of his travels through Yadkin County, it is reasonable to assume that Tabitha's father and Justice Pearson crossed paths more than once. I suspect that her father's respect for Justice Pearson's legacy and independence influenced Tabitha's decision to approach the Supreme Court.

But as the chief justice crossed the Yadkin River into Forsyth County that Saturday, "a paralysis struck" and he died in Winston later that night at age 73. Perhaps the most celebrated jurist of his time was destined to miss the historic event to follow that week.

They say the wheels of justice grind slowly, and Tabitha's quest for admission must have been agonizing. The Supreme Court opened Monday, January 7, but immediately adjourned in honor of the chief justice's death, adding another excruciating 24 hours for Tabitha to reconsider her decision without her potential ally on the bench. On Tuesday, January 8, the 19 male applicants appeared before the Court, were examined, and were admitted to the bar. The Court, however, requested Miss Holton return Wednesday, "ten and ½ o'clock, a.m." with counsel to argue on her behalf.

During the wait, Tabitha told the *Raleigh Observer* that she "suffered the horrors of a hundred deaths." A quiet, unassuming woman, Tabitha had created quite a stir before a Supreme Court that had just lost its chief justice. Certainly, she had every chance to return home and leave the controversy behind. But according to the newspaper, Tabitha's spirits rallied when "she thought of her many days of hard study, and she felt determined to 'do or die.'"

On Wednesday, January 9, 1878, at ten and1/2 o'clock a.m., the Court opened to hear the argument. Tourgée spoke for Tabitha. Former Supreme Court Justice William Battle, then dean and virtual founder of the UNC School of Law, argued in opposition. "No southern lady should be permitted to sully her sweetness by breathing the pestiferous air of the courtroom," Battle argued. Tourgée countered, "There is one objection which I desire to notice, because it clothes itself in the guise of chivalric concern for women." Such "rag tag chivalry" had not prevented women from organizing hospitals during the Civil War, nor prevented women from entering the medical profession. As an attorney, a woman would have even more control over her cases than a physician over her patients. Tourgée concluded that Miss Holton "only asks the Court the privilege of using the brain which God has given her...She asks no favors, but a fair chance if the Court can grant it to her."

The argument lasted 90 minutes. The Court voted. Miss Holton would be allowed to take the exam to be administered by Justice Edwin Reade, who later wrote, "It fell to my lot to conduct the examination; and I did it so gently and sympathetically that my associate justices said enviously, that I did not ask her a single question that would have bothered a child. Well, whether it would have bothered a child or not, it did not bother her, for she answered promptly and correctly and got her license."

The *Raleigh News* reported, "her answers to all the questions propounded were satisfactory and were given in such a manner as to show her acquaintance with the law. Not a single question was unanswered, and it was stated that she passed the examination as well, if not better, than any of the masculine applicants."

Tabitha's certificate was backdated one day so that her admission coincided with the 19 "masculine applicants." I am sure Tabitha appreciated the gesture, but certainly the extra 24-hour delay was not so easily erased in her mind.

Tabitha and her brothers Gene, John, and Samuel went on to practice law in Surry, Yadkin, and Forsyth counties. Tuberculosis took Tabitha's life on June 14, 1886, at age 32, as she traveled to Yadkinville. Her brothers continued their legal pursuits, no doubt enormously inspired by their sister's courage. In 1897, President McKinley named Tabitha's brother Gene as the United States Attorney. President Roosevelt renewed the appointment in 1906 and he served faithfully in that position until 1914.

Today, a marker outside the courthouse in Dobson notes Tabitha's life and achievements. Her portrait, along with brother John's, hangs in the courtroom in Yadkinville with the other prestigious attorneys of Yadkin County, including the portrait of Supreme Court Chief Justice Richmond M. Pearson. I do not know if Tabitha ever met the famed chief justice—I suspect that she may have through her father or Tourgée, who also spoke at the chief justice's memorial service in Raleigh that same month. But I do know that Tabitha's place in history is every bit as secured as his. ■

Walter C. Holton Jr., grandson of Gene Holton and grandnephew of Tabitha Ann Holton, served as the United States Attorney for the Middle District of North Carolina from 1994 to 2001 and now practices in Winston-Salem.

The Selma Cyclepaths

BY ROBERT W. BRYANT JR.

I think it was in late 1988—two years earlier, I had moved from Elizabeth City to join my brother-in-law's legal practice in Selma—when my younger brother, Larry, called me and said he needed to talk with me *in person*. I suspected bad news. My suspicions were, unfortunately, correct. He told me that he had been diagnosed with multiple sclerosis (MS).

Cyclists line up for the 100-mile Bike MS route. Photo courtesy of the Sun Journal.

A terrific athlete until around age 30, and a hero in everyone's eyes but his own, Larry had been suffering for several years from a number of health problems that affected his mobility, vision, and thought processes. In 1988, the medical community had much more limited information and resources than they do today for diagnosing MS. It was through a process of elimination that the diagnosis was made. A husband and father of two sons, Larry was devastated, as were all of us in the family.

MS is an inflammatory disease that affects the ability of nerve cells to communicate with one another. In all people, long fibers (axons) in the nerves are wrapped in a fatty, insulating substance called myelin. Think of the plastic or rubber sheath wrapped around the wiring in an electrical cord and you might better be able to picture what myelin does. In MS, it is believed that the body's own immune system attacks the myelin, damaging it and forming scars (called sclerosis) that prevent the axons from effectively conducting signals. These scars form along the nerves, the spinal cord, and the white matter of the brain. While scientific research has uncovered much about the mechanisms involved in MS, the exact cause of the disease remains elusive. There is no known cure, though medications have been developed over the past 20 years or so to treat the symptoms and to slow the progression of the disease.

Among my many reactions to Larry's news was the feeling of helplessness, a sensation to which I was unaccustomed. As lawyers, we are regularly tasked with identifying a problem, deciding some alternative solutions, and working toward the best possible conclusion for our clients. This feeling of helplessness made me uncomfortable and frustrated. I wanted to find a meaningful way to make a difference not only to Larry, but to others who were in his situation. I had met David Holmes at my church, Edgerton Memorial United Methodist Church, in Selma. David had become aware of Larry's disease and, coincidentally, had picked up a brochure promoting something called the MS 150 sponsored by the Eastern North Carolina Chapter of the National Multiple Sclerosis Society. He was an avid cyclist. He suggested that we try the MS 150 Ride. I soon came to learn that "doing the 150" meant riding 150 miles over a two-day period on a bicycle. The only bike I owned at the time was a cheap, off-the-shelf one from Rose's Department Store, which had been

stored in my shed for several years, so I borrowed David's old touring bicycle. In spite of the fact that the MS 150 was less than three weeks away, I accepted David's offer. After far too short a training period consisting of perhaps riding a total of 40 or 50 miles, I solicited maybe $200 in contributions from family and friends and I rode in my first MS bike tour in 1990. I could not have imagined at the time how that experience would change my life, that of my family, and (I hope) the lives of other families living with multiple sclerosis.

We did not have a formal MS bike team in the beginning. It was just a couple of friends and me. By 1993, our numbers had swelled to maybe seven or eight people and we decided that we needed a name. After an afternoon brainstorming session, one of our riders, Darlene Creech, coined the name we all favored, the Selma Cyclepaths. This earned us the Best Team Name award in the MS tour that year and we beamed with pride. Little did we know back then the many awards that future years held for the Cyclepaths.

Prior to 2003, we never had more than 12 riders in any given year. I sent out hundreds of letters to church friends and attorney colleagues, inviting them to either ride with me or make a contribution. Almost all opted to write a check. In 2002, surgery on my knee forced me to miss the MS 150. I was saddened to learn that only three Selma Cyclepaths made it to the starting line of the MS 150 that year. One of those Cyclepaths was fellow family law attorney Lynn Burleson, who had ridden with us every year since he accepted my challenge in 1996. Lynn practices with the Tharrington Smith firm in Raleigh. He had the notion to rebuild the team with area lawyers. It turned out to be a brilliant idea! Many of these lawyers had made contributions to Lynn or me in the past, but now the plan was to recruit them as riders. We ran ads in area newspapers and in the *Wake County Bar Flyer*. We made announcements at CLE programs, made phone calls, and handed out flyers at various events. The response was amazing. We registered 64 riders in 2003 and have had no less than that number of riders every year since, topping out at 102 riders in 2007. Most of the growth in the number of Cyclepaths riders since 2003 has been occasioned by the steadfast work enthusiastically carried out by Lynn, who has an unparalleled ability to slog though the detailed stuff and achieve the best possible result. For his prodigious efforts I am eternally grateful.

From mid-April to the annual MS Tour in September of each year, the Selma Cyclepaths sponsor weekly training rides on the outskirts of Clayton, North Carolina, every Saturday morning. These are training rides for all ages and abilities. Those who regularly participate in these training rides are not likely to experience the saddle soreness that I did on that first MS 150 weekend.

Ever since the Cyclepaths became a real presence in the MS Bike Tour, the team has been anchored by my many lawyer friends. Currently, Jenny Bradley (Raleigh), Gaines Weaver (Raleigh), Martin Tetreault (Smithfield), and Lynn Burleson (Raleigh) are co-captains of the team.

In 2005, 98 Selma Cyclepaths raised $118,547. For six consecutive years, the Selma Cyclepaths have been the top fundraising team of the eastern North Carolina MS Bike Tour. Since the team was launched in 1993, we have raised a total of $846,042 in support of MS research and programs. As a sitting state district court judge, I am unable to solicit funds for nonprofit organizations, so now I just send the MS Society my own check for as much of a contribution as I can afford each year. I still enjoy riding my bike with the Selma Cyclepaths on Saturday mornings in the spring and summer and in the Bike MS Tour each year and, through the gracious generosity of friends and family, I personally raised a combined total in excess of $100,000 in those years before becoming a judge.

Many of the Selma Cyclepaths team members have a close personal connection to someone with MS. Tom Andrews, former general counsel to the Administrative Office of the Courts and retired since 2005, has participated in the MS Bike Tour rides for 15 years, seven of these as a Cyclepath. Tom's sister, Joyce, diagnosed with MS in 1974, passed away in 1994 at 47 years of age. Always among North Carolina's top fundraisers, Tom has also probably collected at or above $100,000 in donations for the Eastern NC chapter of the MS Society. His supporters are largely people in the court system (judges, magistrates, district attorneys, clerks, etc.), with his regular contributors located all over the state.

Jenny Bradley, a family law attorney with the Cheshire Parker firm in Raleigh, has been riding with the Cyclepaths every year since 2004. Jenny's father, Joe, was diagnosed with MS in 1995 after years of suffering symptoms that were mislabeled or misdiagnosed. Jenny and her dad are thankful that fundraising events like the MS Bike Tours have increased funding for research and programs, and they are confidently hopeful that the disease will eventually be eradicated through

CONTINUED ON PAGE 23

Other North Carolina lawyers and judges who have ridden with Cyclepaths in the MS Tour, or have trained with the team on Saturdays, include the following:

Lisa Angel (Raleigh)
Heidi Bloom (Raleigh)
Kimberly Bryan (Raleigh)
Laurie Burch (Raleigh)
Ken Carmack (Raleigh)
Lois Colbert (Charlotte)
Woofer Davidian (Raleigh)
Tom Dimmock (Raleigh)
Judge Wallace Dixon (Durham)
Archie Futrell III (Raleigh)
Eddie Greene (Raleigh)
Kelly Greene (New Bern)
Bob Hargett (Raleigh)
Wade Harrison (Burlington)
Kevin Hopper (Raleigh)
Logan Howell (Raleigh)
Christine Kennedy (Raleigh)
Frank Laney (Raleigh)
Betsy Cook Lazen (Raleigh)
Judge Rich Leonard (Raleigh)
Alan McInnes (Raleigh)
Cathy McLamb (Raleigh)
Danielle Marquis (Raleigh)
Charles Mooney (Raleigh)
Fred L. Morelock (Raleigh)
Helen Oliver (Raleigh)
John Parker (Raleigh)
Mark Payne (Smithfield)
Carlyn Poole (Raleigh)
Judge Paul Ridgeway (Raleigh)
Max Rodden (Raleigh)
Steve Smalley (Raleigh)
Wade Smith (Raleigh)
Alice Stubbs (Raleigh)
Melissa Trippe (Raleigh)
Will Webb (Raleigh)

WARNING: The Information You Are About to Read…Is Disturbing

BY PETER G. BOLAC

Over the last two years, according to reports made to the Ethics Committee by Staff Auditor Bruno DeMolli, between 50 and 65% of audited lawyers failed to reconcile their client trust accounts. In addition, according to the quarterly report of April 20, 2009, at least half of the audited lawyers had violated the following provisions of Rule 1.15 of the Rules of Professional Conduct:

1. Failing to use business-size checks that contain the auxiliary on-us field (100%).
2. Written accountings not provided to the client according to the rules (60%).
3. Date of deposit appearing on ledger does not reconcile with the bank record (52%).
4. Deposit slips do not list source of funds if source is not the client (50%).

Unfortunately, this particular quarterly report is not an anomaly. There are a staggeringly large number of lawyers who do not comply with the requirements of Rule 1.15. Many seasoned and experienced lawyers may think the problem is with the new crop of young, inexperienced lawyers who have been forced out on their own with nothing but a license and a shingle; however, this assumption is incorrect. As highlighted on the same April 2009 report, nearly a quarter (23%) of *previously audited* lawyers failed to reconcile their trust accounts and nearly a third (32%) of *previously audited* lawyers were found to have more discrepancies in 2009 than in their previous audits. Lawyers of all ages, experience levels, and geographic locations display similar deficiencies.

SIS/Jean Hin

In a world without the constraint of limited resources, the State Bar could open a grievance file against any lawyer who is in violation of Rule 1.15 of the Rules of Professional Conduct, no matter the gravity of the violation. The reality, of course, is that the Grievance Committee is already inundated with allegations of professional misconduct. Happily, many of those allegations prove to be without merit, but they still require investigation and the Grievance Committee still must address them. The Grievance Committee determined that decisive action was needed to correct growing deficiencies in trust accounting practices, but that simply opening a grievance file was not the answer.

Trust Account Compliance Program

The State Bar has created a new program pursuant to amendments to the Discipline and Disability Rules of the North Carolina State Bar, 27 N.C.A.C. 1B, Rule .0112(l), which were approved by the North Carolina Supreme Court in March 2011.

The Trust Account Compliance Program (TAC) is a voluntary program. Participation is confidential. When a lawyer is found after a procedural audit to have significant trust account compliance issues, the chair of the Grievance Committee may offer entrance into the program as an alternative to opening a grievance file. If the lawyer consents to participate in the program, he or she will be required to meet periodically with the State

Bar's Trust Account Compliance Counsel. The trust account compliance counsel will monitor the lawyer's trust accounts, review the lawyer's trust account records, and inspect the lawyer's handling of entrusted funds for as long as two years. If the lawyer timely complies with all requirements of the program and satisfactorily completes the program, the Grievance Committee will not open a grievance file on the issue of the lawyer's pre-referral noncompliance with Rule 1.15.

If the lawyer does not consent to participate in the program, or if the lawyer consents to participate but does not timely comply with all requirements and/or does not satisfactorily complete the program, the Grievance Committee WILL open a grievance file and the lawyer may be subject to imposition of professional discipline for noncompliance with Rule 1.15.

This program is not intended for, and will not be offered to, lawyers involved in possible misappropriation of entrusted funds, criminal conduct, dishonesty, fraud, misrepresentation, deceit, or any other conduct the chair of the Grievance Committee deems inappropriate for referral. These cases will continue to be automatically sent to the Grievance Committee.

A Service for Lawyers and to the Public

The TAC program, while officially under the supervision of the Grievance Committee, is intended to help lawyers learn to manage their trust accounts and to avoid the grievance process. Not every lawyer found to have deficiencies will be asked to enter the program, as some deficiencies can easily be corrected. The program is focused on offering an alternative to the grievance process for lawyers determined to be significantly out of compliance. The objective of the program is for the lawyer to gain competence in trust accounting rules and procedures in a confidential environment, thereby improving the safety of the public's entrusted funds.

The requirements of the program are uniquely tailored to each lawyer based on the nature and gravity of his or her deficiencies. Some lawyers will need less supervision than others, and some lawyers will take less than two years to complete the program, while others will not. Procedural mistakes made during the term of the program do not necessarily expel a lawyer from the program, but may act to expand the requirements for satisfactory completion of the program. If the lawyer is in compliance after two years of the program, no further supervision or monitoring will occur and no grievance file will be opened. In this case, the lawyer has avoided the grievance process, has improved his or her trust accounting practices, and the public has been protected from the dangers of mismanaged trust accounts.

Trust Accounting Resources

Our battle against bad trust accounting practices not only utilizes the TAC program and grievance process, but it also includes resources and education. The State Bar produces a highly informative *Attorney's Trust Account Handbook*, which is available on the State Bar website, www.ncbar.gov. In addition, the staff auditor, Bruno DeMolli, and the trust account compliance counsel, Peter Bolac, continue to present CLE courses on the trust accounting rules to local districts and newly admitted lawyers and are available to answer any questions that you may have concerning the management of your trust account, either by phone at (919) 828-4620, or by email at pbolac@ncbar.gov.

