THE NORTH CAROLINA STATE BAR

JOURNAL

FALL
2011

IN THIS ISSUE

THE
NORTH CAROLINA
STATE BAR
JOURNAL

Fall 2011
Volume 16, Number 3

 The *North Carolina State Bar Journal* (ISSN 10928626) is published four times per year in March, June, September, and December under the direction and supervision of the council of the North Carolina State Bar, 208 Fayetteville Street, Raleigh, NC 27601. Member rate of $6.00 per year is included in dues. Nonmember rates $10.78 per year. Single copies $3.21. The *Lawyer's Handbook* $10.78. Advertising rates available upon request. Direct inquiries to Director of Communications, the North Carolina State Bar, PO Box 25908, Raleigh, North Carolina 27611, tel. (919) 828-4620. Periodicals postage paid at Raleigh, NC, and additional offices. Opinions expressed by contributors are not necessarily those of the North Carolina State Bar. POSTMASTER: Send address changes to the North Carolina State Bar, PO Box 25908, Raleigh, NC 27611. The *North Carolina Bar Journal* invites the submission of unsolicited, original articles, essays, and book reviews. Submissions may be made by mail or e-mail (ncbar@bellsouth.net) to the editor. Publishing and editorial decisions are based on the Publications Committee's and the editor's judgment of the quality of the writing, the timeliness of the article, and the potential interest to the readers of the *Journal*. The *Journal* reserves the right to edit all manuscripts.

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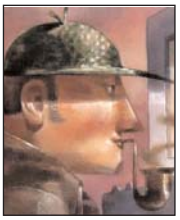

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Update Membership Information: Members who need to update their membership information must do so by contacting the Membership Department via one of the four following methods: (1) log on to the Member Access section of the State Bar's website (www.ncbar.gov); (2) mail changes to: NC State Bar, Membership Dept., PO Box 26088, Raleigh, NC 27611-5908; (3) call (919) 828-4620; or (4) send an e-mail to amaner@ncbar.gov. **In deciding what address to list with the State Bar, be advised that this address will be used for all official correspondence from the State Bar and that membership information is a public record pursuant to the NC Public Records Act.**

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BAR UPDATES

July and the Council in Blowing Rock

By Anthony S. di Santi

In July, the council of the North Carolina State Bar met in Blowing Rock for the first time in many years. The council meets quarterly in Raleigh in October, January, and April. It is the prerogative of the president to select the meeting site for the July meeting, and generally, locations more resort-oriented to which the councilors may bring their family are chosen. We do so because so many of the councilors are not able to take vacations during the year due to the time commitment required to fulfill their responsibilities to the council and their practices. As Blowing Rock is my home, I was proud to be able to introduce many of the councilors to Blowing Rock and to allow them to escape the heat that we generally endure at our other meeting locations in the state.

For the second consecutive year, in association with Mel Wright and the Chief Justice's Commission on Professionalism, we convened a special meeting of representatives of district attorneys, criminal defense attorneys, judges, and administrators of their associations to discuss improving relations within the criminal practice in our state. The first meeting in Pinehurst last year was deemed such a success by the participants that we decided to continue the effort, and this year we were joined by Chief Justice Sara Parker. A broad range of topics was discussed, but if one were to synthesize the meeting into one issue, it would be the need for mentoring of our young lawyers and, as several judges noted, the issue is not limited to the criminal practice as mentoring is needed for our young lawyers in the civil practice as well. For a number of reasons, but one of predominantly the economic reality causing a lack of jobs for recent graduates of our law schools, many lawyers are starting their practices without the guidance and experience of older lawyers that many of us enjoyed when we started our practices. As I noted at the annual meeting of the council in October 2010, the issue of mentoring would be an important concept of my year as president.

The issue of mentoring is of paramount importance to the North Carolina Bar Association as well, and its president, Martin Brinkley, reported to the council in Blowing Rock that the association will soon be unveiling its mentoring program. As a result, the issue of mentoring will be placed on the agenda for the council meeting in October to discuss how the NC State Bar can assist with the implementation of this important program. An aspect of the discussion will be whether such a program will be voluntary or mandatory, as mentoring programs in states that have implemented them have been successful using either concept. Synonymous with the term mentoring is the term professionalism. It is incumbent upon those of us who believe that the issue of professionalism within our bar is the polar star by which we conduct our practices to pass this principal on to those who will succeed us.

The Summer Meeting Intern Program was another program conducted in Blowing Rock which we hope will assist in conveying the credence of professionalism to our young lawyers. Last year Bonnie Weyher, our immediate past-president, and I discussed ways to get younger and more diverse participation in the business of the NC State Bar. She obtained the approval of the council to implement a program in which a student from each law school in North Carolina would attend the summer meeting of the council. The selection of the student was to be made by the law school, with the stipulation that the student must have completed a course in professional responsibility and must be planning to remain in North Carolina upon graduation to practice law. The students were assigned councilors from the Ethics Committee to be their mentors during the meeting. On the first day of the meeting the students were provided an orientation regarding the business of the NC State Bar, after which they attended all of the committee meetings with the exception of the Grievance Committee (meetings of the Grievance Committee are closed meetings). Each of the students, and each of the students' mentors, expressed to me that it was a most enlightening experience by which each student and each mentor gained valuable insight regarding the practice of law. During the next academic year, each student will arrange for a program to be presented at his or her law school, where officers and staff of the State Bar, as well as the student's mentor, will participate so that young lawyers will have a better understanding of the issues that they will encounter when they commence their practice. Hopefully, the program will help instill the credence of professionalism from the inception of their practice. The council will be asked in October to implement this as a permanent program of the State Bar.

I do not have sufficient space allotted to me to inform you of all the work of the council which is conducted during a quarterly meeting to fulfill our responsibility of protection of the public to enable us to maintain the privilege of self-regulation of the practice of law. However, Chief Justice Sarah Parker and Martin Brinkley, president of the NC Bar Association, each addressed an issue that is of utmost importance to the public and the lawyers of North Carolina. It is the issue of access to justice by so many of our citizens who do not have the means to seek that access. Budgetary considerations due to the economic condition of our state will reduce

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It Isn't Easy Being Coy

By L. Thomas Lunsford II

27 N.C.A.C. 1B .0129 Confidentiality

(a) Except as otherwise provided in this rule and G.S. 84-28(f), all proceedings involving allegations of misconduct by … a member will remain confidential until

(1) a complaint against a member has been filed with the secretary after a finding by the Grievance Committee that there is probable cause to believe that the member is guilty of misconduct justifying disciplinary action…

A while back, owing to an astonishing lack of enterprise within the journalistic fraternity, I felt it necessary to devote one of my columns in the *Journal* to my personal exploits in regard to the Duke lacrosse case and the State Bar's consequent disciplinary prosecution of Michael Nifong. Some of you may remember the article, aptly entitled "Fame," in which I recounted my deft handling of the attendant media circus as well as my own burgeoning celebrity as the State Bar's "official spokesman." Of course, my involvement, as intriguing as it was, was merely a sideshow. The main event was the disciplinary case itself. That proceeding, initiated at an absolutely critical moment, brought great credit upon the State Bar. The fearless prosecution of a rogue prosecutor, even as he proceeded to prosecute, demonstrated the vitality and integrity of our self-regulation. Even more importantly, it seemed to accelerate the just outcome of the underlying criminal case. Although my role was marginal, I was justifiably proud to be the voice of the State Bar, if not its face. (That, obviously, was Bruno.)

I advert to the *Nifong* case not to underscore my personal triumph or the agency's commendable attention to duty, but to remind you that for many months after the misconduct occurred—and became a very obvious part of the public record—my voice was silent. Indeed, the State Bar was totally mute with respect to the matter from early April, when our defendant uttered his first patently unethical public statements regarding the lacrosse players, until the disciplinary case was filed before the Disciplinary Hearing Commission (DHC) in late December. This institutional silence evinced no dereliction on anyone's part. It was, rather, mandated by the State Bar's confidentiality rule, quoted above, which in effect requires that all matters pertaining to alleged or apparent misconduct be treated as secret until investigation is complete, probable cause is determined by the Grievance Committee, and a formal complaint initiating a disciplinary case is filed. It is only after the case is filed that the matter, and the State Bar's interest in it, becomes public and can be acknowledged by the agency. Until that occurs, we cannot confirm or deny that an investigation is even pending. This, despite the fact that the entire world is aware of the misbehavior in question and is wondering why "the State Bar isn't doing anything."

It is now well known that the State Bar's office of counsel actually opened an investigative file within a few days after Nifong's first ill-advised press conference. The investigation was then vigorously pursued throughout the next several months leading toward the presentation of the case to the Grievance Committee in October, and the subsequent filing of the disciplinary complaint a couple of months later. Had it not been for the confidentiality rule, it would have been apparent to anyone interested that the State Bar was fully engaged from the onset. As it was, the agency's "official spokesman" was obliged to deflect pointed inquiries from the media and members of the public with lame statements like, "our confidentiality rule prohibits the release of information concerning matters that may be under investigation;" and "we cannot confirm or deny that any particular matter is under investigation;" and, the always popular, "we read the newspapers and you can be sure that the State Bar will do its duty in regard to matters of apparent professional misconduct coming to its attention." I've got to tell you, it isn't easy being coy.