Conclusion

The State Bar is not sure why many lawyers are flouting Rule 1.15. Perhaps they believe they are too busy; perhaps they forget; perhaps they do not realize that failure to handle their trust accounts responsibly will result in disciplinary action; perhaps they believe their deficiencies are not significant enough to warrant the Grievance Committee's attention. However, ignoring these duties will now be a losing strategy. If a lawyer is found to be significantly out of compliance with Rule 1.15, the lawyer must either voluntarily enter the TAC program or become the subject of a grievance. The Grievance Committee routinely refers lawyers who are significantly out of compliance with Rule 1.15 to the Disciplinary Hearing Commission for a public trial. The DHC routinely imposes lengthy stayed suspensions during which respondents must comply with extensive conditions in order to continue practicing law. *See* 09 DHC 25, 10 DHC 4, 10 DHC 12, and 10 DHC 26. All DHC proceedings are public. All disciplinary orders entered by the DHC are public. To avoid this outcome, lawyers must learn to keep proper trust account records and follow required procedures. The trust account compliance counsel stands ready to help them. ■

Peter Bolac is the district bar liaison and trust accounting compliance counsel for the North Carolina State Bar.

Selma Cyclepaths (cont.)

such efforts. A loyal Cyclepath, Jenny has taken on a steadily increasing role in the operation and management of team functions.

Wade Smith, probably already known by many of you as an acclaimed criminal defense lawyer practicing with Tharrington Smith in Raleigh, is the "elder statesman" (read this as most senior) rider among the Selma Cyclepaths. A prolific raiser of funds for the MS Society, Wade unpretentiously goes about doing his part for the team without fanfare, shying away from any individual recognition. He is a real inspiration to his fellow riders, and a talented musician and canvas artist to boot.

Lynn, Tom, Jenny, and Wade are four of the finest people you could ever know, but they are just a few examples of the folks that comprise the Selma Cyclepaths. Every member of the team has similar characteristics of dedication, good-heartedness, and philanthropy. I am privileged to be able to enjoy the company of such individuals.

I have now ridden in 19 MS Bike Tours. I missed the very first tour and two others when surgeries temporarily took me out of the saddle. Larry lived with this debilitating illness for roughly 20 years until complications from MS took his life in 2008. Although he is gone, I still ride in his memory and to help others struggling with MS. While the medical community has yet to develop a cure for this illness, huge strides have been made and hopefully someday soon a cure for MS will be developed. It is my goal that the Cyclepaths will be forced to choose some other worthy charitable organization toward which to devote their collective efforts. Larry remains a hero, even in death, because he continues to provide part of the inspiration for the best cycling team in eastern North Carolina. ■

For more information on the Selma Cyclepaths, go to www.selmacyclepaths.org.

Women at Work: Gender, Discrimination, and Professional Life Satisfaction

By Darcy Clay Siebert

In a recent *Atlantic* article entitled, "The End of Men," author Hanna Rosin writes provocatively about women—in the workplace, in education, and in society. She argues that society is embracing women in a way never before seen, perhaps because "the modern, post-industrial economy is more congenial to women than to men."

Rosin cites researchers, educators, and philosophers to make her point that, "The attributes that are most valuable today—social intelligence, open communication, the ability to sit still and focus—are, at a minimum, not predominantly male." She reports that women now hold 51.4% of managerial and professional jobs, along with 45% of the associates' positions in law firms. Given that women now earn 60% of undergraduate degrees and half of all law degrees, these percentages will continue to increase quickly. Globally, she reports, "the greater power of women, the greater the country's economic success." Despite this, "the US still has a wage gap, one that can be convincingly explained—at least in part—by discrimination."

So how do women lawyers fare in North Carolina? The research literature and the findings from our 2008-2009 study, "Work and Well-Being" answer some questions while raising others.[1] The differences between men and women in the profession are interesting, but the similarities may be even more so.

Men and women in our study appear surprisingly similar on occupational issues, and the findings reflect a generally stressful profession. Both groups report that their workplace is stressful to the same degree, and they face ethical compromises in their work at similar rates. Men and women experience similar rates of support from supervisors and co-workers, and the number that would advise their children to become lawyers is statistically the same—less than half.

Workload differences are also minimal. Men and women work the same number of weekends, have the same number of days on-call for emergencies, and take the same average number of vacation days. When limiting data analysis to full-time workers, men and women report working and billing statistically equivalent numbers of hours. This equivalence of productivity was also recently found in Young & Wallace's 2009 study. It is surprising, then, that men earned more than women earned in our study. Men's average earnings are between $100,000 and $149,999, but women's average earnings are between $75,000 and $99,999.

So what are we to make of this? An examination of literature suggests that although women lawyers do well in terms of income when compared with all employed women, every income study finds that women lawyers' income lags behind male lawyers' income significantly. The theory of human capital would argue that women's lower salaries are a consequence of their differential choices of employment—that they choose lower-paying jobs (e.g., in government) that provide the flexibility they need to juggle work and family (Chiu, 1999; Young & Wallace, 2009). The North Carolina sample supports this hypothesis in that proportionally more men work in private practices (77%) than women do (65%); women tend to work more frequently in government and other public sector jobs. This is similar to Hull & Nelson's 2000 findings among Chicago lawyers. Despite this, we found no gender differences in the size of practice in which lawyers are employed, so women are working in large firms in equal numbers as men. Thus, it is unlikely that this small difference in private versus public employment accounts for the overall difference in personal income.

However, others argue that subtle as well as more blatant forms of discrimination exist among employers so that women's options are restricted from the very beginning of their careers (Hull, 2000). In a complex data analysis, Hagan suggests a number of reasons that women lawyers' income is lower than that of their male counterparts, and the differences are far greater than when presented simply as mean differences and when compared with other professions. Simply said, men are more likely to gain more from elite educations, managerial opportunities, specializations, and yearly salary increases (Hagan, 2007).

The data concerning women lawyers in North Carolina appear to agree with these earlier findings, as women more generally report experiencing discrimination and harassment in their occupation at far greater rates than the men report. This may not entirely be due to salary discrimination, however. Schultz & Shaw (2003) suggest that despite the legal profession's efforts to assimilate women who are entering the profession in increasing numbers, women's wider concerns are still being ignored, "leaving conventional legal practice untransformed in many important respects."

Hagan (2007) agrees in his review, stating that, "Put simply: women enter firms at rates comparable to those for men, but they are more likely to leave (Brockman 1994; Reichman & Sterling 2002), and sooner (Kay 1997), while they earn less (Hagan 1990; Rhode 2001; Stager & Foot 1988) and are less likely to become partners (Donnell *et al.* 1998; Epstein *et al.* 1995; Hagan & Kay 1995; Radford 1990)." Our more current data support this, as women in our study (and others; see Hagan & Kay, 1995) report being significantly more likely to quit practicing in the next few years.

Yet, despite all this evidence, women and men in our study report no difference in their professional life satisfaction. A number of

possibilities could explain this. First, our measure was a global measure of satisfaction; other studies have discovered that although women score higher on some facets of job satisfaction (e.g., the substance of their work), they score much lower on others (job setting, social index of work, and the power track) (Dinovitzer, *et al.*, 2004). Elwork (1995) also reports that female lawyers' satisfaction may be negatively influenced by their experience of more role conflicts—that "they, more than men, are pressured to delay or forgo childbearing, to assume unequal family responsibilities for child and elder care, or to parent children alone." Once again, our data support these previous findings in that proportionally, more women in our study (25.5%) are unmarried than men (15.7%), a finding that is echoed in the literature about professional women who feel compelled to place their career before a personal life if they want to succeed in their profession. Certainly, other factors not captured by our questionnaire contribute to women's sense of discrimination.

To better explain women lawyers' professional life satisfaction, we conducted a multiple regression analysis. This useful statistical analysis captures the influence of multiple variables on professional life satisfaction in one process, rather than more simplistic analyses that examine variables one at a time. When considering all of the many issues investigated in our survey, only five (two negative and three positive) predict professional life satisfaction for women. Negative influences include working in a stressful workplace and having to work on weekends; positive influences include having higher personal income, having more supportive co-workers, and being more committed to one's profession. This is a very different model than for men, whose professional satisfaction is similarly influenced by having coworker support and being committed to their role as lawyers, but additionally influenced by having sufficient material resources to do their jobs and being physically healthy. Men's professional satisfaction is negatively influenced by being faced with ethical compromises and by needing others' approval. (Note—all items are listed in descending order of importance). Thus, it is clear that men and women have different needs to be satisfied with their professional life, and that the occupational factors that may be subject to discriminative practices (i.e., personal income) are important influences.

To provide a richer picture of gender differences, we conducted some additional statistical tests. In terms of professional role, being a lawyer is more salient to women's rather than men's identity. Conversely, men are more committed than women to their role identities as lawyers, yet this role commitment is of equal importance to both men's and women's professional life satisfaction. In terms of personal traits, women report significantly higher levels of overachieving, perfectionism, and needing others' approval. Nevertheless, needing others' approval is important to men's professional satisfaction but not to women's satisfaction, despite the gender differences.

Men and women differ in their personal histories as well. More women than men in our study report having parents with psychiatric problems, and more women report experiencing emotional and sexual abuse as a child. Statistically, more women than men report that their spouse or partner has alcohol and other drug problems, but the difference is so small as to be unimportant, practically. Similarly, a few differences in alcohol and other drug use are evident, but these are, again, not practically important differences (e.g., values for 12-month use of marijuana are 1.08 for women and 1.27 for men, placing them both in the 1-2 times per year range).

Given all this evidence—that women lawyers have troubled personal histories at greater rates than men, have more demanding personal traits such as perfectionism and needing others' approval, and experience discrimination in a variety of areas of their professional lives when being a lawyers is quite salient to their personal identity—one would expect them to be at greater risk for personal problems as well. Yet for the women in our sample, this is not the case. Women's rates of burnout and depression are no different from the men's rates, which is a remarkable finding because in the general population, women experience depression at least twice as much as men. Women in this sample also do not drink alcohol more than the men drink. Similar to reports in the general population, men drink alcohol more days per week than women drink, and reports of the most drinks consumed in a single day are greater for men (average = 6 drinks) than for women (average = 4 drinks). In addition, on the typical measure for average amount of alcohol consumption (average number of days drinking per week x average number of drinks per day), women and men in our study show no differences.

Thus, women in our study are a hardy lot, working like the men, having issues that place them at risk for distress, but reporting no additional personal or professional distress. However, one additional difference may be at play in this study. As a group, men graduated from law school much earlier (average year = 1984) than women (average year = 1993); as a group, women are professionally more junior. To examine if this variable is important, we conducted additional analyses that compared women lawyers who graduated before 1995 (49%) with those who graduated in 1995 or more recently (51%).

Despite the difference in professional (and chronological) age, recent graduates and earlier graduates score no differently in levels of perceived discrimination, harassment, burnout, depression, and most of the alcohol and other drug measures. Among the personality characteristics, the only difference is that the recent graduates report needing others' approval more so than earlier graduates report this. Although not statistically significant, recent graduates tend to report slightly higher levels of overall burnout, and they are especially (statistically significantly) reporting higher scores on "I feel frustrated by my job."

Although both groups have equivalent scores on mental and physical self-report measures, recent women graduates report consuming more alcohol drinks in a single day (4.8) than the earlier graduates, who report 3.5 drinks in a single day. This may reflect the general population estimates that younger people tend to binge drink more, especially those in college or who are recent graduates.

Given these differences between women who are more recent law school graduates and those who graduated before 1995, it may not be surprising that the recent graduates more frequently work when feeling "too distressed to be effective" than earlier graduates. This same group of recent graduates also states that they are more likely to stop practicing law in the next few years for reasons other than retirement. This last question is an important indicator of intention to quit, meaning that the law profession will be losing their young women lawyers at a time when their expertise and recent training could make important contributions to the field.

So what does one conclude from all this information? Rosin suggests that our "white-collar economy values raw intellectual horse-

power, which men and women have in equal amounts. It also requires communication skills and social intelligence, areas in which women, according to many studies, have a slight edge. Perhaps most important—for better or worse—it increasingly requires formal education credentials, which women are more prone to acquire, particularly early in adulthood." If so, then all professions, including the law, need to find ways not just to eliminate the persistent and pervasive discrimination that exists, but also to embrace the kinds of potential that the robust North Carolina women lawyers bring to the table. The American Bar Report (2001) cited by Hagan & Kay (2007) is the most recent available comprehensive review, and it concludes from a wide range of research that, "women's opportunities are limited by traditional gender stereotypes, by inadequate access to mentors and informal networks of support, by inflexible workplace structures, and by other forms of gender bias in the justice system." These issues are amenable to change, as are more obvious differences such as personal income. If the profession wishes to reduce the number of women leaving the profession, retaining the attributes that would serve the profession well, it must invest in the changes that would allow women equal treatment and access to leadership positions. It is not a zero-sum game; men are not diminished when women are advanced. Instead, by affirming women's unique contributions, the entire profession is enriched, its members' health and well-being are improved, and the legal profession's values of social justice and equal opportunity are upheld. ■

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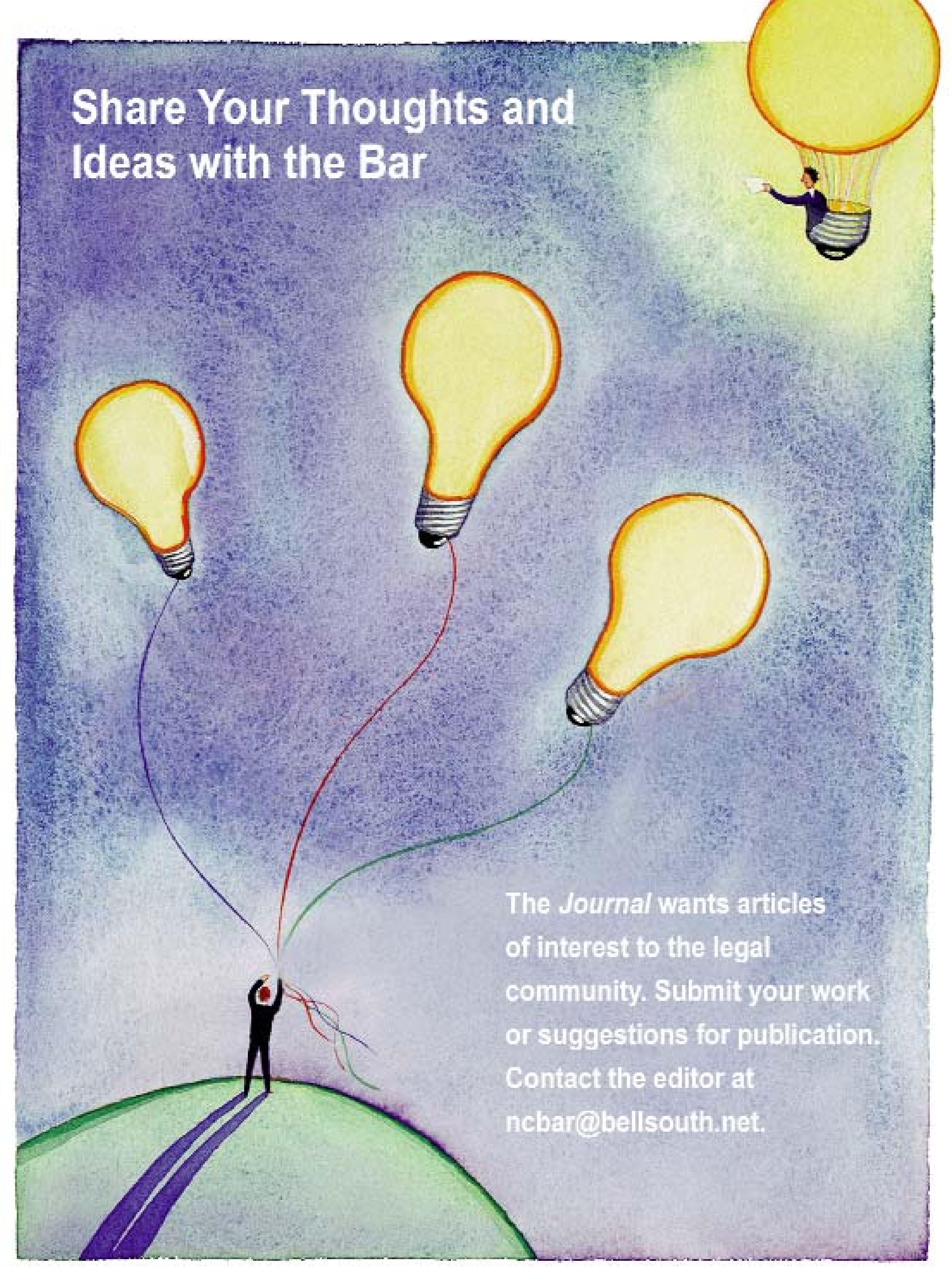
Footnote

Close to ten years ago, the members of the Consortium for Professional Recovery Programs began discussing a collaborative project to survey North Carolina professionals. This consortium, comprised of representatives from medicine, law, dentistry, pharmacy, psychology, nursing, and social work, met regularly to discuss methods to improve the behavioral health issues experienced by their professionals. The consortium members believed that both services and policy could be improved if they had current data about the behavioral health and occupational issues facing their memberships. Over the next several years, the consortium members worked together to develop a comprehensive set of issues that were relevant to all the professions, along with issues that were idiosyncratic to each discipline. The results of this collaborative effort provided the foundation for the development of "Work and Well-Being: A Survey of North Carolina Professionals." Through the tireless efforts of consortium members, the project was refined through an iterative process, ensuring the scientific validity and the professional relevance of the findings. The results of this project, ultimately funded and implemented last year, are summarized herein.