Certainly, most sophisticated people understood that an investigation was ongoing and trusted that their State Bar would ultimately take appropriate action, in public, to address the situation. Unfortunately, a significant segment of the population, having perhaps been disappointed by the government in connection with other matters, was unwilling to take that leap of faith and persisted in doubting our good intentions until the veil was finally lifted. As noted above, it all turned out well in the end. Now, most people only remember my dogged and eloquent adherence to the script. They have forgotten that for a long time I didn't have a script. Going forward, one hopes that our success in the *Nifong* matter will incline the public to trust us to do what is necessary and appropriate in notorious cases. And yet, one suspects that suspicion is more likely to be the public's response to our next informational stonewall, and one wonders whether the benefit of the confidentiality rule can ever truly justify the discredit of the agency.

This raises the question, why do we have a confidentially rule? The rule exists, I believe, mainly to protect the reputations of good lawyers from gratuitous "besmirchment." The fact is that anyone can file a grievance for any reason or no reason at all at no cost. Since nearly 80% are ultimately dismissed, usually because they are outlandish or not susceptible of proof, it makes some sense as a matter of policy that the State Bar should not publicly acknowledge, and thereby lend credence to,

mere allegations. And, besides, if the complaining party really believes that her grievance ought to be made public for some reason, she can always call the newspaper herself or, as is becoming increasingly common, resort to defamation directly on the Internet.

The confidentiality rule has other virtues. It tends to protect client information that might otherwise be disclosed. As things now stand, none of the secrets that come into the possession of the State Bar incident to our investigation of the vast majority of grievances are compromised. The information is gathered discretely and evaluated in closed meetings by the Grievance Committee acting as a sort of grand jury. As noted above, in about 8 out of 10 cases the matter is disposed of outside the public eye, and all of the evidence marshaled in the investigation is consigned to oblivion. Were there no confidentiality rule, the content of each investigative file, which almost always includes sensitive client information, would presumably be public record, like virtually everything else in our files.

And let's not forget that in some cases ignorance can be bliss. As things stand now, the State Bar does not as a matter of policy even bother to advise lawyers that grievances have been filed against them unless there is good reason to request a response. That being the case, a great many patently unmeritorious complaints come to be dismissed without anyone, except the complainant, ever realizing that they were submitted to the State Bar. Not only does this policy, in combination with the confidentiality rule, spare the subject lawyers needless worry and aggravation, but it also obviates the necessity of reporting groundless allegations to malpractice insurers and other entities that might have an interest in the disposition of *all* known grievances, however groundless. If the confidentiality rule were not in place, anyone with the price of a postage stamp and a willingness to swear falsely or ridiculously might have you called to account—somewhere besides the State Bar.

Although there appears to be ample justification for the confidentiality rule, there are a few countervailing considerations. As my experience during the investigative stages of the *Nifong* case tended to show, it's a little silly to refuse to acknowledge that you are doing what every other thinking person in the world knows you are doing. And while experience shows that I can personally get away with all manner of foolishness in the performance of my duties, the State Bar as an entity can't really afford to be silly too often. It's a matter of institutional credibility.

The maintenance of credibility is, of course, essential to effective self-regulation. If our efforts aren't credible, they aren't likely to be effective and they aren't likely to be tolerated. Maybe there's something to be said for absolute openness in the processing of grievances. Maybe our demonstrably successful efforts to police ourselves would be all the more impressive if they could be observed throughout the process. Maybe the sky wouldn't fall if we laid all our cards on the table immediately after they've been dealt.

Interestingly enough, the sky hasn't fallen in Oregon lately. Oregon is the only state in which the grievance system is entirely public. Every complaint filed against a lawyer in that remote and idiosyncratic legal outpost is automatically a matter of public record. This has been the case for many years. According to my sources, the system works well. Gratuitous besmirchment is rare. Clients still confide in their lawyers. Everyone has professional liability insurance. No one is silly, and most people wear Nikes and enjoy the out of doors.

Leaving aside the quaint customs and professional mores of the Pacific Northwest, one wonders whether information about grievances that are being investigated, or that have been dismissed after investigation, might be a valuable commodity in which the public could be said to have some legitimate interest. For instance, anyone familiar with the actual grievance files of the North Carolina State Bar would quickly come to understand that serious misconduct is occassionally foreshadowed by a welter of unsubstantiated complaints that have been quite properly dismissed. If such information were generally available, it could be useful to potential consumers in evaluating various providers of legal services. Indeed, it seems rather unlikely that any person with access to our records would ever hire or recommend the employment of someone known to be one of our "frequent flyers." Now, I would readily concede that a judgment predicated on such information might be misguided—and unfair to the falsely and repeatedly accused—but if I were doing the hiring, I'd probably want to know.

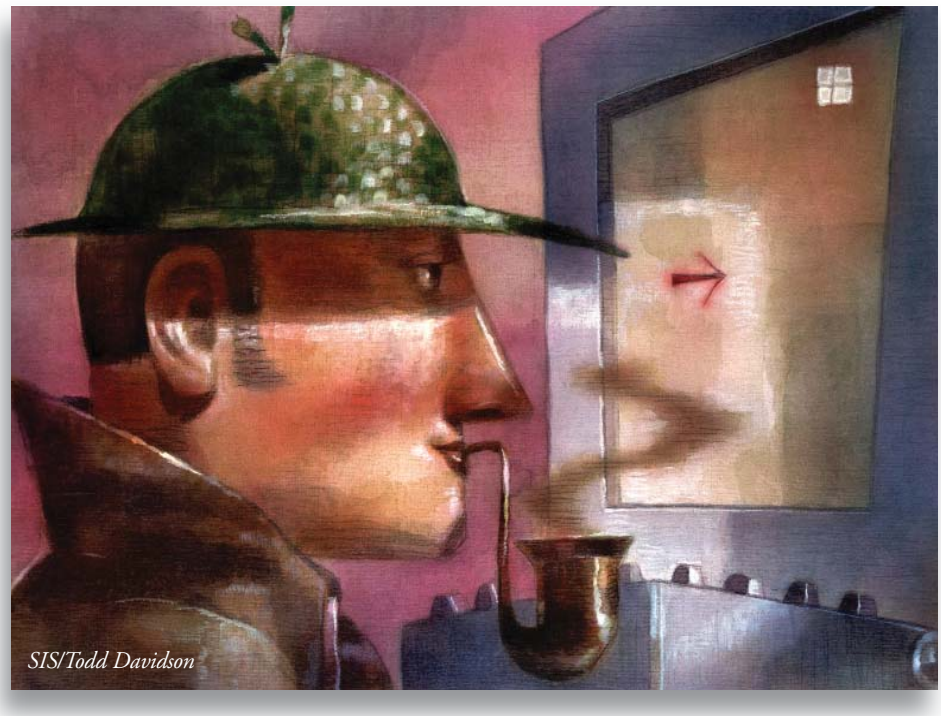
Perhaps what we really need is a different sort of confidentiality rule—one that would protect the content of the investigative file while confessing its existence and its origination. By simply and only acknowledging that an investigation is ongoing regarding a specific matter, the State Bar could affirm its responsibility and confirm its responsiveness without repeating—and thus dignifying—scurrilous allegations. It could also protect confidential client information. And it could take ownership of all of its decisions in regard to grievances, publicly rejecting claims found to be unmeritorious and resolutely proceeding where there is probable cause. Of course, the real question may be whether this admittedly radical notion is "besmirchment neutral." If not, it's probably dead on arrival. Too bad, because it would definitely be good for those of us in the "official spokesman" business who must, from time to time, live in the uncomfortable world between the manifestly unconfirmable and the obviously undeniable. What a conundrum. Would that we could simply agree to live according to the garfunkular wisdom of the poet Simon who once famously sang, concerning two score and ten romantic grievances, "You don't need to be coy, Roy." ■

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

E-Discovery 101

By Ronald R. Davis

E-mail. E-books. E-libraries. E-commerce. The world around us seems inundated by the addition of the letter "e" to terms we thought we knew and understood. So it is perhaps not surprising that "e-discovery" has achieved prominence in the world of litigation. But what does the term "e-discovery" really mean? And does the process of e-discovery differ from traditional rules of discovery familiar to seasoned litigators?



SIS/Todd Davidson

This article will (1) summarize what e-discovery is and (2) explain the ways in which e-discovery procedures depart from or supplement traditional discovery. The goal of this article is to provide North Carolina attorneys with a basic overview of the topic of e-discovery and the rules that may apply in North Carolina.

What is "e-discovery," and why should I be concerned?