We mailed questionnaires to a probability sample of members of the North Carolina State Bar, and we received 390 usable responses. The questionnaire was lengthy, and it included occupational items about workplace and workload, behavioral health questions about alcohol and other drug use, depression, and burnout, along with demographic items. The survey was anonymous; that is, the identity of the respondents could not be connected to the information they provided. As a result, most respondents answered all the items, and many provided written comments as well.

Annual Meeting

You are asked to take notice that the annual meeting of the North Carolina State Bar will be held on Friday, October 21, 2011, in conjunction with the council's quarterly business meeting. Further, the council will hold an election on Thursday, October 20, 2011, at 11:45 a.m. at the Raleigh Marriott City Center, Fayetteville Street, Raleigh, to choose the agency's president-elect, vice-president, and secretary-treasurer for 2011-2012. All members of the Bar are welcome to attend these events.


Share Your Thoughts and Ideas with the Bar
The *Journal* wants articles of interest to the legal community. Submit your work or suggestions for publication. Contact the editor at ncbar@bellsouth.net.

Profiles in Specialization—George Oliver

I recently met with George Oliver, a board certified specialist practicing in New Bern, to talk about his law practice and his board certification in business bankruptcy law. George grew up in North Carolina, attending the University of North Carolina, Chapel Hill, for both his bachelors in Communications and his law degree. Following law school, he worked in Asheville handling primarily criminal defense and civil litigation. In 2000, George welcomed his first daughter and decided to return home to New Bern to be close to his family. George joined the firm Stubbs and Perdue in 2001 and began to handle bankruptcy cases. He became a board certified specialist in business bankruptcy law in 2006. Following are some of George's comments about the specialization program and the impact it has had on his career.

Q: Why did you pursue certification?

At that point in my career, I had been practicing bankruptcy law for five years and I saw it as a way to advance in the profession. I knew it was a great program for a young lawyer. In my practice, I handle Chapter 11 Debtor cases, and there are very few of us who do that work. In a niche practice like this, becoming a board certified specialist was a great way to show other lawyers and clients that I am committed to this practice area.

Q: How did you prepare for the examination?

Around that same time I was working to edit the *North Carolina Bankruptcy Practice Manual* (along with Pam McAfee), so I was immersed in reading and editing writings by some of the state's best lawyers. The timing was really helpful. I also read the bankruptcy code and focused on the consumer portion, since that's not something I was exposed to in my practice at that time.

Q: Was the certification process valuable to you in any way?

It was valuable, it was also difficult. I applied during the first year of the joint certification program with the American Board of Certification (ABC), and compiling the case information was time-consuming. I was lucky to have a great paralegal—Christy Weiss—to assist me. Once the application was complete, I could enjoy reviewing the record of my work for the past five years. That provided a real sense of accomplishment.

I also found the exam challenging. Since the ABC exam is a national one, there were some issues reflected that just don't apply in North Carolina local practice. I answered the questions by providing information about the local customs and that must have been acceptable since I achieved a passing score!

Q: Has the certification been helpful to your practice?

It definitely has. I get most of my referrals from other lawyers, accountants, and previous clients. The certification lets them know that I don't dabble in bankruptcy. The requirements to be a certified specialist are stringent and give a lawyer credibility from the get-go. Particularly for out-of-state referrals, it tells them my experience level. There is also a section of the bankruptcy code that addresses hourly rates and allows board certified specialists to charge higher fees for their services. The courts recognize the certification and place a value on it.

Q: What have your clients said about your certification?

Typically my clients understand that I am a board certified specialist and see the significance of that accomplishment. The information is easily found on my website and in my office materials.

Q: How does your certification benefit your clients?

My certification provides a real benefit to my clients through my commitment to this practice area. I recently had a groundbreaking case approved in our district that was a direct result of my specialization in business bankruptcy law. Through case research, I found some information on a 1993 case where Judge Leonard ruled against a "Dirt for Debt" Plan of Reorganization. With the current economic and real property situation, I decided to try the idea again. In September 2010, Judge Humrickhouse approved a similar plan in the *Bannerman* case. This allows clients

who file Chapter 11 bankruptcy to essentially establish a fair market value for their property, take the appraisal to the judge, and use the property to satisfy the debt. The end result is that the bank retains enough property to satisfy the debt, and the client is able to move forward with no debt owed to the bank. In the right circumstances, this is really beneficial for many people who have been caught "underwater" with their property loans. It provides a workable solution in this economy, which is fair to everyone involved.

Q: How does certification benefit the practice?

In my work, I like it when the attorney on the other side is a board certified specialist. I want him/her to know the law as well or better than I do. I have had clients ask about opposing counsel and initially react negatively when I tell them that the other attorney is board certified as well. I can reassure my client by telling them that that's actually a good thing. I know if opposing counsel is board certified, we will have a greater chance at working things out by consent. We are a very collegial group in the eastern district bankruptcy bar, and the judges encourage us to work together. I appreciate knowing that the other side will be fair, smart, and

CONTINUED ON PAGE 29

Comparability Makes a Difference to IOLTA Income

Income

All information on IOLTA income earned in 2010 has now been received and recorded. After experiencing an unprecedented income downturn in 2009—a 55% decrease over the previous year—the total income of $2.2 million received in 2010 was only a 6% decrease compared to the previous year. However, the first two quarters showed a 34% decrease. Improved income in the last two quarters can be attributed to the implementation of comparability, which took effect July 1, 2010. Under comparability, lawyers may keep IOLTA accounts only in banks that agree to pay IOLTA accounts the highest rate available to that bank's other customers when the IOLTA accounts meet the same qualifications. NC IOLTA maintains the list of eligible banks on the NC State Bar website, and recognizes NC IOLTA's Prime Partner Banks which go above and beyond the eligibility requirements of the revised rule to support the NC IOLTA program. We appreciate the fact that many North Carolina attorneys are encouraging their banks to become Prime Partners.

We would have surpassed last year's income from IOLTA accounts (which decreased by 3%) if SunTrust, one of our largest banks, had not stopped waiving the service charges on IOLTA interest. We are in discussions with SunTrust regarding their IOLTA policy.

Grants

NC IOLTA made just over $3 million in 2010 grants (compared to $4.1 million in 2009) by using $1 million (37%) from our reserve fund. Grants were restricted to a group of grantees at the forefront of access to justice work. Even so, grants to legal aid organizations were decreased by approximately 20%.

When they met in December, the NC IOLTA trustees decided to take $1 million (59%) from our (now smaller) reserve fund for the second year in a row in order to make grants of $2.7 million, and grants were again limited to the group of (mainly) legal aid providers. These grants represent an 11% decrease from 2010 grants for those organizations. Our reserve fund currently holds just over $800,000.

State Funds

In addition to its own funds, NC IOLTA administers state funding for legal aid on behalf of the NC State Bar. For the 2010 calendar year, NC IOLTA administered just over $5.1 million in state funds. Appropriated funds for legal aid have already suffered decreases because of the economy, and proposals for the state budget are projecting significant cuts for 2011-12. Such cuts will require staff attorney layoffs and office closings and will place many more NC citizens in the position of navigating our justice system without the assistance of lawyers. The legal aid programs, the Equal Access to Justice Commission, the Equal Justice Alliance, and the NCBA are working hard to sustain state funding for legal aid work, which is even more necessary in the economic downturn. ■

Specialization (cont.)

experienced.

Q: How do you stay current in your field?

I participate in a couple of great listserves, through the NC Bar Association Bankruptcy Section and the National Association of Bankruptcy Trustees. I also read *American Bankruptcy Institute* and *Lexology* articles, and keep up with E-bar and other legal update emails. I attend numerous continuing legal education (CLE) courses throughout the year, including The Bar Foundation's Annual Bankruptcy Institute, the Eastern Bankruptcy Institute, and the National Association of Bankruptcy Trustees seminars. Because the bankruptcy bar is so collegial, I really love attending the CLEs. I always discover something new and enjoy the company of the other attorneys as well as the opportunity to learn from and help each other.

Q: Is certification important in your practice area?

Certification is very important in the bankruptcy practice today. It's a tricky practice area and a bankruptcy lawyer has to do more than just know the basics of the bankruptcy code. To be effective, you really have to delve in and understand the nuances.

Because bankruptcy is a hot area right now, many lawyers want to handle those cases. I think the five-year minimum experience requirement for certification is critical. In this economy, it's really important to identify lawyers who are experienced in these cases from those who are just dabbling.

Q: How does certification benefit the public?

Certification provides an objective way for potential clients to see which lawyers are active in the profession. I see many company owners and corporate attorneys who have worked with a particular business for years. They are deeply invested in the success or failure of the company and it is sometimes difficult to hand it off to me, trusting that I will know how to best handle the situation. The certification provides some comfort to them that they're making the right decision.

Q: What would you say to encourage other lawyers to pursue certification?

Becoming board certified is definitely worth the effort. I encourage those who may qualify to seriously consider applying this year. ■

For more information on the State Bar's specialization program, please us on the web at http://www.nclawspecialists.gov.

Internet Angst or I Went to Law School, Not MIT

By Suzanne Lever

I am just going to say it. As one of the ethics counsel at the North Carolina State Bar, I hate the Internet. Understanding the Internet is like raising a child. Just as soon as you think you have it figured out, something new gets thrown at you. Or maybe it is more like that mythological creature with all the heads where if you cut off one head, two more heads grow back in its place.

The Ethics Committee first encountered the beast that is the Internet in 1996. In RPC 239 (October 18, 1996), the Ethics Committee addressed the propriety of a law firm having its own website. The opinion provides that it is permissible for a lawyer to display information about his or her legal services on "a site on the World Wide Web which can be accessed via the Internet, a global network of interconnected computers." (We were so young and naïve then.) RPC 239 provides that advertising on the Internet is permissible so long as the website does not contain information that is false or misleading, lists all jurisdictions in which the lawyers in the firm are licensed to practice law, and discloses the geographic location of the law firm's principal office. Seems simple enough.

Oh, for the good old days. At the recent quarterly meeting, the Ethics Committee considered three agenda items dealing with the ever-changing, ever-technical, ever-incomprehensible landscape that is Internet advertising.[1] Proposed 2010 FEO 14 (Using search engine keywords to advertise on the Internet), an inquiry on utilizing live chat support services on a law firm website, and an inquiry on advertising on the Groupon website.

Prior to this deluge of inquiries pertaining to heretofore unheard of Internet offerings, the predominant issue surrounding Internet advertising was the permissible content on law firm websites. In 2000 FEO 1, the Ethics Committee determined that statements about a lawyer's or a law firm's record in obtaining favorable verdicts was permissible on a firm's website if the information was provided in a certain context. This opinion was recently overruled by 2009 FEO 16. The new opinion provides that a law firm may include a "case summary" section on its website, so long as the section contains factually accurate information accompanied by an appropriate disclaimer.

Okay, so it took a few drafts, but we ultimately got the whole "case summary sections" controversy settled. But now the Ethics Committee is faced with numerous inquiries pertaining to Internet advertising options that clearly were not even a twinkle in the eyes of the committee that revised the Rules of Professional Conduct in 2003.

In one inquiry, the Ethics Committee considers the ethical issues surrounding a lawyer advertising on a "deal of the day" or "group coupon" website. A consumer registers his or her email address and city of residence with the company's website. The company emails local "daily deals" to registered consumers. The daily deals are generally for services such as spa treatments, tourist attractions, restaurants, etc. But now, lawyers would like to advertise legal services on these "deal of the day" websites as well. In connection with this inquiry, the Ethics Committee considered, among other issues, the potential for prohibited fee sharing with a nonlawyer, as well as possible refund and trust accounting issues. This opinion is going back to a subcommittee a second time for further head scratching.

In Proposed 2010 FEO 14, the Ethics Committee considered a lawyer's actions in connection with a search engine company's search-based advertising program. Apparently the program allows advertisers (in our case lawyers) to select specific words or phrases that should trigger their advertisements. When a "user" performs a search, the advertisements triggered by the relevant words *magically* appear, along with the search engine's main search results. The specific inquiry considered by the committee asked whether it is a violation of the Rules of Professional Conduct for one lawyer to select another lawyer's name as an advertisement trigger. So for example, if Attorney Joe Smith selects as his advertisement keywords "Attorney Jack Jones," when an Internet user then enters "Attorney Jack Jones" in the search engine, a link to Attorney Joe Smith's website appears as an advertisement. A link to Attorney Jack Jones' website would also appear in the main search results. This one is also going back to a subcommittee for further rumination. The inquiry always invokes a "lively" discussion from the members of the Ethics Committee. What do you think? Does this behavior rise to the level of deceptive conduct under Rule 8.4 or is it just clever marketing? Feel free to join the discussion.

In the third inquiry, the Ethics Committee considers whether a law firm may use a "live chat support service" on its website. Apparently, after downloading the applicable software program to the firm website, a "button" is displayed on the website which reads something like "Click Here to Chat Live." Once a visitor clicks on the button to request a live chat, the visitor will be able to have a typed-out conversation in real-time with an agent of the law firm. Depending on the software program purchased, in addition to the live chat "button" being displayed on the website, a pop-up window may also appear on the screen specifically asking visitors if they would like "live help." In another form of the service, a computer generated voice "*speaks*" to the visitor and asks if the visitor would like live assistance. At issue here is whether the live chat support service amounts to improper in-person solicitation. Relying on the fact that the public has become desensitized to the various interactive features of the Internet, and understands the right to ignore electronic communications, the Ethics Committee gave this technology its blessing and is publishing the opinion comment.

Okay people, what is next?? If I get an

CONTINUED ON PAGE 31

Top Five Ways to Minimize Interruptions

BY VICKI VOISIN

How can you get your work done if you have constant interruptions? You can't...and it's very frustrating.

You have to practice self-defense when it comes to interruptions. If you don't take steps to minimize them, your time will be wasted and your productivity will suffer. Studies show that the average worker is interrupted every eight minutes. The same studies reveal that 15% of the interruptions are important, while the remaining 85% are a waste of time.

Telephone calls and e-mail are major culprits, but even worse are the two-legged interrupters: your co-workers.

Here are five tips to minimize those two-legged interruptions and keep you in the productivity fast lane:

1. Stand up when someone enters your workspace or when they've over-stayed their welcome. When you stand, you send a message that the meeting will either be brief or that it has ended. This works every time. You start moving, they start moving, end of interruption.

2. Never ask "How are you?" when someone stops by your office. This is an open invitation to chat. Do you really want to hear about their gallbladder surgery? Instead, ask, "What can I do for you?" This will get you right to the point of the interruption.

3. A bit of creative workspace re-organization goes a long way. If your desk faces the door, turn it so you don't look right into the hallway at everyone who passes. Once they make eye contact, they always stop to chat.

Can you remove your chairs? If not, stack some files on them so the office pest (i.e., time waster) can't take root for a half hour of blah blah blah. Last, NEVER have a bowl of candy on your desk. Who can resist a handful of M&Ms and a little conversation to go along with them?

4. If you're asked to answer a "quick question" or someone wants "just a minute" of your time, beware! Your first question should be, "How much time do you need?" If you have the time available, go for it and hold them to the deadline. If you don't have a spare 15 minutes, schedule an appointment with them later.

Rehearse a few lines like: "I'm sorry, but I need to finish this deposition summary in the next hour. Can we talk later?" or "Attorney X is waiting for this research. I can spend some time with you at 2:00 this afternoon." If you use lines like these, you've turned the tables and you're now meeting on your own terms.

5. Urge co-workers to accumulate their questions. They should save all but urgent issues to discuss with you in one chunk of time. It's much more productive to spend 20 minutes discussing five client matters than it is to talk about one client matter for ten minutes every hour.

Bonus tip: Don't interrupt yourself! Determine the time of day you are most productive (early morning? mid-afternoon?) and make yourself unavailable to the world during that time every day. Shut your door. Turn off anything that might be noisy or distracting. Stock your desk with all the supplies you need to eliminate unnecessary trips to the supply room. Then, practice what you preach: gather your questions and assignments and interrupt your co-workers only once.

Your challenge: Make a short list of the interruptions you will allow. For all the rest, decide which of today's tips you can implement to minimize them. Once that decision is made, take the necessary steps to curb those interruptions and you'll find yourself on your way to a more productive day. ■

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Legal Ethics (cont.)

inquiry asking whether it is permissible for a lawyer's website to be programmed to project a hologram into a potential client's house, I might just lose it. (Please, please don't tell me this technology already exists.) ■

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Endnote

1. Not to mention the two opinions on "cloud computing" that were also on the agenda and are published for comment in this edition of the *Journal*.

CORRECTION: Legal Ethics Article in the Spring 2011 edition of the *Journal*.