The topic of e-discovery may at first glance seem daunting. Your client has gigabytes of potentially discoverable data stored in her inbox, iPhone, or laptop, but your ability to provide counsel is limited by your familiarity with the technology she is using. E-discovery guides abound but often read like they are written in binary code rather than English. Third-party vendors, hungry for your client's money, remind you with daily e-mails that they are much better than you are at e-discovery. Fortunately, e-discovery is not nearly as complicated as they make it out to be. Essentially, e-discovery is the process of discovery of electronic data and documents. The term "e-discovery" is shorthand for "electronic discovery," just as "e-mail" and "e-commerce" refer to "electronic mail" and "electronic commerce," respectively.

In today's digital world, e-discovery is more important than ever because over 99% of all information being generated is created and stored electronically.[1] This data exists in a variety of formats and mediums, ranging from simple documents stored on a client's hard drive to archived data kept on backup tapes or hidden metadata containing information about electronic documents.[2] However, business technology is built to be used for everyday business and personal communications, not for facilitating discovery in a lawsuit.

Therefore, accessing relevant information can be more expensive and difficult than traditional discovery.

As North Carolina attorneys, we must know e-discovery rules because of the potential consequences for us and our clients of non-compliance. For example, a North Carolina federal court recently gave an adverse inference instruction to the jury when a plaintiff discarded a laptop containing relevant files and e-mails.[3] Likewise, a Michigan plaintiff who intentionally erased data from a zip drive, backdated computer files, and lost a CD and an audio recording had its case dismissed.[4] Sanctions for e-discovery violations are becoming more common, tripling in frequency between 2003 and 2004 and growing rapidly since then.[5]

How does e-discovery work?

Fundamentally, e-discovery operates like traditional discovery. However, e-discovery can be more complex because electronically stored information is retained in exponentially greater volume than hard-copy documents, electronically stored information is dynamic, rather than static, and electronically stored information may be incomprehensible when separated from the system that created it.[6] One handy tool to help remember the most important differences between e-discovery and traditional discovery is to think of the Four P's: Preservation, Processing, Production, and Privilege.

Preservation

A client has a duty at the outset of litigation to not destroy potentially discoverable information and data. This duty is triggered once a party reasonably foresees litigation, perhaps before an actual complaint is filed. Therefore, attention to e-discovery should begin immediately upon learning of the potential for litigation.[7] Once litigation becomes foreseeable, a client should apply a "litigation hold" to govern the storage and alteration of electronic records. Within this "litigation hold," non-privileged information that is potentially discoverable must be retained. Preservation may be more difficult in the e-discovery context, however, because electronic information is so easily generated, manipulated, and deleted. Further, clients may have standardized procedures in place to retain only a certain amount of information at any one time. For example, a client's e-mail retention policy might be to store emails for a period of only 30, 60, or 90 days and then delete or store those emails on backup tapes for emergency purposes only. Convincing a client to suspend its routine e-mail retention or destruction policy and apply a "litigation hold" can be both difficult and time consuming due to pushback from the client.

To ensure that the "litigation hold" is properly administered, the attorney first should develop a strong knowledge of his client's technology and its retention and destruction policies. This information is best obtained by a personal visit with client personnel at the outset of litigation. It may be necessary to retain a technology expert to assist you if the client uses sophisticated data systems. Soon after this meeting, the attorney should issue a "litigation hold" letter, outlining the client's duty to preserve relevant e-mails and other electronic documents. Counsel should continue to remind his client of its preservation duties and ensure that new employees are aware of this duty as well. Resending the "litigation hold" communication, working with the client's technology staff to make sure data is preserved, and even taking possession of a client's actual electronic storage media can ensure that this obligation is met.

Processing

Processing involves collecting, cataloging, and analyzing preserved information so that relevant documents can be targeted for production and to assist attorneys in their evaluation of the case. For complex matters involving large amounts of data, processing can be time-consuming and expensive. Costs range as high as $500 to $1,000 per gigabyte to process and host data. However, an effective processing plan can save time and money later by ensuring that the most relevant documents are quickly produced for use in the litigation.

Production

In the production stage, the first step is to identify what must be produced. Imagine your client has preserved 20 backup tapes with e-mails from 2006. Recovering these e-mails will cost tens of thousands of dollars, even though the exact content of the messages is unknown. This situation is common in e-discovery because, although technology allows large volumes of information to be generated and stored with ease, the information is quickly archived and recoverable sometimes only at great expense. In such situations, the key issue is the familiar standard of "undue burden." If production would impose an undue burden, it is not required. Of course, the parties may not see eye-to-eye on this issue. To show undue burden, the responding party must prove that the burdens and costs of production outweigh the relevance of the responsive information. By contrast, the requesting party can defeat this argument by showing that its need for the requested information outweighs the costs of producing it. Courts can test these arguments by ordering a sampling of the potentially-relevant data before compelling full production, and parties often compromise by agreeing to a specific set of search terms.

In some situations, courts will offset the burden of production by requiring cost-sharing arrangements between the parties.[8] In deciding whether to grant such an order, courts generally consider the following factors: the specificity of the request, the availability of the information from other sources, the cost of production relative to the amount in controversy, the cost of production relative to the parties' resources, the ability of each party to control costs, the importance of the issues in the litigation, and the benefit to the parties of having the information.[9]

The second step is to decide how the data should be produced. Unlike paper documents and tangible items, electronic information can be produced in a variety of formats ranging from static image files to fully-functional native forms. For instance, your client could produce e-mails as PDF files, which are essentially pictures of the e-mails viewable on a computer screen. Alternatively, your client could produce e-mails in the form of the original software, like Microsoft Outlook. Production in such a native format allows the requesting party to fully sort and search the data while also viewing it with attachments intact. Discovery requests can specify a desired form of production, but the responding party is not necessarily bound by the request and it can voice objections. Ultimately the form of production will be whatever is agreed to by the parties or mandated by the court.

Privilege

Protecting privileged information is an especially difficult exercise in e-discovery. The potentially enormous volume of discoverable data often makes it impracticable (if not literally impossible) to review every piece of responsive electronic material to determine if any are privileged. For instance, e-mail correspondence with a client might be protected by

attorney-client privilege, yet it might take hundreds of hours to review tens of thousands of responsive e-mails to weed out the few privileged ones. To deal with this difficult situation, courts have approved "clawback" agreements. In a clawback agreement, the parties mutually agree to produce all identified information, and also agree to return and not use as evidence any information that is later identified as privileged. This approach expedites litigation and saves clients time and money by eliminating the need for attorneys to spend hundreds of hours searching for every privileged document. Note, however, that clawback agreements in no way affect the substantive law of privilege as contained in evidence rules or statutes.

Specific Rules for North Carolina

Specific e-discovery rules can vary by jurisdiction. Different rules apply in North Carolina federal courts and North Carolina state courts.

North Carolina Federal Courts

The Federal Rules of Civil Procedure (FRCP) were amended in 2006 to address e-discovery. Rule 26 includes basic e-discovery procedures. Rule 26(b)(2)(B) contains an added stipulation that production of electronic documents not reasonably accessible is not required when the responding party would suffer undue burden or cost. Additionally, according to Rule 26(f)(3)(C), the parties must discuss e-discovery issues at their Rule 26(f) conference, including the form in which electronic documents should be produced. Revised Rule 16(b)(3)(B)(iii) empowers the court to include a plan for e-discovery in its scheduling order.

The FRCP also contain rules relating to production. Rule 33(d) provides that a party's electronically stored business records can be examined by the other party if such an examination would provide an answer to an interrogatory. Rule 34(a)(1)(A) empowers parties to specify the form of production, but Rule 34(b)(2)(D) allows responding parties to object to a specified form. Rule 45 allows third parties to be subpoenaed for their electronic information, subject to the other pre-existing Rule 45 procedures for third-party subpoenas. Finally, Rule 26(f)(3)(D) now specifically provides for the creation of clawback agreements to manage privilege issues.

The western district of North Carolina has local rules on e-discovery. LCvR 16.1(G) provides that an initial pretrial conference can be requested by the parties, at which e-discovery and other issues can be discussed and resolved before a magistrate judge. Additionally, LCvR 45.1(C) states that non-parties producing readily retrievable electronic data should do so in electronic format, preferably on a CD.

North Carolina State Courts

Until June 2011 North Carolina had no specific rule of civil procedure governing e-discovery. The North Carolina Rules of Civil Procedure were amended in June 2011 to add rules pertaining to e-discovery in North Carolina state courts.[10] The new procedures resemble the federal rules outlined above and apply to actions filed on or after October 1, 2011. Specifically, Rule 26 now includes "electronically stored information," including metadata, within the scope of discoverable material. Additionally, Rule 26 now provides for a discovery meeting, conference, and plan that must address, in part, e-discovery. Rules 34 and 45 were amended to address electronically stored information. Finally, and perhaps most notably, Rule 37 contains a new protective clause that may shield clients from sanctions for destruction of electronic information. According to the new rule, a court may not impose sanctions if a party has lost electronically stored information as part of routine, good-faith operation of an electronic information system, absent exceptional circumstances. In addition to the new requirements of the North Carolina Rules of Civil Procedure, Rules 17 and 18 of the North Carolina Business Court place additional requirements on litigants with cases in the North Carolina Business Court.

Conclusion and Additional Reading

Despite its seeming complexity, e-discovery actually operates much like traditional discovery. By remembering the Four P's (Preservation, Processing, Production, and Privilege), North Carolina attorneys should be able to sufficiently manage the complexities and procedural requirements implicated by the addition of modern technology into the world of litigation. For further reading on this topic, several court opinions are particularly helpful. The entire *Zubulake v. UBS Warburg* series, consisting of seven different opinions authored by Judge Shira Scheindlin, is a must-read for federal court practice.[11] Many of Judge Scheindlin's recommendations were incorporated into the Federal Rules of Civil Procedure in 2006. For North Carolina law, *Analog Devices v. Michalski* [12] provides a thoughtful analysis of e-discovery issues by the North Carolina Business Court. Finally, the Sedona Conference, a group devoted to "best practices" in e-discovery, maintains an extensive collection of helpful resources, available online at thesedonaconference.org. ■

Ronald R. Davis is a member of Womble Carlyle Sandridge & Rice, PLLC, and practices business litigation in its Greensboro and Winston-Salem offices. *The author gratefully acknowledges the assistance of Matt Triplett, a rising second year law student at Duke University School of Law, in the preparation of this article.*

Endnotes

1. David K. Isom, *Electronic Discovery Primer for Judges*, Fed. Cts. L. Rev. 1, 1 & n.1 (2005).
2. For more information on metadata, *see* Erik Mazzone, *Metadata 101: Beware Geeks Bearing Gifts*, NC State Bar J., Spring 2011, at 10.
3. *Teague v. Target Corp.*, 2007 WL 1041191, at *2 (W.D.N.C. 2007).
4. *Fharmacy Records v. Nassar*, 248 F.R.D. 507, 530 (E.D. Mich. Mar. 31, 2008).
5. Dan H. Willoughby, Rose H. Jones, & Gregory R. Antine, *Sanctions for E-discovery Violations: By the Numbers*, 60 Duke L.J. 789, 790-91 (2010).
6. *Analog Devices v. Michalski*, 2006 WL 3287382, at *5 (NC Super. Nov. 1, 2006) (citing Comm. on Rules of Practice & Procedure, Judicial Conference of the US Report of the Judicial Conference Committee on Rules of Practice and Procedure Rules App. C-18 (2005), www.uscourts.gov/rules/Reports/ST09-2005.pdf).
7. The issue of when litigation is foreseeable has recently been litigated in federal court. *See Micron Tech. v. Rambus Inc.*, 2011 WL 1815975 (Fed. Cir. May 13, 2011); *Hynix Semiconductor v. Rambus*, 2011 WL 1815978 (Fed. Cir. May 13, 2011) (holding that reasonable foreseeability is a flexible standard and that litigation need not be "imminent" to be foreseeable). These companion opinions provide a helpful clarification of the "reasonably foreseeable" standard.
8. *See, e.g., Analog Devices, Inc. v. Michalski*, 2006 WL 3287382 (NC Super. Nov. 1, 2006).
9. *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309 (S.D.N.Y. May 13, 2003).
10. An Act to Clarify the Procedure for Discovery of Electronically Stored Information and to Make Conforming Changes to the North Carolina Rules of Civil Procedure, Session Law 2011-199 (2011).
11. *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309 (S.D.N.Y. May 13, 2003); *Zubulake v. UBS Warburg LLC*, 230 F.R.D. 290 (S.D.N.Y. May 13, 2003); *Zubulake v. UBS Warburg LLC*, 216 F.R.D. 280 (S.D.N.Y. July 24, 2003); *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212 (S.D.N.Y. Oct. 22, 2003); *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422 (S.D.N.Y. 2004); *Zubulake v. UBS Warburg LLC*, 231 F.R.D. 159 (S.D.N.Y. Feb. 3, 2005); *Zubulake v. UBS Warburg LLC*, 382 F.Supp.2d 536 (S.D.N.Y. Mar. 16, 2005).
12. 2006 WL 3287382 (NC Super. Nov. 1, 2006).

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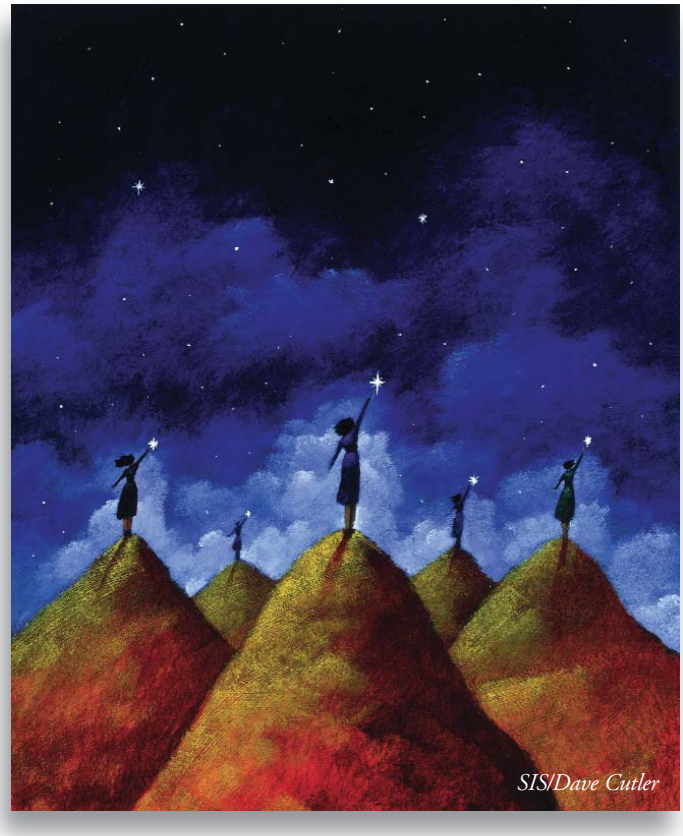
The North Carolina Association of Women Attorneys:

Creating Camaraderie, Nurturing Leaders, and Protecting the Rights of Women

By Carolyn McAllaster and Jennifer Brobst

One hundred years after Tabitha Holton became the first woman to pass the bar exam in North Carolina and the first woman in the South to become a licensed attorney,[1] the North Carolina Association of Women Attorneys (NCAWA) began its formation on March 11, 1978, in Chapel Hill.[2] NCAWA was the brainchild of Durham attorney Sharon Thompson. Along with attorneys Anne Slifkin, Carolyn McAllaster, and Kathy Schneberk-King, Thompson poured over the State Bar list of attorneys trying to identify those who were women, which was not always obvious (Leslie? Beverly?). They came up with a list of 375 female members of the Bar. In 1979, Carolyn McAllaster was elected as the first convener/president of the association, with a founding number of 100 members. That first year, the North Carolina State Bar provided NCAWA with office space in its building.



SIS/Dave Cutler

Today, NCAWA has hundreds of members, including a number of men, and five local chapters across the state.[3] The organization is more structured, with an employed executive director, large board, lobbyist, and numerous committees, but the purpose of the organization remains consistent with its founding mission:

1. to increase the effective participation by women in the justice system, in public office, and within the legal profession;

2. to promote the rights of women under the law;

3. to promote the welfare of the women attorneys of North Carolina; and

4. to promote and improve the administration of justice.

Creating Camaraderie

The 1970s produced the first large classes of women graduating from law schools. Female law students were involved in Women in Law organizations. They were learning about laws and cases that strengthened the rights of women in employment, the family, and reproductive rights. Also, there was finally safety in numbers for women students in class and in the law school environment generally. In NCAWA's first year, North Carolina was in the throes of a number of firsts: Naomi Morris became the first woman to serve as chief justice of the North Carolina Court of Appeals, Annie Brown Kennedy became the first African American woman attorney to be appointed to the North Carolina General Assembly,[4] and Linda Sedivec was the first Hispanic woman to graduate from the University of North Carolina (UNC) School of Law.

As the NCAWA conveners reached out to women attorneys, they were met with overwhelming support for the creation of the new bar association. They heard about the isolation women felt as they practiced law, often as the only female attorneys in their counties. Women told stories of the reactions they received when they walked into court, such as judges addressing them as "sweetie" and "honey" or hearing that they should not walk in front of the bar because that was for "attorneys only." Women told stories of difficult job searches—one being told that she was not qualified to be a real estate attorney because she would not be able to lift the heavy deed books. The formation of NCAWA could create a network of support for women as they made their way in the profession.