The article entitled *OCOB Opines that Lawyers May Not Secure Legal Fees with Deeds of Trust on Clients' Residential Property* in the last edition of the *Journal* implied that the Office of the Commissioner of Banks (OCOB) issued an opinion on the application of the licensure requirements in the North Carolina Secure and Fair Enforcement Mortgage Licensing Act (NC S.A.F.E.), N.C. Gen. Stat. §53-244.010 *et seq.*, to a lawyer who prepares a deed of trust on a client's residence to secure the lawyer's own legal fee. The OCOB has not issued an official opinion or declaratory ruling on this issue. We apologize to the commissioner of banks for any misrepresentation. Lawyers are encouraged to review and comply with NC S.A.F.E. when seeking a deed of trust on client's residence to secure a fee.

Grievance Committee and DHC Actions

Disbarments

Sybil Barrett of Charlotte falsely represented on a HUD-1 Settlement Statement that the proceeds of the seller's loan were a downpayment by the buyer. Barrett was disbarred by the Disciplinary Hearing Commission.

Gregory Bartko of Atlanta surrendered his law license and was disbarred by the Wake County Superior Court. Bartko was convicted in federal court in the Eastern District of North Carolina of one count of conspiracy, four counts of mail fraud, and one count of the sale of unregistered securities.

Joel H. Brewer of Roxboro, formerly the elected district attorney for the 9A Judicial District, surrendered his law license and was disbarred by the Wake County Superior Court. Brewer was convicted of nine misdemeanor criminal charges, including seven counts of assault on a female.

Kelton Brown of Knightdale surrendered his law license to the DHC and was disbarred. Brown used entrusted funds for his own personal benefit and for the benefit of third parties without authorization to do so and practiced law while he was administratively suspended.

Tonya Ford of Raleigh surrendered her law license to the DHC and was disbarred. Ford used entrusted funds for her own personal benefit without authorization to do so and practiced law while she was administratively suspended.

Mark Jenkins of Waynesville neglected multiple clients, made false representations to clients about the statuses of their cases, collected excessive fees, and failed to respond timely to the Bar. Jenkins was disbarred by the DHC.

Larry Overton of Ahoskie surrendered his law license to the State Bar Council and was disbarred. Overton misappropriated entrusted funds.

David Rogers of Raleigh was convicted of attempted murder and is in prison. He was disbarred by the Disciplinary Hearing Commission.

The DHC found that **Holly Stevens** of Fayetteville prepared and submitted to lenders HUD-1 Settlement Statements that contained false information and/or that failed to accurately portray the transaction, manipulated the timing of preliminary opinions of title to hide flip transactions, made false representations of ownership on preliminary opinions of title, and disbursed funds inconsistently with the representations on the HUD-1s. Stevens was disbarred.

Suspensions & Stayed Suspensions

Charles Feagan of Columbus neglected his client's case and failed to respond to the Bar. Feagan was reprimanded for similar misconduct in 2009. The DHC suspended his license for five years.

Kimberly Jordan of Raleigh made false representations to a client to obtain fees for services she had not rendered and failed to respond to the Bar. The Disciplinary Hearing Commission suspended her license for three years.

By order of reciprocal discipline, **James Kernan** of Oriskany, NY, was suspended for five years or the term of his federal probation, whichever is longer. The Supreme Court of New York disciplined Kernan for his conviction in federal court of knowingly permitting a convicted felon to be engaged in the business of insurance.

Pittsboro lawyer **Cabell Regan** committed numerous trust account violations, including commingling personal and entrusted funds, using entrusted property for the benefit of a third party without authorization, and failing to reconcile his trust account. Regan was also convicted of five counts of willful failure to file state income tax returns. The Disciplinary Hearing Commission suspended his license for three years. The suspension is stayed for two years upon compliance with numerous conditions.

The DHC found that Raleigh lawyer **Phillip Rose** facilitated fraudulent real estate transactions by preparing and submitting false HUD-1 Settlement Statements. His license was suspended for one year. The suspension is stayed for two years upon compliance with numerous conditions.

Carmen Battle, **Pauline Makia**, and **Jamie Newsom** practiced law in Fayetteville. They unwittingly facilitated mortgage fraud because they were incompetent and/or because they did not supervise their non-lawyer assistants. The Disciplinary Hearing Commission suspended their law licenses for five years. The suspensions are stayed upon compliance with numerous conditions.

Show Cause Hearings

In June, 2010, **William E. Brown** of Fayetteville was suspended for three years for attempting to have sex with his clients and engaging in conduct prejudicial to the administration of justice. The suspension was stayed for three years contingent upon his compliance with extensive conditions. The State Bar filed a motion for Brown to show cause why the stay should not be lifted because of his failure to comply with the conditions. The Disciplinary Hearing Commission lifted the stay and activated the suspension for six months. Brown must satisfy the conditions in the original order to be eligible for reinstatement.

Interim Suspensions

The DHC entered an interim order suspending the law license of **Theophilus O. Stokes III** of Greensboro following his conviction for two misdemeanor counts of receiving stolen goods.

Censures

Charlotte lawyer **Pamela Hunter** was censured by the Grievance Committee for filing a frivolous medical malpractice claim. She later abandoned the lawsuit and offered to pay her client money from her personal funds. She did not explain the payments in a way that allowed the client to make an

informed decision about the payments, leading the client to believe the lawsuit had been settled.

John T. Orcutt of Raleigh was censured by the Grievance Committee for making misleading statements in advertising his legal services by comparing his services with other lawyers' services when the comparisons could not be substantiated.

Travis Simpson of Winston-Salem was censured by the Grievance Committee. He failed to respond promptly to the Grievance Committee, failed to give a full and fair disclosure of the facts surrounding the grievance, failed to return property owned by his client, neglected his client's case, failed to keep his client apprised of the status of the case, and failed to promptly return a client file.

The Grievance Committee censured Charlotte lawyer **Robert K. Trobich**. He failed to comply with the Bankruptcy Court's order to appear, failed to respond to motions for sanctions and contempt, failed to appear for hearings on those motions, and failed to comply with court orders. The Bankruptcy Court found that Trobich engaged in willful, intentional, gross, and flagrant violations of the court's orders.

High Point lawyer **Stephen Wallace** was censured by the Grievance Committee for filing frivolous claims and using means that had no substantial purpose but to embarrass, delay, or burden third persons. He attempted to enforce an order awarding attorney fees that he knew was entered in error. Wallace was previously disciplined for other misconduct in the same litigation.

Reprimands

Raleigh lawyer **John R. Bennett III** was reprimanded by the Grievance Committee for failing to participate in the fee dispute resolution process in good faith and for failing to respond to the State Bar.

Maynard A. Harrell Jr. of Plymouth was reprimanded by the Grievance Committee for failing to turn over three client files promptly and for failing to respond promptly to the State Bar.

W. Ray Hudson of Troy was reprimanded for failing to respond to the Grievance Committee. Hudson eventually produced the information sought after he was compelled to do so by court order.

Bryan D. Martin of Advance was reprimanded for failing to respond to the Grievance Committee.

Transfers to Disability Inactive Status

The DHC transferred **Annette Exum** of Raleigh to disability inactive status.

Albert M. Neal Jr. of Candler asserted a disability defense to disciplinary charges. The Disciplinary Hearing Commission stayed the disciplinary proceedings, transferred Neal to temporary disability inactive status, and ordered him to undergo a medical evaluation. ■

In Memoriam

Bobby Glenn Abrams
Wilson

Albeon Griffin Anderson
Wilmington

Mark Alan Ash
Raleigh

John Linder Barber Sr.
Winston-Salem

Avery Colburn Bordeaux
Raleigh

Cynthia Y. Carroll
New Bern

Gary Douglas Chamblee
Charlotte

William Maxie Davis Jr.
Clinton

Jennie Dorsett
Raleigh

William Gordon Edwards
Jamestown

Wallace C. Harrelson
Greensboro

John Mark Heavner
Gastonia

Charles Bernard Hodson
Chapel Hill

Mark Layne Jenkins
Waynesville

Vaughn Edward Jennings Jr.
Winston-Salem

William Joslin
Raleigh

Howard Alvin Knox Jr.
Rocky Mount

Solomon Levine
Charlotte

Ernest W. Machen Jr.
Charlotte

Darrell Lane Matthews
Charlotte

Colleen Kelly McCarthy
Fayetteville

James B. McMullan
Washington

Rebecca Harbour Partesotti
Takoma Park, MD

Edward Knox Powe III
Durham

Jimart Lee Rhinehart
Wilmington

Clyde Thomas Rollins
Greensboro

Donald Miller Seltzer
Charlotte

John Elwood Shackelford
Asheville

Thomas Warwick Steed Jr.
Raleigh

William K. Van Allen
Charlotte

Debra Leigh Whited
Burlington

James Monroe Yelton Jr.
Johnson City, TN

Herman W. Zimmerman Jr.
Lexington

Featured Artist—Marvin Saltzman

It is difficult to make a statement about my work, the purpose of making my work, or the [effect] of its imagery upon viewers. I have been trying to put the visual fact into the verbal for the past 40 years...since the time when I decided that the landscape would be the base of my visual ramblings. It is now possible to put this into a few words...“I draw from the landscape site-specific and paint about the landscape.” While those few words tell all there is to tell...some want more.

—Marvin Saltzman

Cumberland #3

Marvin Saltzman has been creating and exhibiting his award-winning unique landscape drawings and paintings for over four decades. His works have been displayed nationally in numerous private and public collections from California to New York.

Saltzman was a recipient of the 1998 North Carolina Award in Fine Arts given by the North Carolina Department of Cultural Resources for his “strong, passionate, abstract paintings and the equally strong feelings he inspires in students.”[1]

Saltzman was born in Chicago, Illinois, and attended the University of Chicago and the School of the Art Institute of Chicago from 1954 to 1956. He received his Bachelor of Fine Arts and Masters of Fine Arts from the University of Southern California and went on to teach at several universities, including the University of North Carolina at Chapel Hill from 1967 to 1996. While at UNC, he played a significant role in the renovation of the Department of Art.

Saltzman's paintings have been displayed in North Carolina at WakeMed Hospital, the Ackland Art Museum, Duke University, the Greenville Museum of Art, and IBM Corporation, and nationally at several locations including the Library of Congress, the National Academy of Sciences, and the National Museum of American Art.

Saltzman explains the process for creating his landscape drawings and paintings as follows:

I paint in series...as few as four and as many as 24. I investigate through multiple layers of paint visual possibilities of a given PLACE. What a viewer sees is a surface created on top of a complex compositional statement…multiple layers of paint made with brushes #1 through 3...and an intense use of color...a palimpsest...allowing the remnants of previous layers to emerge as the viewer examines the painting from different distances. Over the surface is an array of “glyphs,” which force the viewer to move not only into the canvas but around the surface…dictated by the use of my brush and color choice. It is about my landscape...My sense of a given PLACE.

Saltzman currently lives and creates in Chapel Hill, North Carolina. ■

Each quarter, the works of a different contemporary North Carolina artist are displayed in the storefront windows of the State Bar building. The artwork enhances the exterior of the building and provides visual interest to pedestrians passing by on Fayetteville Street. The State Bar is grateful to The Mahler Fine Art, the artists' representative, for arranging this loan program. The Mahler is a full-service fine art gallery representing national, regional, and North Carolina artists, and provides residential and commercial consulting. The Mahler, along with its sister gallery, The Collectors Gallery, are located in downtown Raleigh. Readers who want to know more about an artist may contact owners Rory Parnell and Megg Rader at (919) 896-7503 or info@themahlerfineart.com.

Endnote

1. Excerpt from the 1998 North Carolina Awards Brochure www.marvinsaltzman.com/about2.php.

Committee Considers the Risks of Software as a Service and Online Banking

Council Actions

At a meeting on April 22, 2011, upon the recommendation of the Ethics Committee, the State Bar Council adopted the opinions summarized below:

2011 Formal Ethics Opinion 1

Lawyer as Advocate and Witness

Opinion provides guidelines for the application of the prohibition in Rule 3.7 on a lawyer serving as both advocate and witness when the lawyer is the litigant.

2011 Formal Ethics Opinion 2

Former Client's Failure to Object to Conflict

Opinion sets forth the factors to be taken into consideration when determining whether a former client's delay in objecting to a conflict constitutes a waiver.

2011 Formal Ethics Opinion 3

Advising a Criminal Defendant Who is an Undocumented Alien

Opinion rules that a criminal defense lawyer may advise an undocumented alien that deportation may result in avoidance of a criminal conviction and may file a notice of appeal to superior court, although there is a possibility that the client will be deported. [Note: The council revised the opinion, changing the client/criminal defendant's name from "Hector" to "Client A" throughout.]

Ethics Committee Actions

At its meeting on April 21, 2011, the Ethics Committee voted to withdraw and send the following proposed opinions to subcommittees for further (or continued) study: Proposed 2010 FEO 14, *Use of Search Engine "Adwords" to Advertise on Internet*, and Proposed 2011 FEO 4, *Participation in Reciprocal Referral Agreement*. Proposed 2011 Formal Ethics Opinion 5, *Representation of Lender in Contested Foreclosure When Corporate Trustee is Owned by Spouse and Paralegal*, published in the last edition of the *Journal*, will be recommended for adoption at the July quarterly meeting of the council. A proposed opinion previously published in the *Journal* as Proposed 2010 FEO 7, *Subscribing to Software as a Service While Fulfilling the Duties of Confidentiality and Preservation of Client Property*, was revised and is issued below under a new opinion number in order that it might be published in tandem with a related proposed opinion on online banking. (No opinion will be issued as "2010 FEO 7.") Three new proposed opinions are published for comment. The comments of readers are welcomed.

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.

Proposed 2011 Formal Ethics Opinion 6
Subscribing to Software as a Service While Fulfilling the Duties of Confidentiality and Preservation of Client Property
April 21, 2011

Proposed opinion rules that a law firm may contract with a vendor of software as a service, provided the lawyer uses reasonable care to assure that the risks that confidential client information may be disclosed or lost are effectively minimized.

Inquiry #1:

Much of software development, including the specialized software used by lawyers for case or practice management, document management, and billing/financial management is moving to the "software as a service" (SaaS) model. The American Bar Association's Legal Technology Resource Center explains SaaS as follows:

> SaaS is distinguished from traditional software in several ways. Rather than installing the software to your computer or the firm's server, SaaS is accessed via a web browser (like Internet Explorer or FireFox) over the Internet. Data is stored in the vendor's data center rather than on the firm's computers. Upgrades and updates, both major and minor, are rolled out continuously…. SaaS is usually sold on a subscription model, meaning that users pay a monthly fee rather than purchasing a license up-front.[1]

SaaS for law firms may involve the storage of a law firm's data, including client files, billing information, and work product on remote servers rather than on the law firm's own computer and, therefore, outside the direct control of the firm's lawyers. Lawyers have duties to safeguard confidential client information, including protecting that information from unauthorized disclosure, and to protect client property from destruction, degradation, or loss (whether from system failure, natural disaster, or dissolution of a vendor's business). They also have a continuing need to retrieve client data in a form that is usable outside of a vendor's product.[2] Given these duties and needs, may a law firm use SaaS?

Opinion #1:

Yes, provided steps are taken effectively to minimize the risk of inadvertent or unauthorized disclosure of confidential client information and to protect client property, including the information in a client's file, from risk of loss.

The use of the Internet to transmit and store client information presents significant challenges. In this complex and technical environment, a lawyer must be able to fulfill the fiduciary obligations to protect client information and property from risk of disclosure and loss. The lawyer must protect against security weaknesses unique to the Internet,

particularly "end-user" vulnerabilities found in the lawyer's own law office. The lawyer must also engage in continuous education about ever-changing security risks presented by the Internet.

Rule 1.6 of the Rules of Professional Conduct states that a lawyer may not reveal information acquired during the professional relationship with a client unless the client gives informed consent or the disclosure is impliedly authorized to carry out the representation. Comment [17] explains, "A lawyer must act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision." Comment [18] adds that, when transmitting confidential client information, a lawyer must take "reasonable precautions to prevent the information from coming into the hands of unintended recipients."

Rule 1.15 requires a lawyer to preserve client property, including information in a client's file such as client documents and lawyer work product, from risk of loss due to destruction, degradation, or loss. *See also* RPC 209 (noting the "general fiduciary duty to safeguard the property of a client"); RPC 234 (requiring the storage of a client's original documents with legal significance in a safe place or their return to the client); and 98 FEO 15 (requiring exercise of lawyer's "due care" when selecting depository bank for trust account).

Although a lawyer has a professional obligation to protect confidential information from unauthorized disclosure, the Ethics Committee has long held that this duty does not compel any particular mode of handling confidential information, nor does it prohibit the employment of vendors whose services may involve the handling of documents or data containing client information. *See* RPC 133 (stating there is no requirement that firm's waste paper be shredded if lawyer ascertains that persons or entities responsible for the disposal employ procedures that effectively minimize the risk of inadvertent or unauthorized disclosure of confidential information). Moreover, while the duty of confidentiality applies to lawyers who choose to use technology to communicate, "this obligation does not require that a lawyer use only infallibly secure methods of communication." RPC 215. Rather, the lawyer must use reasonable care to select a mode of communication that, in light of the circumstances, will best protect confidential communications, and the lawyer must advise affected parties if there is reason to believe that the chosen communications technology presents an unreasonable risk to confidentiality. *Id.*

Furthermore, in 2008 FEO 5, the committee held that the use of a web-based document management system that allows both the law firm and the client access to the client's file is permissible:

> provided the lawyer can fulfill his obligation to protect the confidential information of all clients. A lawyer must take steps to minimize the risk that confidential client information will be disclosed to other clients or to third parties. *See* RPC 133 and RPC 215….A security code access procedure that only allows a client to access its own confidential information would be an appropriate measure to protect confidential client information….If the law firm will be contracting with a third party to maintain the web-based management system, the law firm must ensure that the third party also employs measures which effectively minimize the risk that confidential information might be lost or disclosed. *See* RPC 133.

In a recent ethics opinion, the Arizona State Bar's Committee on the Rules of Professional Conduct concurred with the interpretation set forth in North Carolina's 2008 FEO 5 by holding that an Arizona law firm may use an online file storage and retrieval system that allows clients to access their files over the Internet provided the firm takes reasonable precautions to protect the security and confidentiality of client documents and information.[3]

In light of the above, the Ethics Committee concludes that a law firm may use SaaS if reasonable care is taken effectively to minimize the risks to the disclosure of confidential information and to the security of client information and client files.

No opinion is expressed on the business question of whether SaaS is suitable for a particular law firm.

Inquiry #2:

Does "reasonable care" require any specific practices?

Opinion #2:

Yes. Reasonable care requires, at a minimum, the security measures listed below. Note, however, that these are only minimum requirements. Lawyers are advised to consult with a security professional when determining what additional steps should be taken. *See also* Opinion #3 below.

- An agreement on how confidential client information will be handled in keeping with the lawyer's professional responsibilities must be included in the SaaS vendor's Terms of Service or Service Level Agreement, or in a separate agreement that states that the employees at the vendor's data center are agents of the law firm and have a fiduciary responsibility to protect confidential client information and client property.
- The agreement with the vendor must specify that firm's data will be hosted only within a specified geographic area. If by agreement the data is hosted outside of the United States, the law firm must determine that the hosting jurisdiction has privacy laws, data security laws, and protections against unlawful search and seizure that are as rigorous as those of the United States and the state of North Carolina.
- If the lawyer terminates use of the SaaS product, the SaaS vendor goes out of business, or the service otherwise has a break in continuity, the law firm must have a method for retrieving the data, the data must be available in a non-proprietary format that is compatible with other firm software or the firm must have access to the vendor's software or source code, and data hosted by the vendor or third party data hosting company must be destroyed or returned promptly.
- The law firm must be able get data "off" the vendor's or third party data hosting company's servers for lawyers' own use or in-house backup offline.
- Employees of the firm who use SaaS receive training on and are required to abide by end-user security measures including, but not limited to, the creation of strong passwords and the regular replacement of passwords.

Mandated security measures have the potential to create a false sense of security in an environment where the risks are continually changing. Therefore, due diligence and perpetual education as to the security risks of SaaS are required.

Inquiry #3:

Are there other ways to minimize risk of loss or unauthorized disclosure of client prop-

erty or confidential information that a law firm should consider when contracting with a SaaS vendor?

Opinion #3:

Yes, the list[4] below provides some ways to minimize the security risks of SaaS.[5] The list is not all-inclusive, and consultation with a security professional competent in the area of online computer security is recommended when contracting with a SaaS vendor. Moreover, given the rapidity with which computer technology changes, what constitutes reasonable care may change over time and a law firm should employ or periodically consult with such a professional.

• The financial history of the SaaS vendor has been investigated and indicates financial stability.

• A lawyer for the firm has read and understood the user or license agreement, including the security policy, and understands the meaning of the terms.

• The measures for safeguarding the physical and electronic security and confidentiality of stored data of the SaaS vendor or any third-party data hosting company, including but not limited to firewalls, encryption techniques, socket security features, and intrusion-detection systems,[6] have been evaluated by the law firm or a security professional and are satisfactory.

• The law firm, or a security professional, has reviewed copies of the SaaS vendor's security audits and found them satisfactory.

• To safeguard against natural disaster, the SaaS vendor regularly backs up the firm's data to multiple data centers in different locations within the specified geographic area.

• The agreement with the vendor confirms that access to the firm's data will be limited to those employees of the vendor or any third-party data hosting company who are informed of the fiduciary responsibility to protect client information.

• The agreement with the vendor provides that the law firm owns the data.

• Clients with access to shared documents are aware of the confidentiality risks of showing the information to others. *See* 2008 FEO 5.

• The law firm has a back-up for shared document software in case of service interruption such as an outside server going down.

• The firm lawyers are educated on the risks of utilizing the Internet to transmit and store client information and are trained on security measures including, but not limited to, creating strong passwords and regularly changing the passwords.

• Security software is installed on the computers at the law firm to ensure that the user is connected to the SaaS vendor website and the computer is protected against malware, viruses, and hacker attacks.

Endnotes

1. *FYI: Software as a Service (SaaS) for Lawyers*, ABA Legal Technology Resource Center www.abanet.org/ tech/ltrc/ fyidocs/saas.html.
2. *Id.*
3. Paraphrasing the description of a lawyer's duties in Arizona State Bar Committee on Rules of Professional Conduct, Opinion 09-04 (Dec. 9, 2009).
4. List derived from the recommendations of Erik Mazzone, Director of Center for Practice Management, North Carolina Bar Association (in email communications with counsel to the Ethics Committee, 3/30/10 and 3/31/10) and ABA Legal Technology Resource Center, *see* fn. 2.
5. Standards for better storage and transmission of client data were recently proposed by the International Legal Technology Standards Organization, a non-profit organization. These can be found at www.iltso.org.
6. A firewall is a system (which may consist of hardware, software, or both) that protects the resources of a private network from users of other networks. Encryption techniques are methods for ciphering messages into a foreign format that can only be deciphered using keys and reverse encryption algorithms. A socket security feature is a commonly-used protocol for managing the security of message transmission on the Internet. An intrusion detection system is a system (which may consist of hardware, software, or both) that monitors network and/or system activities for malicious activities and produces reports for management. Definitions and additional information may be found at www.iwebtool.com; www.numatek.com; www.whatis.com; www.wikipedia.org; and www.wisegeek.com.

Rules, Procedure, Comments

All opinions of the Ethics Committee are predicated upon the Rules of Professional Conduct as revised effective March 1, 2003, and thereafter amended, and referred to herein as the Rules of Professional Conduct (2003). The proposed opinions are issued pursuant to the "Procedures for Ruling on Questions of Legal Ethics." 27 N.C.A.C. ID, Sect .0100. Any interested person or group may submit a written comment or request to be heard concerning a proposed opinion. Any comment or request should be directed to the Ethics Committee at PO Box 25908, Raleigh, NC 27611, by June 30, 2011.

Captions and Headnotes

A caption and a short description of each of the proposed opinions precedes the statement of the inquiry. The captions and descriptions are provided as research aids and are not official statements of the Ethics Committee or the council.

Proposed 2011 Formal Ethics Opinion 7
Using Online Banking to Manage a Trust Account
April 21, 2011

Proposed opinion rules that a law firm may use online banking to manage its trust accounts provided the firm's managing lawyers are regularly educated on the security risks and actively maintain end-user security.

Inquiry:

Most banks and savings and loans provide "online banking," which allows customers to access accounts and conduct financial transactions over the Internet on a secure website operated by the bank or savings and loan. Transactions that may be conducted via online banking include account-to-account transfers, payments to third parties, wire transfers, and applications for loans and new accounts. Online banking permits users to view recent transactions and view and/or download cleared check images and bank statements. Additional services may include account management software.

Financial transactions conducted over the Internet are subject to the risk of theft by hackers and other computer criminals. Given the duty to safeguard client property, particularly the funds that a client deposits in a lawyer's trust account, may a law firm use online banking to manage a trust account?

Opinion:

Yes, provided steps are taken effectively to

minimize the risk of loss or theft specifically including the regular education of the firm's managing lawyers on the ever-changing security risks of online banking and the active maintenance of end-user security.

As noted in [Proposed] 2011 FEO 6, *Subscribing to Software as a Service While Fulfilling the Duties of Confidentiality and Preservation of Client Property*, the use of the Internet to transmit and store client data (or, in this instance, data about client property) presents significant challenges. In this complex and technical environment, a lawyer must be able to fulfill the fiduciary obligations to protect client information and property from risk of disclosure and loss. The lawyer must protect against security weaknesses unique to the Internet, particularly "end-user" vulnerabilities found in the lawyer's own law office. The lawyer must also engage in continuous education about ever-changing security risks presented by the Internet.

Rule 1.15 requires a lawyer to preserve client property, to deposit client funds entrusted to the lawyer in a separate trust account, and to manage that trust account according to strict recordkeeping and procedural requirements. *See also* RPC 209 (noting the "general fiduciary duty to safeguard the property of a client") and 98 FEO 15 (requiring a lawyer to exercise "due care" when selecting depository bank for trust account). The rule is silent, however, about online banking.

Online banking may be used to manage a client trust account if the fiduciary obligations in Rule 1.15 can be fulfilled. To do this, a lawyer who is managing a trust account must use reasonable care to effectively minimize the risks to client funds on deposit in the trust account by remaining educated as to the dynamic risks involved in online banking and ensuring that the law firm invests in proper protection and multiple layers of security to address those risks. *See* [Proposed] 2011 FEO 6.

A lawyer who is managing a trust account has affirmative duties to regularly educate himself as to the security risks of online banking; to actively maintain end-user security at the law firm through safe practices such as strong password policies and procedures, the use of encryption and security software, and the hiring of an information technology consultant to advise the lawyer or firm employees; and to ensure that all staff members who assist with the management of the trust account receive training on and abide by the security measures adopted by the firm. Understanding the contract with the depository bank and the use of the resources and expertise available from the bank are good first steps toward fulfilling the lawyer's fiduciary obligations.

This opinion does not set forth specific security requirements because mandatory security measures would create a false sense of security in an environment where the risks are continually changing. Instead, due diligence and perpetual education are required. A lawyer must fulfill his fiduciary obligation to safeguard client funds by applying the same diligence and competency to manage the risks of online banking that a lawyer is required to apply when representing clients.

Proposed 2011 Formal Ethics Opinion 8
Utilizing Live Chat Support Service on Law Firm Website
April 21, 2011

Proposed opinion provides guidelines for the use of live chat support services on law firm websites.

Inquiry:

A law firm would like to utilize a live chat support service on its website. Typically, such a service requires the law firm to download a software program to the firm website. After the software is downloaded, a "button" is displayed on the website which reads something like "Click Here to Chat Live." The button is often accompanied by a picture of a person with a headset. Once a visitor clicks on the button to request a live chat, the visitor will be able to have a typed out conversation in real-time with an agent identified as perhaps a "law firm staff member" or an "operator." The agent will guide the visitor through a series of screening questions through the use of a script. Typically, the agent will learn about the facts of the potential case. The agent will also obtain contact information for the visitor. The agent then emails a transcript of the "chat" to the law firm. In some instances, the law firm pays only for the transcripts of "chats" in which the visitor provides a way for the law firm to contact him or her.

Depending on the software program purchased, in addition to the live chat "button" being displayed on the website, a pop-up window may also appear on the screen specifically asking visitors if they would like "live help." The window may contain a picture of a person with a headset and reads something like, "Hi, you may just be browsing but we are here to answer your questions. Please click 'yes' for live help." The pop-up window is software-generated. It is only after the visitor clicks on the button that the live agent is engaged.

In another form of the live chat support service, the "button" and pop-up window showing a picture of a person with a headset is displayed on the website and a voice says something like, "Hi, we are here to answer your questions. Please click 'yes' for live help." These statements are presumably software-generated. It is only after the visitor clicks on the "yes" button that the live agent is engaged.

Is the utilization of these types of live chat support services a violation of the Rules of Professional Conduct?

Opinion:

No. Rule 7.3(a) provides that a lawyer shall not by "in-person, live telephone, or real-time electronic contact" solicit professional employment from a potential client unless the person contacted is a lawyer or has a family, close personal, or prior professional relationship with the lawyer. Instant messaging, chat rooms, and other similar types of conversational computer-accessed communication are considered to be real-time or interactive communication. The interactive typed conversation with a live agent provided by the live chat support service described above constitutes a real-time electronic contact.

It is important to note that the prohibition in Rule 7.3(a) applies only to lawyer-initiated contact. Rule 7.3 does not prohibit real-time electronic contact that is initiated by a potential client. In each of the instances described above, the website visitor has made the initial contact with the firm. The visitor has chosen to visit the law firm's website, indicating that they have some interest in the website's content. It is appropriate at this juncture for the law firm to offer the website visitor live assistance.

In addition to the fact that the potential client has initiated the contact with the law firm, the circumstances surrounding this type of real-time electronic contact do not trigger the concerns necessitating the prohibition set

out in Rule 7.3. Comment [1] to Rule 7.3 explains the policy considerations behind the prohibition:

> There is a potential for abuse inherent in direct in-person, live telephone, or real-time electronic contact by a lawyer with a prospective client known to need legal services. These forms of contact between a lawyer and a prospective client subject the layperson to the private importuning of the trained advocate in a direct interpersonal encounter. The prospective client, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult fully to evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer's presence and insistence upon being retained immediately. The situation is fraught with the possibility of undue influence, intimidation, and over-reaching.

The use of a live chat support service does not subject the website visitor to undue influence or intimidation. The visitor has the ability to ignore the live chat button or to indicate with a click that he or she does not wish to participate in a live chat session.

The Philadelphia Bar Association recently issued an opinion that allows certain real-time electronic communications, including communications through blogs, chat rooms, and other social media. Philadelphia Bar Ass'n Prof'l. Guidance Comm., Op. 2010-6 (2010). The opinion states that Rule 7.3 does not bar the use of social media for solicitation where a prospective client to whom the lawyer's communication is directed has the ability "to 'turn off' the soliciting lawyer and respond or not as he or she sees fit." The Philadelphia Bar Association opined that "with the increasing sophistication and ubiquity of social media, it has become readily apparent to everyone that they need not respond instantaneously to electronic overtures, and that everyone realizes that—like targeted mail—emails, blogs, and chat room comments can be readily ignored, or not, as the recipient wishes."

Although the use of this type of technology is permissible, the practice is not without its risks, and a law firm utilizing this service must exercise certain precautions. The law firm must ensure that visitors who elect to participate in a live chat session are not misled to believe that they are conversing with a lawyer if such is not the case. While the use of the term "operator" seems appropriate for a nonlawyer, a designation such as "staff member," or something similar, would require an affirmative disclaimer that a nonlawyer staff member is not an attorney. The law firm must ensure that the nonlawyer agent does not give any legal advice.

The law firm should be wary of creating an "inadvertent" lawyer-client relationship. In addition, the law firm should exercise care in obtaining information from potential clients and be mindful of the potential consequences/duties resulting from the electronic communications. Rule 1.18 provides that a person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client and that, even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client may generally not use or reveal information learned in the consultation. Furthermore, Rule 1.18(c) prohibits a lawyer from representing a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter. Therefore, acquiring information from a prospective client via the live chat service could create a conflict of interest with a current client that would require withdrawal.

Proposed 2011 Formal Ethics Opinion 9
Use of Letterhead by Person Who is Not Employed or Affiliated with Firm
April 21, 2011

Proposed opinion rules that a lawyer may not allow a person who is not employed by or affiliated with the lawyer's firm to use firm letterhead.

Inquiry #1:

May a lawyer allow a person who is not employed by the lawyer's firm and who is not subject to the supervision or control of any lawyer with the firm to use the firm's letterhead?

Opinion #1:

No. It is professional misconduct for a lawyer to violate the Rules of Professional Conduct through the acts of another. Rule 8.4(a). The Rules prohibit false or misleading communications by a lawyer about the lawyer or the lawyer's services. Rule 7.1(a). They also prohibit conduct involving dishonesty, fraud, deceit, or misrepresentation. Rule 8.4(c). A recipient of a letter on a law firm's letterhead assumes that the letter was written by a firm lawyer or by an employee or affiliate[1] of the firm who is acting under the authority, supervision, and control of a firm lawyer. If a person who is not employed or formally affiliated with the firm sends a letter on firm letterhead, it creates the false impression that the person has the authority to act on behalf of the law firm and is being supervised by a firm lawyer. In the worst case, the recipient may falsely assume that the sender is a lawyer with the firm. A lawyer may not participate actively or passively in this deception. If a lawyer learns that someone who is not employed or affiliated with the firm is using firm letterhead to write to third parties, the lawyer must take steps to stop the misuse of the letterhead.

A lawyer may, however, allow a client to draft a letter to be printed on letterhead if the lawyer reviews and assumes responsibility for the content of the letter by signing it.

Inquiry #2:

A client would like to use the letterhead of his lawyer's firm for activities that do not constitute the practice of law. For example, when negotiating the terms of a loan with a third party, the client wants to write the terms on the firm letterhead and have the third party sign the document. The client and the lawyer anticipate that the loan will subsequently be closed by the lawyer. May a lawyer allow a client to use his firm's letterhead in this manner? May a lawyer agree to such use if the lawyer supervises or controls the content of the document?

Opinion #2:

No, because the third party may falsely believe that the client is acting with the authority of the law firm. *See* Opinion #1. In addition, it may create the false impression that the law firm is verifying or endorsing the transaction. ■

Endnote

1. A person who is not an employee but who is formally affiliated with a firm, such as a contract lawyer or paralegal, may use firm letterhead if the person is authorized to act on the firm's behalf and the affiliation is set forth on the letterhead or otherwise in the letter. *See, e.g.,* RPC 126.