This need and desire for camaraderie based on common experience and minority status is universal. For example, Lelia Robinson-Sawtelle, one of the first women in the 19th Century to practice before the United States Supreme Court, helped form The Equity Club, the first national association for women attorneys. She explained their purpose in formation as follows:[5]

> There is a certain "moral support" in the confiding sympathy of brave-souled, warm-hearted women, who have dared and suffered in kind with ourselves, which becomes a tower of strength to nerve the heart and sustain the brain when both are taxed to the utmost as is often the case in the practice of our grand profession. I became convinced years ago, that the few women lawyers of the country should become better acquainted for their mutual benefit, and acting upon such conviction, wrote to several of my sisters in the profession, from which

WOMEN IN BAR ASSOCIATION EXECUTIVE LEADERSHIP [8]

(as of September 2010)

BAR ASSOCIATION	WOMEN OVERALL	WHITE WOMEN	WOMEN OF COLOR
NC Advocates for Justice	2 out of 17 (18%)	(2) 18%	(0) 0%
NC Association of Women Attorneys	12 out of 12 (100%)	(12) 100%	(0) 0%
NC Association of Defense Attorneys	10 out of 27 (37%)	(9) 33%	(1) 4%
NC Bar Association	11 out of 33 (33%)	(8) 24%	(3) 9%
American Bar Association	5 out of 9 (56%)	(4) 45%	(1) 11%
National Association of Women Lawyers (not all members identified)	17 out of 17 (100%)	(14) 82%	(3) 18+%
National Bar Association (The nation's oldest and largest national association of predominantly African American law professionals)	7 out of 23 (30%)	(0) 0%	(7) 30%
Hispanic National Bar Association	6 out of 15 (40%)	(0) 0%	(6) 40%
National Asian American Pacific American Bar Association	5 out of 9 (56%)	(0) 0%	(5) 56%

resulted a correspondence both pleasant and profitable.

At that first meeting of NCAWA on March 11, 1978, the keynote speaker was attorney Dr. Pauli Murray, who had been raised in North Carolina. She was the first African American woman to become ordained as an Episcopal priest, and also the first African American woman in the nation to publish in an academic law review.[6] Before attaining these achievements, Dr. Murray had been refused admission to UNC School of Law because of her race and to Harvard's graduate law program because of her sex. She urged the group to remain diverse: "I hope you will stay together as you have begun together. Black women…bring to the women's movement a kind of experience and a kind of toughness. Today, feminism for me is fun—30 years ago, racism was agony."

The experiences of women are inherently diverse and complex. Among white women attorneys and women attorneys of color, women law students from low income or affluent families, or from urban or rural backgrounds, none will ever have the same experience:[7]

> The African American female lawyer is unique. She is unique in her endurance and will to survive in the face of repressive and restrictive conditions. Her experience and mere being is unlike that of other female lawyers. It is this uniqueness that fortifies and encourages us all to keep the struggle for justice and equality alive.

In the early 1990s, NCAWA began lobbying the State Bar to collect demographic information (age, sex, and race) about the composition of its membership in order to identify trends and needs in the profession. After significant renewed efforts by NCAWA Presidents Susan Dotson-Smith and Charlotte-Anne Alexander in 2008 and 2009, who both collaborated with other bar association partners, the State Bar agreed and has begun this year to ask its members to provide these details. It should soon be possible to have an accurate demographic breakdown of attorneys in our state, including statistics based on race and gender.

NCAWA itself began to collect demographic data on its members in 2009 to better identify the needs and diversity of its membership. Despite a promising start, NCAWA has struggled over the years to maintain diversity in its membership and leadership positions. As the chart on this page reveals, maintaining racial and ethnic diversity in board leadership remains a challenge for many bar associations. However, NCAWA's dedicated mission and advanced monitoring will allow it to improve its reach. In a study of bar association leadership demographics, the need for both increased leadership opportunities and a welcoming environment for women attorneys of color is apparent in many bar associations, both state and national.

The trend towards increasing recognition for women attorneys in North Carolina has been constant. By 1997, NCAWA had joined the National Conference of Women's Bar Associations (NCWBA), and NCAWA President Lynne Albert was elected NCWBA President in 2006. Strength in numbers and the power of the "old girls'" network cannot be denied. It may be that the greater diversity and number of attorneys today have engendered a greater choice of voluntary bar association memberships. This will require a new way of thinking about what members want and need from professional associations. At the 2010 NCAWA annual conference, which focused on diversity in the profession, a show of hands during a plenary session revealed that almost every woman attorney in the room was a member of several bar associations, mainstream and specialized, local, state, and national. Many who had achieved success in mainstream bar associations expressed a strong interest in retaining their NCAWA membership in order to retain the camaraderie they had enjoyed for many years in the presence of other women attorneys.

Nurturing Leaders

In 1978, most of the 375 women attorneys in the state were under the age of 30.

They were eager to become fully integrated into the legal profession, not merely as members, but as leaders—on bar committees, as Bar councilors, on the Board of Law Examiners, as judges, and as legislators. They saw the formation of NCAWA as a vehicle to meet those goals. However, not all of the women attorneys in North Carolina supported the formation of NCAWA. Most notably, Justice Susie Sharp of the North Carolina Supreme Court and Judge Naomi Morris of the North Carolina Court of Appeals viewed the formation of a separate bar association as a step backwards for women attorneys, and a path to isolation rather than leadership and integration into the bar. They had spent their careers seeking inclusion in the power structure of the mainstream bar and had been successful in their efforts. Justice Sharp was the first female chief justice of any state's highest court in the nation. They understandably did not want to jeopardize the progress they and a handful of other women attorneys had made. Katherine Everett was the exception to this view. At age 83, and as the third woman to pass the bar in North Carolina, she sat in the middle of the first row at the convening meeting of NCAWA in 1978. When she was given an award by the association in 1983, Ms. Everett wrote, "I was only one of the first—not the first woman licensed—though I was the pioneer woman in arguing a case in person in the North Carolina Supreme Court, and winning. We've come a long way since 1920."

In 1978, there was only one woman on the North Carolina Supreme Court, one woman on the North Carolina Court of Appeals, no women on the superior court bench, no women Bar councilors, no women on the Board of Law Examiners, and very few female district court judges. The creation of NCAWA gave women attorneys a seat at the table. Almost immediately, doors opened. NCAWA began receiving calls from the governor's office when judicial vacancies occurred, and received invitations to send representatives to the long-range planning meetings of the State Bar. Various North Carolina bar associations asked for NCAWA recommendations for committee assignments. NCAWA was given designated positions on statewide boards, such as the North Carolina Prisoner Legal Services.[9] Instead of isolating women attorneys into a separate bar association, NCAWA proved to be a launch pad for women to become more involved in the mainstream bar.

Perhaps the increasing number of women in the judiciary has been NCAWA's most successful effort for women in leadership. NCAWA members had to work diligently to exert their combined influence on public appointments and elections. In 1982 and 1983, NCAWA finally began to see some women appointed to the superior court bench. Attorney Joyce Davis of Raleigh and Francis Rutty of Salisbury were appointed to the Judicial Nominating Committee by the governor and the chief justice. NCAWA worked with Governor Hunt's office to support the appointment of Mary Mack Pope to a special superior court seat at a time when only two women had previously been superior court judges—Susie Sharp from 1949 to 1962 and Winifred Wells in 1972. In addition, NCAWA lobbied hard and successfully for the appointment of Sarah Parker to the court of appeals in 1984.

In 1986, the NCAWA-PAC was formed in large part through the efforts of member Lynn Fontana to give members a vehicle through which to support judicial candidates for election. Also that year, for the first time, NCAWA succeeded in getting three women elected to the State Bar Council—Trish Pegram, Julia Jones, and Kay Webb. In 1998 as the number of women judges had increased, Court of Appeals Judge Linda McGee created the Judicial Division of NCAWA. Each year since then, Judge McGee has spear headed judicial panels of female judges at each of the state's law schools in collaboration with the law school women student organizations.

As expected and hoped for, women attorneys increasingly achieved leadership roles beyond the bounds of NCAWA. Successful women in the law have not always been members of NCAWA, but many women have been members of both mainstream and specialized bar associations, such as NCAWA.[10] For example, Rhoda Billings became the first woman president of the North Carolina Bar Association in 1991. In 2000, M. Anne Reed became the first woman president of the North Carolina State Bar. Last year, NCAWA member Bonnie Weyher made diversity of the North Carolina State Bar councilors one of the priorities of her State Bar presidency. Current president Anthony di Santi has vowed to continue these efforts.

Today a majority of North Carolina's Supreme Court justices are women and include longstanding members of NCAWA—Chief Justice Sarah Parker, Justice Patricia Timmons-Goodson, and Justice Robin Hudson. Seven of the 15 court of appeals judges are also currently women, including founding NCAWA member Linda McGee. Nevertheless, a number of counties in North Carolina still have never had a woman serve as a superior court judge.[11] Also, women corporate counsel continue to face thick glass ceilings. In 2009, only 17% of corporate counsel in Fortune 500 companies were women, up from 8.4% in 2000.[12] Clearly, the need for advocacy on behalf of women has not ended.