Amendments Approved by the Supreme Court

At a conference on March 10, 2011, the North Carolina Supreme Court approved the following amendments to the rules of the North Carolina State Bar:

Amendments to Reinstatement Rules to Make Disciplinary Suspension Supersede Administrative Suspension

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

27 N.C.A.C. 1D, Rules of the Standing Committees of the North Carolina State Bar, Section .0900 Procedures for Administrative Committee

The amendments provide that an administrative suspension order dissolves when an order of reinstatement is granted from a disciplinary suspension.

Amendments to the Discipline Rules to Create a Trust Accounting Supervisory Program

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

The amendments create a trust accounting supervisory program. A lawyer who is found, during random auditing or otherwise, to be out of compliance with the trust accounting provisions of the Rules of Professional Conduct may be referred by the chair of the Grievance Committee to the program. A referred lawyer must provide proof of compliance with all trust accounting rules for a two-year period and, if the lawyer successfully completes the program, a grievance file will not be opened.

Amendments to the Requirements for Reinstatement from Administrative Suspension

27 N.C.A.C. 1D, Rules of the Standing Committees of the North Carolina State Bar, Section .0900 Procedures for Administrative Committee

The amendments require a petitioner for reinstatement who has been inactive or suspended for a year or more to take 12 CLE credit hours for each year of inactivity or suspension. A petitioner who has been inactive or suspended for seven years or more is required to pass the bar examination. The CLE and bar exam requirements do not apply to a member who was on inactive status at the time the amendments became effective; however, the requirements apply to any member who transfers to inactive status after the effective date of the amendments and to any suspended member regardless of the date of suspension. The rule amendments also permit the secretary of the State Bar to reinstate an inactive member to active status if the member has fulfilled all of the requirements for reinstatement and there are no issues relating to the inactive member's character or fitness.

Amendment to the Plan of Legal Specialization

27 N.C.A.C. 1D, Rules of the Standing Committees of the North Carolina State Bar, Section .1700, The Plan of Legal Specialization

The amendments to the Plan of Legal Specialization allow the Board of Legal Specialization to appoint five advisory members to a specialty committee for the purpose of enhancing the ability of a specialty committee to develop, administer or give a specialty exam, or to create a new subspecialty. The board may waive the peer review and examination requirements for certification for any initial advisory member of a specialty committee.

Amendments to the Standards for the Workers' Compensation Law Specialty

27 N.C.A.C. 1D, Rules of the Standing Committees of the North Carolina State Bar, Section .2700 Certification Standards for the Workers' Compensation Law Specialty

The amendments clarify the CLE requirements for certification and continued certification as a workers' compensation law specialist.

Amendments to the Standards for the Social Security Disability Law Specialty

27 NCAC 1D, Rules of the Standing Committees of the North Carolina State Bar, Section .2800, Certification Standards for the Social Security Disability Law Specialty

The amendments adjust requirements in the CLE standard for certification and recertification as a specialist in social security disability law.

Amendments to the Standards for the Elder Law Specialty

27 N.C.A.C. 1D, Rules of the Standing Committees of the North Carolina State Bar, Section .2900 Certification Standards for the Elder Law Specialty

The amendments adjust requirements in the CLE standard for certification as a specialist in elder law.

Amendments to the Standards for the Criminal Law Specialty and to Create a Specialty in Appellate Practice

27 N.C.A.C. 1D, Rules of the Standing Committees of the North Carolina State Bar, Section .2500 Certification Standards for the Criminal Law Specialty

27 N.C.A.C. 1D, Rules of the Standing Committees of the North Carolina State Bar, Section .3000 Certification Standards for the Appellate Practice Specialty

The standards for the new appellate practice specialty certification are consistent with the standards for other specialties in requiring a successful applicant to demonstrate substantial involvement, attendance at CLE seminars in the specialty, adequate peer review, and passage of an examination. The new specialty in appellate practice will encompass both criminal and civil law. The rule amendments also eliminate the criminal appellate subspecialty from the standards for the criminal law specialty. Existing criminal appellate practice specialists will be recognized as appellate practice specialists.

Amendments Not Approved by the Supreme Court

At its conference on March 10, 2011, pursuant to N.C. Gen. Stat. §84-21, the North Carolina Supreme Court declined to enter upon its minutes the following amendment to the rules of the North Carolina State Bar:

Proposed Amendments to the Rules of Professional Conduct

27 N.C.A.C. 2, Rules of Professional Conduct, 0.1 Preamble: A Lawyer's Responsibilities; 0.2 Scope

The proposed amendment to the Preamble would have added a statement urging lawyers not to discriminate in their practices on the basis of race, gender, national origin, religion, age, disability, sexual orientation, or gender identity. A proposed amendment to the Scope section of the Rules of Professional Conduct would have clarified that the Preamble is the introduction to the Rules and is never the basis for professional discipline.

Amendments Pending Approval of the Supreme Court

At its meeting on April 22, 2011, the council of the North Carolina State Bar voted to adopt the following rule amendments for transmission to the North Carolina Supreme Court for approval (for the complete text see the Spring 2011 edition of the *Journal* or visit the State Bar website: www.ncbar.gov):

Proposed Amendments to The Plan for Certification of Paralegals

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

The proposed amendments will enable online voting for paralegal candidates for the board.

Proposed Amendments to the Rules of Professional Conduct

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

The proposed amendments to Rule 7.3, *Direct Contact with Potential Clients*, clarify that the advertising notice on targeted letters soliciting professional employment must be in font that is as large as any other printing in the letter.

Proposed Amendments

At its meeting on April 21, 2011, the council voted to publish the following proposed rule amendments for comment from the members of the bar:

Proposed Amendments to the Discipline and Disability Rules

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

The proposed amendments to Rule .0112 require a respondent lawyer to submit a signed response to a letter of notice and make non-substantive improvements to the rule.

.0112 Investigations: Initial Determination; Notice and Response; Committee Referrals

(a) **Investigation Authority** - Subject to the policy supervision of the council and the control of the chair~~person~~ of the Grievance Committee, the counsel, or other personnel under the authority of the counsel, will investigate the grievance and submit to the chair~~person of the Grievance Committee~~ a report detailing the findings of the investigation.

(b) **Grievance Committee Action on Initial or Interim Reports** - As soon as practicable after the receipt of the initial or any interim report of the counsel concerning any grievance, the chair~~person~~ of the Grievance Committee may

(1) treat the report as a final report;

(2) direct the counsel to conduct further investigation, including contacting the respondent in writing or otherwise; or

(3) **direct the counsel to** send a letter of notice to the respondent.

(c) **Letter of Notice, Respondent's Response, and Request for Copy of Grievance** - If **the counsel serves a letter of notice upon the respondent**, ~~a letter of notice is sent to the respondent,~~ it will be served by certified mail and will direct that a response be ~~made~~ provided within 15 days of ~~receipt~~ service of the letter of notice **upon the respondent**. ~~Such response will be~~ **The response to the letter of notice shall include** a full and fair disclosure of all ~~the~~ facts and circumstances pertaining to the alleged misconduct. **The response must be in writing and signed by the respondent. If the respondent requests it, the** ~~The~~ counsel will provide the respondent with a copy of the **written** grievance ~~upon request, except~~ ~~where~~ **unless** the complainant requests ~~to remain anonymous~~ **anonymity** pursuant to Rule .0111(d) of this subchapter.

(d) **Request for Copy of Respondent's Response** - The counsel may provide **to the complainant** a copy of the respondent's ~~response(s)~~ **response** to the letter of notice ~~to the complaining party~~ unless the respondent objects thereto in writing.

(e) **Termination of Further Investigation** - After **the Grievance Committee receives the** ~~a~~ response to a letter of notice ~~is received~~, the counsel may conduct further investigation or terminate the investigation, subject to the control of the chair~~person~~ of the Grievance Committee.

(f) **Subpoenas** - For reasonable cause, the chair~~person~~ of the Grievance Committee may issue subpoenas to compel the attendance of witnesses, including the respondent, for examination concerning the grievance and may compel the production of

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. Amendments become effective upon approval by the court. **Unless otherwise noted, proposed additions to rules are printed in bold and underlined, deletions are interlined.**

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.

books, papers, and other documents or writings **which the chair deems** ~~deemed~~ necessary or material to the inquiry. Each subpoena will be issued by the chair~~person of the Grievance Committee,~~ or by the secretary at the direction of the chair~~person~~. The counsel, deputy counsel, investigator~~,~~ or any members of the Grievance Committee designated by the chair~~person~~ may examine any such witness under oath or otherwise.

(g) **Grievance Committee Action on Final Reports – The Grievance Committee will consider the grievance as** ~~As~~ soon as practicable after ~~the receipt of~~ **it receives** the final report of the counsel ~~or the termination of an investigation, the chairperson will convene the Grievance Committee to consider the grievance~~, except as otherwise provided in these rules.

(h) **Failure of Complainant to Sign and Dismissal Upon Request of Complainant** - The investigation into ~~the conduct of an attorney~~ **alleged misconduct of the respondent** will not be abated by ~~the~~ failure of the complainant to sign a grievance, **by** settlement~~,~~ **or** compromise **of a dispute between the complainant and the respondent, or by the respondent's payment of**~~, or~~ restitution. The chair~~person~~ of the Grievance Committee may dismiss a grievance upon request of the complainant and with consent of **the** counsel where it appears that there is no probable cause to believe that the respondent ~~has~~ violated the ~~Revised~~ Rules of Professional Conduct.

(i) **Referral to Law Office Management Training** - If at any time prior to a finding of probable cause~~,~~ the chair~~person~~ of the Grievance Committee, upon the recommendation of the counsel or **of** the Grievance Committee, determines that the alleged misconduct is primarily attributable to the respondent's failure to employ sound law office management techniques and procedures, the chair~~person of the Grievance Committee~~ may, with the respondent's consent, refer the case to a program of law office management training approved by the State Bar. The respondent will then be required to complete a course of training in law office management prescribed by the chair~~person of the Grievance Committee~~ which may include a comprehensive site audit of the respondent's records and procedures as well as **attendance at** continuing legal education seminars. ~~If the respondent successfully completes the rehabilitation program, the~~ **The** Grievance Committee ~~can~~ **may** consider **the respondent's successful completion of the law office management training** ~~that~~ as a mitigating ~~factor~~ **circumstance** and may~~, for good cause shown~~**, but is not required to**, dismiss the grievance **for good cause shown**. If the respondent fails to **successfully complete the program of law office management training as agreed,** ~~cooperate with the training program's employees or fails to complete the prescribed training, that will be reported to the chairperson of the Grievance Committee and the investigation of the original grievance shall resume~~ **the grievance will be included on the Grievance Committee's agenda for consideration of imposition of discipline at the Grievance Committee's next quarterly meeting.**

(j) **Referral to Lawyer Assistance Program** - ~~If at any time before a finding of probable cause, the Grievance Committee determines that the alleged misconduct is primarily attributable to the respondent's substance abuse or mental health problem, the Committee may refer the matter to the Lawyer Assistance Program Board. The respondent must consent to the referral and must waive any right of confidentiality that the respondent might otherwise have had regarding communications with persons acting under the supervision of the Lawyer Assistance Program Board.~~

(1) If at any time before a finding of probable cause the Grievance Committee determines that the alleged misconduct is primarily attributable to the respondent's substance abuse or mental health problem, the committee may offer the respondent an opportunity to voluntarily participate in a rehabilitation program under the supervision of the Lawyer Assistance Program Board before the committee considers discipline.

If the respondent accepts the committee's offer to participate in a rehabilitation program, the respondent must provide the committee with a written acknowledgement of the referral on a form approved by the chair. The acknowledgement of the referral must include the respondent's waiver of any right of confidentiality that might otherwise exist to permit the Lawyer Assistance Program to provide the committee with the information necessary for the committee to determine whether the respondent is in compliance with the rehabilitation program.

(2) Completion of Rehabilitation Program – If the respondent successfully completes the rehabilitation program, the Grievance Committee may consider successful completion of the program as a mitigating circumstance and may, but is not required to, dismiss the grievance for good cause shown. If the respondent fails to complete the rehabilitation program or fails to cooperate with the Lawyer Assistance Program Board, the Lawyer Assistance Program will report that failure to the counsel and the grievance will be included on the Grievance Committee's agenda for consideration of imposition of discipline at the Grievance Committee's next quarterly meeting.

~~(k) **Completion of Rehabilitation Program** - If the respondent successfully completes the rehabilitation program, the Grievance Committee can consider that as a mitigating factor and may, for good cause shown, dismiss the grievance. If the respondent fails to complete the rehabilitation program or fails to cooperate with the Lawyer~~

~~Assistance Program Board, the failure will be reported to the chairperson of the Grievance Committee and the investigation of the grievance will resume.~~

~~(l)~~ (k) **Referral to Trust Accounting Supervisory Program** - ….

Proposed Amendments to Procedures for the Administrative Committee

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

In March, the Supreme Court approved rule amendments to require a petitioner for reinstatement who has been inactive or suspended for one year or more to take 12 CLE credit hours for each year of inactivity or suspension; and to further require a petitioner who has been inactive or suspended for seven years or more to pass the bar examination. Unfortunately, the rule on reinstatement from inactive status contained two erroneous references to the "period of suspension" rather than the "period of inactive status." The proposed amendments correct this error.

.0902 Reinstatement from Inactive Status

(a) Eligibility to Apply for Reinstatement ….

(b) Contents of Reinstatement Petition. The petition shall set out facts showing the following:

(1) ….

(6) [this provision shall be effective for all members who are transferred to inactive status on or after January 1, 2011] if seven years or more have elapsed between the date of the entry of the order transferring the member to inactive status and the date that the petition is filed, the member has obtained a passing grade on a regularly scheduled North Carolina bar examination; provided, each year of active licensure in another United States jurisdiction during the period of ~~suspension~~ **inactive status** shall offset one year of ~~suspension~~ **inactive status** for the purpose of calculating the seven years necessary to actuate this provision; and

(7) ….

(c) Service of Reinstatement Petition ….

Proposed Amendments to the Rules Governing the CLE Program

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

The proposed amendments expand the definition of professional responsibility/ethics courses to include instruction on ethical decision-making and recognize the CLE Board's authority to determine how CLE credits are applied to satisfy a deficit.

.1501 Scope, Purpose and Definitions

(a) Scope….

(b) Purpose….

(c) Definitions

(1) "Accredited sponsor" shall mean ….

(13) "Professional responsibility" shall mean those courses or segments of courses devoted to a) the substance, underlying rationale, and practical application of the Rules of Professional Conduct; b) the professional obligations of the lawyer to the client, the court, the public, and other lawyers; ~~and~~ c) **moral philosophy and ethical decision-making in the context of the practice of law; and d)** the effects of stress, substance abuse, and chemical dependency, or debilitating mental conditions on a lawyer's professional responsibilities and the prevention, detection, treatment, and etiology of stress, substance abuse, chemical dependency, and debilitating mental conditions. This definition shall be interpreted consistent with the provisions of Rule .1501(c)(4) or (6) above.

(14) "Professionalism" courses are ….

.1518 Continuing Legal Education Program

(a) Annual Requirement. ….

(e) The board shall determine the process by which credit hours are allocated to lawyers' records to satisfy deficits. The allocation shall be applied uniformly to the records of all affected lawyers and may not be appealed by an affected lawyer.

Proposed Amendments to The Plan of Legal Specialization

27 N.C.A.C. 1D, Section .2500, Certification Standards for the Criminal Law Specialty

The proposed amendments create juvenile delinquency law as a subspecialty of the criminal law specialty.

.2501 Establishment of Specialty Field

The North Carolina State Bar Board of Legal Specialization (the board) hereby designates criminal law **(encompassing both federal and state criminal law)**, including the subspecialties of state criminal law **and juvenile delinquency law**, as a field of law for which certification of specialists under the North Carolina Plan of Legal Specialization (*see* Section .1700 of this subchapter) is permitted.

.2502 Definition of Specialty

The specialty of criminal law is the practice of law dealing with the defense or prosecution of those charged with misdemeanor and felony crimes in state and federal trial courts. Subspecialties in the field are identified and defined as follows:

(a) State Criminal Law – The practice of criminal law in state trial courts.

(b) Juvenile Delinquency Law - The practice of law in state juvenile delinquency courts. The standards for the subspecialty are set forth in Rules .2508 - .2509.

.2503 Recognition as a Specialist in Criminal Law

A lawyer may qualify as a specialist by meeting the standards ~~set~~ for criminal law or the subspecialties of state criminal law **or juvenile delinquency law**. If a lawyer qualifies as a specialist by meeting the standards ~~set~~ for the criminal law specialty, the lawyer shall be entitled to represent that he or she is a "Board Certified Specialist in Criminal Law." If a lawyer qualifies as a specialist by meeting the standards ~~set~~ for the subspecialty of state criminal law, the lawyer shall be entitled to represent that he or she is a "Board Certified Specialist in State Criminal Law." **If a lawyer qualifies as a specialist by meeting the standards for the subspecialty of juvenile delinquency law, the lawyer shall be entitled to represent that he or she is a "Board Certified Specialist in Criminal Law – Juvenile Delinquency."**

….

.2507 Applicability of Other Requirements

The specific standards set forth herein for certification of specialists in criminal law, ~~and~~ the subspecialty of state criminal law **and the subspecialty of juvenile delinquency law** are subject to any general requirement, standard, or procedure adopted by the board applicable to all applicants for certification or continued certification.

.2508 Standards for Certification as a Specialist in Juvenile Delinquency Law

Each applicant for certification as a specialist in juvenile delinquency law shall meet the minimum standards set forth in Rule .1720 of this subchapter. In addition, each applicant shall meet the following standards for certification:

(a) Licensure and Practice - An applicant shall be licensed and in good standing to practice law in North Carolina as of the date of the application. During the period of certification an applicant shall continue to be licensed and in good standing to practice law in North Carolina.

(b) Substantial Involvement - An applicant shall affirm to the board that the applicant has experience through substantial involvement in the practice of juvenile delinquency law.

(1) Substantial involvement shall mean during the five years immediately preceding the application, the applicant devoted an average of at least 500 hours a year to the practice of juvenile delinquency law, but not less than 400 hours in any one year. "Practice" shall mean substantive legal work, specifically including representation of juveniles or the state in juvenile delinquency court, done primarily for the purpose of providing legal advice or representation, or a practice equivalent.

(2) "Practice equivalent" shall mean:

(A) Service for one year or more as a state district court judge responsible for presiding over juvenile delinquency court for 250 hours each year may be substituted for one year of experience to meet the five-year requirement set forth in Rule .2508(b)(1) above;

(B) Service on or participation in the activities of local, state, or national civic, professional or government organizations that promote juvenile justice may be used to meet the requirement set forth in Rule .2508(b)(1) but not to exceed 100 hours for any year during the five years.

(3) An applicant shall also demonstrate substantial involvement during the five years prior to application unless otherwise noted by providing information that demonstrates the applicant's significant juvenile delinquency court experience such as:

(A) Representation of juveniles or the state during the applicant's entire legal career in juvenile delinquency hearings concluded by disposition;

(B) Representation of juveniles or the state in juvenile delinquency felony cases;

(C) Court appearances in other substantive juvenile delinquency proceedings in juvenile court;

(D) Representation of juveniles or the state through transfer to adult court; and

(E) Representation of juveniles or the state in appeals of juvenile delinquency decisions.

(c) Continuing Legal Education - An applicant must have earned no less than 40 hours of accredited continuing legal education (CLE) credits in criminal and juvenile delinquency law during the three years preceding application. Of the 40 hours of CLE, at least 12 hours shall be in juvenile delinquency law, and the balance may be in the following related fields: substantive criminal law, criminal procedure, trial advocacy, and evidence.

(d) Peer Review -

(1) Each applicant for certification as a specialist in juvenile delinquency law must make a satisfactory showing of qualification through peer review.

(2) All references must be licensed and in good standing to practice in North Carolina and must be familiar with the competence and qualifications of the applicant in the specialty field. The applicant consents to the confidential inquiry by the board or the specialty committee of the submitted references and other persons concerning the applicant's competence and qualifications.

(3) Written peer reference forms will be sent by the board or the specialty committee to the references. Completed peer reference forms must be received from at least five of the references. The board or the specialty committee may contact in person or by telephone any reference listed by an applicant.

(4) Each applicant must provide for reference and independent inquiry the names and addresses of ten lawyers and judges who practice in the field of juvenile delinquency law or criminal law or preside over juvenile delinquency or criminal law proceedings and who are familiar with the applicant's practice.

(5) A reference may not be related by blood or marriage to the applicant nor may the reference be a partner or associate of the applicant at the time of the application.

(e) Examination - An applicant must pass a written examination designed to demonstrate sufficient knowledge, skills, and proficiency in the field of juvenile delinquency law to justify the representation of special competence to the legal profession and the public.

(1) Terms - The examination shall be given annually in written form and shall be administered and graded uniformly by the specialty committee.

(2) Subject Matter – The examination shall cover the applicant's knowledge in the following topics:

(A) North Carolina Rules of Evidence;

(B) State criminal substantive law;

(C) Constitutional law as it relates to criminal procedure and juvenile delinquency law;

(D) State criminal procedure;

(E) North Carolina Juvenile Code, Subchapters II and III, and related case law; and

(F) North Carolina caselaw as it relates to juvenile delinquency law.

(3) Examination Components - An applicant for certification in the subspecialty of juvenile delinquency law must pass part I of the criminal law examination on general topics in criminal law and part IV of the examination on juvenile delinquency law.

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

The period of certification is five years. A certified specialist who desires continued certification must apply for continued certification within the time limit described in Rule .2509(d) below. No examination will be required for continued certification. However, 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.

CONTINUED ON PAGE 48

Law School Briefs

All of the law schools located in North Carolina are invited to provide material for this column. Below are the submissions we received this quarter.

Campbell University School of Law

Campbell Law trial team sweeps competition, wins regional championship—Defeating teams from five law schools in a row, a Campbell Law School mock trial team brought home the crystal championship trophy from the regional American Association for Justice ("AAJ") Student Trial Advocacy Competition held in Washington, DC on March 3-6, 2011.

In the preliminary rounds, the Campbell Law team defeated teams from West Virginia Law School, George Mason Law School, and Richmond Law School, winning all nine judges' ballots. They faced American Law School in the semi-finals, again taking all three judges' ballots. In the final round, the Campbell Law team faced an excellent team from William & Mary Law School, but won the judges' vote 2-1 to bring home the winning trophy.

Delta Theta Phi chapter hosts second annual Judge Robinson O. Everett Awards gala—The Campbell Law School chapter of Delta Theta Phi recently hosted its second annual Judge Robinson O. Everett Awards Gala naming Major General William K. Suter, Clerk of the Supreme Court of the United States of America, as its 2011 Recipient.

The Judge Robinson O. Everett Award for Legal Excellence is awarded to an individual who perpetuates the objectives of the Delta Theta Phi fraternity, including:

- The application of the highest standards of personal integrity;
- Respect for law, rights, and property of others; and
- The highest ethical and professional standards of conduct in the study, practice, and teaching of the law.

Phi Alpha Delta Law presents 32nd annual James Iredell Award to fourth circuit appointees—On April 11, Campbell Law School's chapter of the Phi Alpha Delta Law Fraternity recognized Fourth Circuit appointees Judge Albert Diaz and Judge James A. Wynn Jr. as the 2011 recipients of the Justice James Iredell Award.

Since 1980 the James Iredell Award has been presented each year to individuals who have made significant contributions to the legal profession.

Charlotte School of Law

Sheryl Buske, an assistant professor at Charlotte School of Law, has been selected by the Fulbright Program as a 2011-2012 Fulbright Scholar. Buske, the recipient of a lecturing and research appointment from the Fulbright Program, will divide time in Ghana teaching courses in children's international human rights at Kwame Nkrumah University of Science & Technology, Faculty of Law, and conducting a research study. Her research will attempt to identify and explain strategies used by young "kayayoos," a distinct group of Ghanaian street girls who work as head-load porters in the urban markets, to incorporate mothering into their lives on the street.

Charlotte School of Law recently became the third law school in the United States to have a Cooperative Legal Education Program, joining the law schools at Northeastern and Drexel universities. The program is being piloted this spring with corporate counsel departments, including Compass Group, Family Dollar, Rack Room, and TIAA-CREF, and the school plans to expand rapidly this summer to the national market. CharlotteLaw Corporate Counsel Co-ops promote experiential learning by providing lawyers in training, many of whom have business backgrounds or interests, the unique opportunity to be mentored and supervised by corporate attorneys.

CharlotteLaw's 2011 *Legends and Leaders* in the Law Speaker Series has welcomed renowned legal expects including Charles Ogletree, the Jesse Climenko Professor at Harvard Law School; Kenneth Feinberg, the 9-11 and BP gulf oil spill "Pay Czar;" Justice Paul Martin Newby, Supreme Court of North Carolina; Judge Albert Diaz, US Fourth Circuit Court of Appeals; and Thomas Perez, Assistant US Attorney General - Civil Rights Division. The final speaker for the spring will be Leon Fresco, who serves as immigration counselor for Senator Charles E. Schumer at the United States Senate.

Duke Law School

Duke Law establishes Robinson O. Everett Professorship—A new endowed professorship honors the late Professor Robinson O. Everett, LLM '59, a revered faculty member who taught at Duke for more than 51 years and inspired thousands of Duke Law students and alumni with his kindness, his service to the law and legal profession, and his devotion to Duke Law School. To date, more than $2.5 million has been raised to fund the professorship. The Duke Endowment's Strategic Faculty Initiative contributed matching funds of $1.25 million to the chair, which will support a distinguished legal scholar who also will teach classes for Duke University undergraduates.

Prolific emerging scholar Stephen E. Sachs joins Duke Law faculty—Stephen E. Sachs will join the Duke Law faculty on July 1, 2011. An emerging scholar in the areas of civil procedure, constitutional law, Anglo-American legal history, and conflict of laws, Sachs will teach Civil Procedure in the fall 2011 semester.

Sachs comes to Duke from Mayer Brown in Washington, DC, where he is an associate in the litigation practice. He clerked for Chief Justice John G. Roberts Jr. during the 2009-2010 Supreme Court term. He clerked for Judge Stephen F. Williams on the U.S. Court of Appeals for the DC Circuit in 2007-2008 prior to joining Mayer Brown.

Law and Entrepreneurship LLM has successful inaugural year—Duke Law's inaugural class of 14 Law and

Entrepreneurship LLM students spent their second semester immersed in legal work relating to early-stage enterprises within the Research Triangle and beyond. They prepared to hit the ground running in their practicums with a rigorous first-semester curriculum focused on the fundamentals and regulatory frameworks of entrepreneurship, accounting principles, and approaches to equity valuation even as they had a chance to shadow local entrepreneurs and advise student startups.

Elon University School of Law

Elon hosts inaugural Billings, Exum & Frye National Moot Court Competition—Seventeen law schools participated in the competition, held April 1 and 2, 2011, and David Gergen, chair of Elon Law's national advisory board and former adviser to four US Presidents, delivered a keynote address.

The competition honors Rhoda Bryan Billings, James G. Exum Jr. and Henry E. Frye. Each has served as chief justice of the NC Supreme Court and in leadership positions within the profession and in public life. All three are founding members of Elon Law's national advisory board.

George R. Johnson Jr., Dean of Elon Law, said, "Our three chief justices are great leaders who have been wonderful servants to our law school, our profession, our state, our nation. They have served with such distinction, yet such humility. These towering figures of North Carolina and the law do us really great honor by allowing us to use their names for this competition, and we thank them tremendously."

More than 100 distinguished judges and lawyers volunteered to serve as judges including Steven M. Colloton, Circuit Judge, US Court of Appeals for the Eighth Circuit; five justices of the NC Supreme Court, including Chief Justice Sarah Parker; four judges of the NC Court of Appeals; and two judges of the US District Court for the Middle District of North Carolina.

"Elon Law and its moot court board are grateful for the tremendous support the competition received from alumni, attorneys, law firms, and distinguished jurists," said Alan Woodlief, an associate dean and professor at Elon Law and director of the school's moot court program.

Sponsors included Gold Level Sponsor Womble Carlyle Sandridge & Rice, PLLC, who sponsored the competition's Best Oral Advocate awards; Silver Level Sponsor Smith Moore Leatherwood, LLP; and Elon University President and Mrs. Leo M. Lambert, who sponsored the competition's top award, the Chief Justices' Cup.

Visit law.elon.edu/mootcourt for competition results.

North Carolina Central University School of Law

The North Carolina Central University (NCCU) School of Law is finishing up this academic year with the exciting news that *US News and World Report* ranked the law school amongst the Top Ten Most Popular Law Schools in the nation. This ranking is based on the percentage of students that actually accept offers of admission to a law school. The law school credits its growing reputation in practical skills training, coupled with its comparative affordability, as reasons for the ranking.

The law school has completed the first phase of its Technology Assisted Legal Instruction and Services (TALIAS) program by bringing online its satellite operations at Elizabeth City State University and North Carolina A&T State University. This program, funded by a $1.8 million grant, is designed to use technology to extend the legal services of the NCCU School of Law Clinic. We are moving to bring online additional telepresence operations at Winston-Salem State University, Fayetteville State University, and several Legal Aid offices in the state of North Carolina. The program will offer legal services and instruction in foreclosure prevention, Veterans' claims before the US Veteran's Administration, and aid services for victims of domestic violence.

North Carolina Central University School of Law is honored to have as keynote speaker for its spring commencement the Honorable James A. Wynn Jr. who was recently confirmed by the US Senate and appointed by President Barack Obama to serve on the US Court of Appeals for the Fourth Circuit.

University of North Carolina School of Law

LL.M. program—On January 25, 2011, the ABA gave its "acquiescence" to the school's new one-year master of laws degree program (LL.M) in US law and procedure for foreign lawyers.

The Center on Poverty, Work, and Opportunity held its annual conference on March 28, 2011, "A North Carolina Summit: Progress and Economic Justice in a Time of Crisis," to address unemployment and budget concerns in the state.

Dutch Ambassador Visits UNC—Renée Jones-Bos, Ambassador to the United States from The Netherlands, visited on March 29, 2011, to discuss The Hague, the International Criminal Court (ICC), and international human rights.

Authors publish in* Science *journal—John Conley, William Rand Kenan Jr. Professor of Law, and researchers from UNC and Duke suggest a new legal model for DNA sample contributions in an article published in the April 15 issue of *Science*.

Commencement—Teresa Roseborough '86, deputy general counsel for MetLife, will serve as keynote speaker for the Class of 2011's commencement exercises on May 8. Roseborough was the first African-American woman to serve as editor-in-chief of the *North Carolina Law Review*. Prior to joining MetLife, Roseborough served as partner with the Atlanta office of Sutherland Asbill and Brennan. She clerked for Justice John Paul Stevens of the US Supreme Court.

Wake Forest University School of Law

The newest law journal at Wake Forest, the *Journal of Law & Policy*, has adopted the "Losing to Win: Discussions of Race and Intercollegiate Sports" conference, which was held April 13-14 as its Spring 2011 symposium. Expert panelists speaking during the opening sessions of the two-day academic conference on college sports and race detailed how lucrative sports competition—men's basketball and football—have led many to ask whether student-athletes in those sports are exploited for their talent while others profit immeasurably. The major interdisciplinary conference was sponsored by the Provost and organized by the law

CONTINUED ON PAGE 54

Thank You to Our Meeting Sponsor

Thank you to Lawyers Mutual Liability Company for sponsoring the Councilors' Picnic.

John B. McMillan Distinguished Service Award

Recent Award Recipients

William D. ("Bill") Kenerly—Mr. Kenerly was licensed in 1973 and engaged in the private practice of law in Salisbury. He then served as the elected district attorney in District 19C from 1991 until his retirement in late 2010. Lawyers and judges alike praise Mr. Kenerly for his exemplary service to the legal profession, the state of North Carolina, and the United States through his service in the marine corps. As a lawyer, Mr. Kenerly is known for his humility, professionalism, and thorough preparation of cases. As a prosecutor, Mr. Kenerly displayed a commitment to truth and a keen sense of fairness, which—as a mentor and role model—he passed on to younger prosecutors. Mr. Kenerly was a founding member of the North Carolina Innocence Inquiry Commission, a significant reform that bolstered public confidence in the justice system. He served as an adjunct professor at Wake Forest University School of Law, lectured on professionalism at the New Prosecutors School, and taught annually at the Salisbury Citizens Police Academy. As district attorney, Mr. Kenerly welcomed the opportunity to meet with the local criminal defense bar to address policy changes and issues that arose between prosecutors and defense lawyers. Members of the defense bar laud Bill Kenerly's knowledge of the law, commitment to justice, and unfailing courtesy to all involved in the legal system.

James E. ("Jim") Holshouser Jr.—Mr. Holshouser is a native of Watauga County and graduated from Davidson College. After receiving his JD from UNC School of Law, he was admitted to the Bar in 1960. Mr. Holshouser served four terms in the North Carolina House of Representatives before he was elected as governor in 1972. When his term expired in 1977, Mr. Holshouser began practicing law in Moore County, where he is known for friendliness and humility despite his many accomplishments. He was a member of the Committee on Court Study for the North Carolina Bar Association, and was appointed by the chief justice of the NC Supreme Court to serve on the Judicial Response Committee. Mr. Holshouser has served on the boards of multiple colleges and universities and currently serves on the Advisory Board of Elon University School of Law. Jim Holshouser's commitment to enhancing the legal system, his service to the state of North Carolina, and his leadership in many civic activities has earned him the respect and admiration of the Bar and the broader community.