Protecting the Rights of Women

NCAWA has taken its mission of promoting the rights of women under the law seriously. Its first legislative position was to support the Equal Rights Amendment in 1978. In the early years, NCAWA was instrumental in getting equitable distribution passed in North Carolina. The legislation was written by Greensboro attorneys Meyressa Schoonmaker, Gwyn Davis, and Ellen "Lennie" Gerber and shepherded through the legislature by NCAWA in 1981. It was NCAWA's first major piece of legislation and, as Lennie stated, "it helped us get into the legislative halls." Notably, that same year Sandra Day O'Connor became the first woman to serve as a United States Supreme Court Justice.

Closely following this initial success, NCAWA was successful in changing the tenancy by the entirety statute in 1983. At that time the husband had the legal right to control all rents and profits of property owned as tenants by the entirety. Domestic violence legislation was also passed in 1983 with NCAWA's support. Part of NCAWA's success in advocacy has been its ability and desire to collaborate with other organizations. For example, in its successful advocacy to eliminate the marital rape exemption in North Carolina in 1993, NCAWA joined with NC NOW, the North Carolina Coalition Against Sexual Assault, the North Carolina Council of Churches, North Carolina Legal Services, and Planned Parenthood.[13] Since then, NCAWA has

often worked in coalitions and has supported and worked for child support reform, day care reform, reproductive freedom, domestic violence programs, pay equity, and support for low-income families.

NCAWA has also contributed several notable amicus briefs in key cases. For example, in 1992 NCAWA member Elizabeth Kuniholm authored an amicus brief in *Doe v. Holt*, also signed by the North Carolina Academy of Trial Lawyers (North Carolina Advocates for Justice). This brief to the North Carolina Supreme Court supported the lower court's rejection of an application of the doctrine of parental immunity in a tort claim involving child sexual abuse.

Policy efforts to ameliorate work-life balance concerns and gender equity in the workplace for women attorneys and judges in North Carolina have had a longstanding place of importance for NCAWA. In 1989, as a result of the efforts of the NCAWA administrations of Jane Wettach and Pam Silberman, and in recognition of the increasing numbers of women in the profession, the NC Bar Association provided funding for a statewide survey to be conducted jointly with NCAWA on how gender affects the practice of law. As expected, the survey results highlighted many of the serious challenges that women attorneys faced, including the impact of child-rearing on career choices, income disparities between equally situated male and female attorneys, the impact of workplace policies on career advancement, and other documented discriminatory behaviors in legal professional settings. The survey results led to the formation of the Commission on the Status of Women in the Legal Profession, co-chaired by attorneys Dorothy Bernholz and Sharon Parker. The 1993 findings and recommendations of the commission continue to be relevant and provide a model framework for legal employers on issues of gender equity such as parental leave policies, alternative work schedules, involvement of women in firm management and client development activities, and adoption of sexual harassment policies.

As technology rapidly improved in the new millennium, NCAWA responded in kind, unveiling a new, more expansive website. In 2002, NCAWA sponsored the award-winning statewide television program "Laying Down the Law," with host Lynne Albert, whose televised interviews educated the state on women's rights and legal concerns for a number of years.

Most recently, NCAWA helped lead the effort for adoption by the North Carolina State Bar of the proposed amendment to the Preamble to the Rules of Professional Conduct that would have encouraged attorneys not to "discriminate on the basis of a person's race, gender, national origin, religion, age, disability, sexual orientation, or gender identity." After vigorous debate and study, the proposed amendment was approved by the North Carolina State Bar Council in January 2011, but regrettably on March 10, 2011, the North Carolina Supreme Court declined to approve the proposed amendment.

Conclusion

Looking back to its first meeting in 1978, as the group worked through the day's agenda to set the goals of the organization, lifelong friendships and professional relationships were begun. They debated, they laughed, they marveled at the energy, and most of all they basked in each other's support and companionship. By the end of the day the conveners had formed a steering committee and voted to form as an organization. The energy, warmth, and dedication of that initial group of women have remained a hallmark of NCAWA over the years, continuing to offer camaraderie, opportunities for leadership, and efforts to protect women under the law in our state.

The breadth of achievement for North Carolina women in the law in the last century has been remarkable, not only in terms of organizational strength and vision, but also in their ability to participate successfully in a number of arenas at once. No written work could adequately honor the numerous women who have contributed to the development of NCAWA and women in the legal profession. Women attorneys today are successful leaders in the traditional mainstream, state and national (and international) forums, and in networking that focuses on the common experience of race, ethnicity, sexual orientation, age, gender, and much more. As long as women's unique needs continue to require a champion under the law, NCAWA will remain vigilant in ensuring that their voices are heard. ■

Carolyn McAllaster, JD, is a clinical professor of law and director of the AIDS Legal

Project at Duke University School of Law. She was a co-founder of NCAWA and its first convener/president.

Jennifer Brobst, JD, LLM, is the legal director for the Center for Child and Family Health, a nonprofit consortium of faculty and staff from Child and Parent Support Services, Duke University, North Carolina Central University, and the University of North Carolina at Chapel Hill. The center's Legal Program is a component of the NCCU School of Law Clinical Programs. She formerly served as the historian on the Board of Directors for the North Carolina Association of Women Attorneys, and as president of its Durham-Orange Chapter. Many thanks to NCCU Law intern Jacinta Jones for her editing and helpful comments.

Endnotes

1. *See generally,* Walter C. Holton Jr., "Tabitha Ann Holton, First in the South," 16 NC State Bar J. 2 (2011).
2. Both authors have relied in part on the current archives of NCAWA, which are housed in Duke University Library's Special Collections in the Sallie Bingham Center, available for viewing by the public. For a more detailed overview of the history of NCAWA, see Jennifer Brobst, "North Carolina Association of Women Attorneys (1978-2009): A Comprehensive History of NCAWA Members and Women Attorneys Nationally" available at www.ncawa.org/attachments/files/60/NCAWA%20Chronology%20as%20of%20Dec%2011%202009_1.pdf.
3. *See* www.ncawa.org. Chapters include Charlotte Women's Bar, Durham-Orange Women Attorneys, Eastern North Carolina, Wake Women Attorneys, and Western North Carolina Women Attorneys.
4. Note that Alfreda Johnson Webb, a veterinarian, was the first African-American woman appointed to the NC General Assembly in 1971. Annie Brown Kennedy was the second.
5. Mary L. Clark, "The First Women Members of the Supreme Court Bar, 1879-1900," 36 San Diego L. Rev. 87, 129 (1999). The Equity Club was formed in 1887 as a national correspondence club for women attorneys through the University of Michigan Law School, which was one of the first law schools to admit women in the United States.
6. J. Clay Smith Jr. (ed.), *Rebels in Law: Voices in History of Black Women Lawyers* 281 (University of Michigan Press, 1998). Dr. Murray published her article in the UCLA Law Review in 1948.
7. *African American Female Pioneers in Search of Justice and Equality: 1947-1990*, vol. 3 Chronicle of Black Lawyers in North Carolina (North Carolina Association of Black Lawyers 1990).
8. Jennifer Brobst, "Gender Disparity in Public Service," North Carolina Bar Association continuing legal education presentation manuscript 9 (October 2010). This data was obtained through website research and telephone interviews with bar association offices. The author suggests the following conclusion on considering these numbers: "Women's leadership in public service is bound to take its full and rightful place. Whether this destiny is achieved with honor and respect for the diversity within society as a whole and specifically among women will be the measure of our success." *Id.* at 11.
9. *See generally,* Michael S. Hamden, "North Carolina Prisoner Legal Services: A Model for Other States?" 40 No. 2 Crim. Law Bulletin ART 2 (2004).
10. In an interview in 1995, former NCAWA President Ellen "Lennie" Gerber advised women law students to join both women's law student and attorney organizations, as well as the general bar associations. Walter H. Bennett & Judith W. Wegner, "Law Alumni Service to the Public and the Law School," 78 N.C. L. Rev. 846, 897 (1995).
11. *E.g.*, Orange County.
12. Hope E. Ferguson, "Women General Counsel: Beyond the Glass Ceiling," in *Diversity and the Bar* (Minority Corporate Counsel Association, March 2002), and Minority Corporate Counsel Association, "MCCA 2009 Survey of Fortune 500 Women General Counsel" (2009).
13. Jaye Sitton, "Old Wine in New Bottles: The 'Marital Rape Allowance,'" 72 N.C. L. Rev. 261, 287, fn 176 (1993).

Rules of Civil Procedure and Their Impact on Foreclosure Cases in North Carolina

By Timothy J. Peterkin

Homeowners across the country are facing foreclosure. The numbers are staggering.[1] In fact, many economists suggest that the rise in foreclosure rates has a direct impact on the entire economy. In North Carolina, foreclosures are on the rise as well, even though the growth in North Carolina is not as voluminous as other states.[2]

SIS/Rob Colvin

The reasons for an increase in foreclosures are numerous and the subject of much debate. Some argue that the issue is simply about personal responsibility. After all, if the homeowners pay their mortgage (and property taxes and insurance), there would be no foreclosures. Others argue that greedy lenders trick unsophisticated homeowners into getting mortgages they cannot afford. In fact, the tricks are very subtle and sophisticated. There are teasers rates and adjustable rate mortgages that make the mortgage payments lower at first, but then they rise. Congress and state legislatures have enacted legislation designed to protect homeowners and limit unscrupulous lenders. However, some Rules of Civil Procedure and some questionable court opinions have hindered the enforceability of the act and its ability to protect homeowners.