Bruce T. Cunningham Jr.—Mr. Cunningham was a Morehead Scholar at Chapel Hill and earned his law degree from the University of Virginia in 1973. He has been a criminal defense lawyer in Moore County for over 37 years. During that time, he acted as legal advisor to the North Carolina chapter of Families Against Mandatory Minimums and held several leadership positions in the North Carolina Advocates for Justice (NCAJ). Mr. Cunningham promotes legal education by frequently speaking at seminars and CLEs about criminal practice. He has contributed to legal scholarship by authoring several law review articles on criminal sentencing issues. He devotes considerable time to mentoring and advising less-experienced criminal defense lawyers in his community and through the NCAJ listserv. Mr. Cunningham recently presided as "chief justice" in a mock Supreme Court argument by tenth grade civics students at a local high school. The exercise promoted

CONTINUED ON PAGE 48

Seeking Distinguished Service Award Nominations

The John B. McMillan Distinguished Service Award program honors current and retired members of the North Carolina State Bar throughout the state who have demonstrated exemplary service to the legal profession. Such service may be evidenced by a commitment to the principles and goals stated in the Preamble to the Rules of Professional Conduct, for example: furthering the public's understanding of and confidence in the rule of law and the justice system; working to strengthen legal education; providing civic leadership to ensure equal access to our system of justice for all those who, because of economic or social barriers, cannot afford or secure adequate legal counsel; seeking to improve the administration of justice and the quality of services rendered by the legal profession; promoting diversity and diverse participation within the legal profession; providing professional services at no fee or a reduced fee to persons of limited means or to public service or charitable groups or organizations; encouraging and counseling peers by providing advice and mentoring; and fostering civility among members of the bar.

Awards will be presented in recipients' districts, usually at a meeting of the district bar. The State Bar Councilor from the recipient's district will participate in introducing the recipient and presenting the certificate. Recipients of the Distinguished Service Award will also be recognized in the State Bar *Journal* and honored at the State Bar's annual meeting in Raleigh. Members of the bar are encouraged to nominate colleagues who have demonstrated outstanding service to the profession. The nomination form is available on the State Bar's website, www.ncbar.gov. Please direct questions to Peter Bolac at the State Bar office in Raleigh, (919) 828-4620. ■

Client Security Fund Reimburses Victims

At its April 21, 2011, meeting, the North Carolina State Bar Client Security Fund Board of Trustees approved payments of $206,000.70 to eight clients who suffered financial losses due to the misconduct of North Carolina lawyers.

The new payments authorized were:

1. An award of $400 to a former client of Fredrick Pierce of Raleigh. The board found that Pierce was retained to represent a client in getting the client's license reinstated. Pierce undertook the representation knowing his stayed suspension was about to be activated. Pierce provided no valuable legal services prior to being suspended and later disbarred. Pierce was disbarred on October 15, 2010. The board previously reimbursed five other Pierce clients a total of $4,400.

2. An award of $100,000 to a former client of J. Scott Taggart of Greenville. The board found that Taggart was retained to handle a client's real estate closing. Taggart actively participated with another in defrauding the client by leading him to believe that $899,117 was retained in Taggart's trust account to fund a 1031 like-kind exchange when the purported buyer of the client's property had not provided the funds necessary to close, and the property that was to complete the exchange was never deeded to the client. Taggart was disbarred on December 16, 2009.

3. An award of $3,700 to a former client of Mark Waple of Fayetteville. The board found that Waple was retained to represent a client in appealing the Department of Defense Disability Board's disability rating for the client and to seek the client's medical retirement from active duty. Waple failed to provide any valuable legal services for the fee paid prior to a trustee being appointed to close Waple's practice. The board previously reimbursed two other Waple clients $18,500.

4. An award of $3,650 to a former client of Mark Waple. The board found that Waple was retained to represent a client in applying for a change in his discharge status from the army. Waple failed to provide any valuable legal services for the fee paid.

5. An award of $79,625.70 to an applicant who suffered a loss from an estate matter handled by Clifton West of Fayetteville. The board found that West was counsel for a personal representative in an estate. The personal representative was not competent to supervise West's actions. West misappropriated much of the decedent's assets. West filed false accountings in the estate to cover his misappropriation. The applicant was a charity that was the sole beneficiary of the estate. West was disbarred on January 20, 2006.

6. An award of $5,625 to a former client of Lyle Yurko of Charlotte. The board found that Yurko was retained to review the client's sentencing. Yurko abandoned his practice without providing any valuable legal services for the fee paid. The board authorized the reimbursement to be made to the client's friend who had paid the fee to Yurko on the client's behalf. The board previously reimbursed three of Yurko's clients a total of $79,455.

7. An award of $9,500 to a former client of Lyle Yurko. The board found that Yurko was retained to review a client's cases for possible post-conviction relief. The client paid Yurko a $5,000 fee and $4,500 in expected costs. Yurko abandoned his practice without providing any valuable legal services for the fee paid or expending any costs.

8. An award of $3,500 to a former client of Lyle Yurko. The board found that Yurko was retained to review a client's case for possible post-conviction relief. Yurko abandoned his practice without providing any valuable legal services for the fee paid. ■

Rule Amendments (cont.)

(a) Substantial Involvement - The specialist must demonstrate that for the five years preceding reapplication he or she has had substantial involvement in the specialty or subspecialty as defined in Rule .2508(b).

(b) Continuing Legal Education - The specialist must have earned no less than 65 hours of accredited continuing legal education credits in criminal law and juvenile delinquency law with not less than six credits earned in any one year. Of the 65 hours, at least 20 hours shall be in juvenile delinquency law, and the balance may be in the following related fields: substantive criminal law, criminal procedure, trial advocacy, and evidence.

(c) Peer Review - The specialist must comply with the requirements of Rule .2508(d) of this subchapter.

(d) Time for Application - Application for continuing certification shall be made not more than 180 days nor less than 90 days prior to the expiration of the prior period of certification.

(e) Lapse of Certification - Failure of a specialist to apply for continued certification in a timely fashion will result in a lapse of certification. Following such lapse, recertification will require compliance with all requirements of Rule .2508 of this subchapter, including the examination.

(f) Suspension or Revocation of Certification - If an applicant's certification has been suspended or revoked during the period of certification, then the application shall be treated as if it were for initial certification under Rule .2508 of this subchapter. ■

Service Awards (cont.)

public awareness about the legal system by teaching students about the law and civil debate. Bruce Cunnigham is known as a quietly dedicated advocate for his clients, a passionate opponent of the death penalty, and an admired mentor and role model for criminal defense lawyers in North Carolina. ■

July 2011 Bar Exam Applicants

The July 2011 Bar Examination will be held in Raleigh on July 26 and 27, 2011. Published below are the names of the applicants whose applications were received on or before April 26, 2011. Members are requested to examine it and notify the board in a signed letter of any information which might influence the board in considering the general fitness of any applicant for admission. Correspondence should be directed to Fred P. Parker III, Executive Director, Board of Law Examiners, PO Box 2946, Raleigh, NC 27602.

Kristin Abbott
Charlotte, NC
Elliot Abrams
Washington, DC
Tracey Ackerly
Durham, NC
Naa Atsoi Adu-Antoh
Angier, NC
Davood Ahmadi-Torshizi
Raleigh, NC
Holley Akers
Jacksonville, FL
Ryan Alber
Champaign, IL
Brian Alexander
Apex, NC
Kristen Alkire
Greensboro, NC
Brady Allen
Raleigh, NC
James Allen
Durham, NC
Rebecca Allen
Willow Spring, NC
Stacey Allred
Chapel Hill, NC
Malachi Alston
Charlotte, NC
Africa Dalton Alston
Winston-Salem, NC
Christopher Anderson
Chapel Hill, NC
Jesse Anderson
Winston Salem, NC
Justin Anderson
Raleigh, NC
Lawrence Andrusyszyn
Cary, NC
Christopher Anglin
Greensboro, NC
Michael Ankrum
Wilmington, NC
Douglas Ansel
Corpus Christi, TX
Gerard Anthony
Raleigh, NC
Christopher Appel
Raleigh, NC
Justin Apple
Raleigh, NC
Nicole Applefield
Morgantown, WV
Ramsay Archie
Chapel Hill, NC
John Arco
Charlotte, NC
Erik Armstrong
Durham, NC
Law Armstrong III
Greensboro, NC
Elizabeth Arnold
Winston-Salem, NC
Erik Ashman
Greensboro, NC
Andrew Atkins
Raleigh, NC
Tiffany Atkins
Greensboro, NC
Melissa Atkinson
Raleigh, NC
Ramyn Atri
Durham, NC
Matthew Autry
Raleigh, NC
Bradley Aycock
Raleigh, NC
William Aycock II
Chapel Hill, NC
Najib Azam
Greensboro, NC
Blair Bacisin
Raleigh, NC
Christopher Badger
Chapel Hill, NC
Carl Badineaux
Winston-Salem, NC
Powell Baggett
Greensboro, NC
Lynne Bahrami
Durham, NC
Saba Baig
Raleigh, NC
Earnest Bailey
Oak Ridge, NC
Kelly Baird
Roanoke Rapids, NC
Alexis Baker
Greensboro, NC
James Baley
Gainesville, FL
David Ball
Cary, NC
Sarah Banks
Charleston, SC
Kristi Barbre
Cedartown, GA
Derrick Barger
Greensboro, NC
Richard Barnes Jr.
Charlotte, NC
Clare Barnett
Durham, NC
Fitz Barringer
Durham, NC
Lucy Barrios
Carrboro, NC
Lauren Bassett
Winston-Salem, NC
Peter Batalon
Charlotte, NC
Melanie Bates
Durham, NC
Christopher Battles
Durham, NC
Christopher Beal
Greensboro, NC
Ashleigh Beamer
Durham, NC
Melanie Beck
Durham, NC
Catherine Bell
Macon, GA
Helena Bell
New Bern, NC
Nabela Benaissa
Cary, NC
Robert Benbow
Williamsburg, VA
Margo Bennett
Bedford, VA
Sarah Bennett
Huntersville, NC
Maegan Berch
Sneads Ferry, NC
Ariadne Berrios-Febles
Charlotte, NC
Denise Bessellieu
San Antonio, TX
William Biggers II
Carrboro, NC
Mary Billings
Gastonia, NC
Stephen Billy
Harrisburg, PA
Robert Blackmon
Cary, NC
Benton Blaine
Charlotte, NC
Charles Blanton
Wilmington, NC
Ralph Blincoe III
Louisville, KY
Rachel Blunk
Carrboro, NC
Atiya Boddie
Rocky Mount, NC
Mark Bolin
Raleigh, NC
Jocelyn Bolton
Cary, NC
Dan Bolton III
San Antonio, TX
Portia Boone
Durham, NC
Jenna Borders
Chapel Hill, NC
Gary Bowers
Lexington, NC
Melissa Bowers
Raleigh, NC
Christopher Bowes
New York, NY
Kelly Bowker
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Joseph Bowman
Columbia, SC
Sarah Bowman
Lillington, NC
Tia Bowman
Cary, NC
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Grundy, VA
Katelynn Bradley
Matthews, NC
Brian Brady
Raleigh, NC
Joyce Brafford
Raleigh, NC
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Cary, NC
Scott Branam
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Alicia Bray
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Jennine Brazell
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Jonathan Brentnell
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Zachary Brintle
Raleigh, NC
Steven Brittain
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Mark Brooks
Pembroke, NC
Whitney Brooks
Charlotte, NC
Robert Broughton
Winston-Salem, NC
Justin Brown
Winston-Salem, NC
Bianca Brown
Charlotte, NC
Andrew Bruch
Raleigh, NC
Kenneth Bryan
Chapel Hill, NC
James Bryan Jr.
Lansing, MI
Adrienne Bryant Clark
Wilson, NC
Elizabeth Buckner
Charlotte, NC
Kara Buczek
Lake City, FL
Jonathan Bullock
Durham, NC
Katie Burke
New York, NY
Michael Burnett
Mebane, NC
Shugart Burnett
Charlotte, NC
Eric Burnette
Louisville, KY
Jason Burton
Greensboro, NC
Benjamin Busch
Akron, OH
Meggan Bushee
Winston-Salem, NC
Matthew Byerley
Whitsett, NC
Rocky Cabagnot
Tallahassee, FL
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Charlotte, NC
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Richmond, VA
Jesse Caldwell IV
Gastonia, NC
Anil Caleb
Fayetteville, NC

Christopher Cambridge
Raleigh, NC
Mark Donald Campbell
Kings Mountain, NC
Thelma Campbell
Charlotte, NC
Matthew Canady
Charlotte, NC
Gregory Canali
Huntersville, NC
Jordan Cansler
Durham, NC
John Carella
San Francisco, CA
Marcus Carpenter
Bessemer City, NC
Alexis Carr
Raleigh, NC
Taylor Carraway
Walstonburg, NC
Timothy Carraway
Raleigh, NC
Nicholas Carter
Portland, ME
Zshakira Carthens
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Aubrey Charpentier
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Jeffrey Cole
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Amber Cross
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Winston-Salem, NC
James Crutchley
Topeka, KS
Regina Cucurullo
Raleigh, NC
Hilary Cummings
Chicago, IL
Michael Curley
Raleigh, NC
Megan Curran
Winston Salem, NC
Jennifer Dalman
Stem, NC
Jacob Daniel
Chapel Hill, NC
Kevin Davis
Winterville, NC
Kevin Davis
Newark, DE
Amy Davis
Durham, NC
Margaret Davis
Durham, NC
Morgan Davis
Chapel Hill, NC
Tamaya Davis
Greensboro, NC

Tonya Davis Barber
Goldsboro, NC
James Davis II
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Perrin de Jong
Asheville, NC
Maria Cerina De Ramos
Morrisville, NC
Benjamin Dean
New York, NY
Sarah Dean
Pineville, KY
Michael DeLuca
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Jonathan Dunlap
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Zachary Dussault
Chapel Hill, NC
Leila Early
Durham, NC
Eileen Earnhardt
Williamsburg, VA

Ashley Earnhart
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Kevin Eckhardt
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Robert Ector
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Adrianne Edmonds
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Douglas Edwards
Durham, NC
Antonette Edwards
Durham, NC
Erin Edwards
Louisburg, NC
Kriston Efird
Charlotte, NC
Austin Eggers
Greensboro, NC
Effiong Ekanem
Durham, NC
Jane Elbert
Cary, NC
Michael Eller
Greenville, SC
Reynolds Elliot
Chapel Hill, NC
Tanisha Elliott
Washington, DC
Meredith Ellis
Charleston, SC
Alexander Elmes
Chapel Hill, NC
Richard Elmore Jr.
Raleigh, NC
Edward Enarson
Raleigh, NC
Michele English
Orlando, FL
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St. Petersburg, FL
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Tallahassee, FL
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Washington, DC
Kelli Espaillat
Matthews, NC
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Whitney Frye
Pleasant Garden, NC
Joseph Fulk
Birmingham, AL
David Galbavy
Charlotte, NC
Sheri Gallagher
Matthews, NC
Emily Gallimore
Raleigh, NC
Clarissa Galvin
Apex, NC
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Winston Salem, NC
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Charlotte, NC
Jonathan Garner
Virginia Beach, VA
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Alisa Garvey
Cary, NC
Andrew Gatt
Durham, NC
Kaylan Gaudio
Greensboro, NC
Lauren Gebhard
Chapel Hill, NC
Rebecca Gedalius
Durham, NC
Elizabeth Gerber
Columbus, OH
Laura Geriner
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Lisa Gessler
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Winston-Salem, NC
Tyler Gillis
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Samantha Gilman
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FT Bliss, TX
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Wake Forest, NC
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Natalie Gominger
Durham, NC
Peng Gong
Cary, NC
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Joshua Goodman
Charlotte, NC
Amy Goodman
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Alyn Goodson
Durham, NC
Allison Goodwin
Durham, NC
Allison Goodwin
Sanford, NC
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Durham, NC
Titichia Mitchell
Durham, NC
Preston Mitchum
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Ashley Morrison
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Raleigh, NC
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Courtney O'Brien
Land O Lakes, FL
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Joy O'Donnell
Dublin, OH
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Yokohama,
Amy Oraefo
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Nicholas Overby
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Tanisha Palvia
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Yasha Patel
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Alexander Pham
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Law School Briefs (cont.)

school's Professor Timothy Davis and Wake Forest University Department of Sociology Professor Earl Smith. The *Journal of Law & Policy* is devoted to publishing both legal and interdisciplinary scholarship, according to Editor-in-Chief James Bauer. The *Journal* editors will devote one issue, which is anticipated to publish in the winter of 2012, to a collection of law review-style articles from more than a dozen of the "Losing to Win" conferees. "This issue will feature premier authorship and analysis, with perspectives on race and intercollegiate athletics from an ESPN contributor and journalist, a university president, law professors, and a social psychology professor, among a variety of others," Bauer said. The conference examined the issues of race and intercollegiate sports through a wide and comprehensive lens and featured the perspectives of athletes, academics, administrators, lawyers, and journalists, and initiated a direct and ongoing dialogue around the variables that impact today's student-athletes of color. In addition to Professor Davis, panelists from the law school included Professor Ahmed Taha, Professor Omari Simmons, and Professor Beth Hopkins. To learn more about the conference, please visit http://losingtowin.wfu.edu. ■

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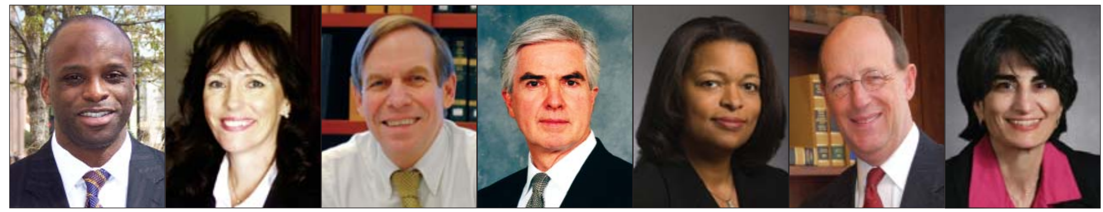

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