Court is No Place For Equity

If a homeowner is facing foreclosure, usually the lender has a "power of sale" provision in the deed of trust that allows the lender to go to the county clerk of court and have a hearing.[3] At this hearing, the clerk will not be in a position to hear all of the arguments that the homeowner may have. In fact, the clerk will have no choice but to proceed with the foreclosure even in the face of uncontroverted evidence that the lender has violated the Anti-Predatory Lending Act. The courts made a distinction between legal and equitable arguments in these proceedings.[4] The clerk can only hear the legal arguments. If the homeowner only has equitable arguments, the homeowner will lose his home at this hearing. If the homeowner files an appeal of the foreclosure to be heard by the superior court judge, the homeowner's equitable arguments will still not be heard and the homeowner will still lose his home, regardless of the strength of the equitable arguments.

It would surprise the average homeowner to know that equitable arguments cannot be raised at a foreclosure hearing. Only legal defenses are permitted at a foreclosure hearing before the clerk.[5] Courts are seen as places people go to seek justice and fairness—equity, if you will. The images that are seen on television suggest that a courtroom is a place to address all of the issues and seek complete resolutions. However, time and time again, the

appellate courts have made a distinction between legal and equitable defenses to a foreclosure. The result is quite concerning. If the homeowner is arguing what the court has deemed an equitable argument, this argument or defense can have no bearing on the foreclosure hearing before the clerk or on the *de novo* appeal of the foreclosure order before the superior court judge. No matter how voluminous the evidence or how compelling the equitable argument may be, the clerk and the superior court judge are without jurisdiction to hear these arguments or make rulings based upon these arguments when there is a foreclosure that has been filed under N.C. Gen. Stat. § 45-21.16.[6]

Equitable arguments simply cannot be raised at a foreclosure hearing or on the *de novo* appeal. Issues such as fraud and usury or violations of the NC Anti-Predatory Lending Act are all considered equitable arguments and thus improper before the clerk at the foreclosure hearing or the superior court judge in the *de novo* review. If the homeowner argues there was fraud in the loan transaction, this argument cannot be raised in the foreclosure hearing because fraud is an equitable argument. Despite overwhelming evidence that the lender actually did defraud the homeowner, the clerk would still have to enter the order for the foreclosure. The superior court judge presiding over the foreclosure appeal would also have to ignore the fraud and uphold the foreclosure order entered by the clerk.

Foreclosure actions under §45-21.16 were designed to be simple, straightforward proceedings. The questions were basic: did the homeowner have an obligation to pay; did the homeowner pay as he promised he would; does the paperwork say the lender can take the house back if the homeowner has not paid as promised; and did the homeowner know about this hearing? As has often been said, "If you don't want to lose your house, pay your mortgage." It does seem very simple. Unfortunately, mortgage transactions have become more complicated and the reasons for foreclosure have also become more complicated. If the scenarios for the homeowner were simply a result of irresponsible derelicts taking advantage of lenders who were kind enough to loan money, there would be no need for usury laws, anti-predatory lending laws, and there would certainly be no need for this article.

At first glance, this does not seem problematic. After all, the clerk is to look at the paperwork and determine if four elements are met: existence of a valid debt, default, power of sale granting the right to a non-judicial foreclosure, and proper notice of the proceedings.[7] The clerk gets an affidavit from the trustee that says the homeowner has missed some payments, no matter how much.[8] Next, the trustee shows the clerk the deed of trust. In this document, the power to use the quick and fast foreclosure process has been granted, instead of a judicial foreclosure.[9] The trustee can show the clerk that the homeowners were notified of the proceeding.[10] If the trustee has an executed promissory note, then the foreclosure sale should be ordered.

The result is that the clerk does not hear an "equitable" argument at a legal proceeding when homeownership interests are at stake, and the courts prohibit "equitable" arguments.

Legal Defenses Are Allowed

The clerk can entertain a legal defense to a foreclosure. The courts have been very narrow in defining what is a legal defense to a foreclosure in a hearing before the clerk. If the homeowner says he/she never signed the loan documents, this is a proper legal defense.[11]

Equitable Defenses

Equitable defenses are strictly prohibited in a clerk's hearing. In November 2005, a nonprofit agency that is dedicated to mortgage foreclosure defense filed a Motion to Set Aside a Foreclosure in an effort to save Ms. Weeks' home.[12] Ms. Weeks was in her 90s and everyone around her agreed that she had dementia at the time of the closing of the loan. There were affidavits from her daughter and her pastor (a member of the Board of County Commissioners) attesting to the fact that Ms. Weeks did not have contractual capacity. There was no way that she could have known what document she was signing. Further, no notary or closing attorney would have thought that she was in a position to sign loan documents. Her home of over 50 years had been mortgaged a few years earlier and had now gone through a foreclosure. Her representatives explained to the legal advocate that they were not aware of any mortgage on the property, and more importantly, if there was a mortgage, there was no way that Ms. Weeks understood what she was doing when or if she signed any loan documents. This appeared to be a clear case of fraud. Ms. Weeks was bedridden and spoke of being late for work, even though she had not had a job in over 30 years. No one wanted to see the 90-year-old widow lose her home.

Unfortunately, fraud is an equitable defense and the clerk cannot hear such defenses at a foreclosure hearing.[13] It is irrelevant to the clerk that this lady could not identify her own daughter, much less understand that she was signing a loan that would encumber her primary residence. Instead of stopping the foreclosure and demanding an investigation into the matter before the hearing could proceed, the clerk had no choice but to sign an order that was going to cause a 90-year-old woman to be removed from her home by the sheriff the day before Thanksgiving. The clerk cannot be held responsible for this outcome because even in the most egregious of circumstances, the clerk's hands are tied. The legal advocates for Ms. Weeks had affidavits from ministers and elected officials who had known Ms. Weeks for decades and attested to her lack of competence. There was really no question that this loan was executed under fraudulent circumstances. The only question remaining was how Ms. Weeks could get relief. Could she get the advocate to go to the hearing and explain that the mortgage company should not be allowed to foreclose because the homeowner did not have contractual capacity to execute a mortgage? Unfortunately, the answer to the question is no. The advocate could not properly present evidence of the fraud that caused this mortgage to come into existence. If no other action was filed, the foreclosure would be completed without addressing the evident fraud that occurred. This cannot be the result that the Legislature intended when the North Carolina Anti-Predatory Act was enacted. Ms. Weeks could have filed a T.R.O. preliminary injunction and superior court complaint to ultimately enjoin the sale of her home. However, there is a real concern that this foreclosure took place in spite of the evidence of fraud.

Similarly, in *In the Matter of Foreclosure Godwin*, 121 N.C. App. 703, 468 S.E.2d 811 (1996), there was an issue regarding one of the homeowner's contractual capacity at the time of the consummation of the loan. The appellate court upheld the trial and clerk's ruling that allowed the foreclosure to proceed.[14] The foreclosure was upheld despite the fact that there was evidence of the mortgagor's lack of competency.

> A deed executed by an incompetent grantor may be set aside by a suit in equity to rescind or cancel the deed (internal cites

omitted). But such relief is not available as a matter of right (internal cites omitted). Rather, a court in the exercise of its equitable jurisdiction must weigh the equities of a particular case to reach a just resolution.[15]

Pursuant to N.C. Gen. Stat. § 45-21.16, the clerk or the superior court judge on appeal can only hear legal arguments at these proceedings. Issues such as incompetency are equitable in nature. "The relief potentially available because of a mortgagor's incompetency is equitable in nature. Accordingly, the incompetency of a mortgagor is an equitable rather than a legal defense to foreclosure and may not be raised in a hearing under G.S. § 45-21.16."[16] While the issue of incompetency can ultimately be litigated, those issues cannot be raised in a foreclosure hearing or appeal because they are deemed "equitable."

In 1978, a trial judge erroneously determined that a foreclosure should be dismissed for equitable reasons.[17] The judge was presiding over a foreclosure appeal pursuant to N.C. Gen. Stat. § 45-21.16. While there was a valid debt and default on the payment obligation, the court determined that equity concerns prevailed and the foreclosure action should be dismissed. The appellate courts disagreed.

> Although a superior court judge has general equitable jurisdiction, a court is without jurisdiction unless the issue is brought before the court in a proper proceeding. The proper method for invoking equitable jurisdiction to enjoin a foreclosure sale is by bringing an action in the superior court pursuant to G.S. § 45-21.34.[18]

Despite acknowledging that the superior court judge has general equitable jurisdiction, the appellate court determined the judge could not exercise such equitable jurisdiction in a foreclosure appeal. The court focused on the legislative intent of the statute as the basis for overturning the judge's ruling. "In ascertaining this intent the courts should consider the language of the statute and what it sought to accomplish."[19] Based on the interpretation of the statute, it has become increasingly difficult to bring issues of fraud and predatory lending before a competent court. Was it the legislative intent to allow a lender to be able to foreclose on an admittedly predatory or fraudulent loan? It is very likely that in 1978 the housing industry did not have the same concerns that exist today.[20] There was no Anti-Predatory Lending Act in 1978. Even with North Carolina serving as a trailblazer in consumer rights, the legislature has never revisited the process in which these predatory loans can be litigated. It defies common sense that the state legislature would enact a strong anti-predatory lending law, but allow homes to be foreclosed on even when the lender admits to having violated the law. Issues of usury, fraud, and incompetency are still valid defenses and cannot be raised at a foreclosure hearing because they have been deemed equitable defenses.

If the court had ruled that superior court judges still have equity jurisdiction in foreclosure appeals, homeowners who need to address serious legal matters would have a clear method of doing that. For example, if the court had equitable jurisdiction in a foreclosure appeal, the court could stop a foreclosure such as the case of Ms. Weeks. The lender could not unapologetically foreclose on a home when all of the evidence suggests that the homeowner did not have contractual capacity. Even in the most conservative state, such results are unpalatable and likely unanticipated by the legislature.

The Process You Must Engage In to Litigate an Equitable Defense

In all fairness, it must be explained that it is possible to litigate an equitable defense to a foreclosure action.[21] The remedy is available, but much more difficult to pursue. It is virtually impossible to engage in this process without legal counsel. The homeowner must file a temporary restraining order, a motion for a preliminary injunction, and a superior court complaint that addresses the equitable defense(s).

1. **Temporary restraining order.**[22] This order is only in effect for ten days.[23] The homeowner must also post a bond to effectuate the order.

2. **Preliminary injunction**.[24] The hearing on the preliminary injunction should be within ten days of the entry of the temporary restraining order. This hearing is before a superior court judge. The homeowner has the burden of proving he/she will suffer irreparable harm if the relief is not granted and that he/she has a likelihood of success on the merits of the underlying complaint. This seems simple enough, but the irreparable harm of losing your house in a foreclosure has not seemed to persuade our judges.[25] Interestingly, a homeowner cannot prevail on the preliminary injunction if the only argument regarding irreparable harm is that he will lose his home, be evicted, face homelessness, have credit damage, etc. There must be uniqueness to the home. Without a showing of the uniqueness of the home, the court will likely find that money damages are sufficient to make the homeowner whole again and thereby the preliminary injunction will be denied.

3. **To win the preliminary injunction is to win the battle, not the war.** After the homeowner has prepared for a hearing with ten days of preparation, if he is successful, he has still not saved his home, nor has he proven his case. He has merely stopped the foreclosure until a full trial can be heard on the merits of the underlying complaint.[26]

4. **No appeal to denial of preliminary injunction.** If the homeowner is not successful in the preliminary injunction hearing, an average person would think that the homeowner was safe because it would not be reasonable to foreclose on the home when the fraud or other equitable issues have not been fully addressed and there is a pending complaint yet to be litigated. The average person would be wrong to think that the pending complaint stops the foreclosure. If the preliminary injunction is denied, the trustee moves on with the foreclosure. The pending complaint can still be litigated, but only monetary damages can be recovered. Even if the homeowner litigates the full complaint, when the case is resolved the home will have been sold.[27] Here is another example of when the lender could have defrauded the homeowner and even when the allegations are proven to be true, the lender was still able to foreclose on the home. Perhaps it would have taken extensive discovery in order to demonstrate the likelihood of success on the merits. With only ten days to prepare, such discovery tools are not available. The preliminary injunction hearing is a truncated or abbreviated trial. There is no time for depositions, discovery, or other tools in the attorney's arsenal that might have allowed him to have been successful.

If the homeowner feels aggrieved after losing the preliminary injunction hearing and wants to appeal to an appellate court, the law does not provide such a remedy.[28] Ironically, the preliminary injunction is not appealable because it is not considered to be a final adjudication on the merits of the complaint. After the preliminary injunction hearing is over, there is still the underlying complaint to litigate. Well, the homeowner will suffer the loss of his home if the motion for a preliminary injunction is denied. As noted earlier, the sale

will proceed and will be final. Thus, even the judge's abuse of discretion in a preliminary injunction hearing will have no bearing on the ability of the homeowner to appeal and seek relief. The appeal would be interlocutory.

Courts have generally found that interlocutory appeals are contrary to notions of judicial economy.[29] While this is a firmly rooted philosophy, the same logic does not easily apply to a foreclosure case. In the foreclosure, the issues have not truly been litigated at the preliminary injunction hearing. If the homeowner has to wait until the full trial on the merits of the case, the property will be sold. If the homeowner wins and proves that the loan was predatory or proves that the lender has engaged in fraudulent acts, the residence cannot be returned.[30]

Oddly enough, the courts have allowed a junior lien holder to appeal the dissolution of a temporary restraining order.[31] In *Carolina Cooling & Heating, Inc. v. Blackburn*, the junior lienholder had a temporary restraining order entered to halt a proceeding instituted by the senior lienholder. When the superior court judge resolved the restraining order, the decision was appealed.

Practically speaking, the action that was filed was done with the intent to keep the home. If the preliminary injunction is denied, the home will be sold,[32] and the homeowner has no real incentive to continue pursuing litigation. A denial of a preliminary injunction is not an adjudication on the merits of the case. The homeowner could still win the case—proven that there was fraud or predatory lending or that the loan was usurious—however, the home will be gone forever. Who would continue to pay an attorney or continue to engage in the legal process when the ultimate goal has already been lost?

Four Issues that the Clerk Will Decide On at the Foreclosure Hearing

The clerk can only hear four issues at a hearing. If the clerk finds the existence of (i) valid debt of which the party seeking to foreclose is the holder, (ii) default, (iii) right to foreclose under the instrument, (iv) notice to those entitled to such, the clerk must enter an order allowing the foreclosure sale.[33] Unfortunately, as with any area of law, there is much room to debate what these elements actually mean. As with most of the issues discussed in this article, the courts have found ways to interpret these matters to the benefit of the lenders and not the homeowners.[34]

The most difficult legal "pill" to swallow is the narrow interpretation of "validity of the debt" and "existence of default." Lenders argue that the execution of a promissory note is the only evidence needed to determine there is a valid debt. Homeowners want to argue that the debt is not valid if the debt is packaged into a usurious loan, if the lender is collecting excessive interest, or if the violations of federal and state lending laws would cause the lender to have to forfeit the interest. Further, if the homeowner is owed damages because of the violations of the Anti-Predatory Lending Act, this can serve as a set-off to any arrears that have accrued. This is not a frivolous position to take.

For example, if the lender alleges that the homeowner is in default by $5,000, the homeowner may seek to defend himself by alleging the lender has violated the Anti-Predatory Lending Act. If the homeowner has a viable claim, he may recover twice the interest that was collected over the last two years.[35] Furthermore, if the homeowner can prove damages under the Anti-Predatory Lending Act, the homeowner can prove damages under the unfair trade practices act and he can treble his damages.[36] If the homeowner has a $100,000 mortgage at a fixed 8% interest rate for 30 years, within the first two years of the loan, the homeowner will pay over $600 a month in interest. If the damages for a violation of the Anti-Predatory Lending Act are determined to be twice the interest paid for the two year period prior to the filing of the action, the damages are $28,800 [($600 x 24 months) x 2]. If you subtract the $5,000 in arrears, the homeowner is still owed $23,800. Applying this approach, the homeowner is not liable for the arrears and the lender owes the homeowner a refund. Thus, there is no "existence of a default." When the homeowner owes the lender $5,000 but the lender owes the homeowner $28,800 it would seem that the lender would be in no place to foreclose.

Unfortunately, this argument is said to be "beyond the scope" of the four issues. In all fairness, the court should not be able to act to address the homeowners' failure to comply with the rules, but refuse to address the lenders' failure to comply with the rules. No one wants to reward derelicts who ignore the rules and seek to take advantage of the system. Our courts, with the encouragement of our legislature, need to ensure that both sides are being given equal treatment in these foreclosure cases. With this current system, lenders are shielded from the scrutiny the homeowner is subjected to and will ultimately be able to foreclose on a property without having proven all rules have been followed.

The end result is that the homeowner has two superior court cases being litigated at the same time. Both cases deal with the real property that is the subject of the foreclosure. Both cases deal with the enforceability of the debt and the amount alleged as owed. However, the cases cannot be heard together. This flies in the face of basic notions of judicial economy.

Conclusion

The NC Anti-Predatory Lending Act remains a potent law and its existence has prevented many lenders from consummating or realizing the benefit of loans that were not advantageous to North Carolina homeowners. However, loans that potentially have predatory lending claims should not be subject to quick foreclosure proceeding before the clerk. There should be a more straightforward method to raising this defense and other equitable arguments. The homeowner should not be required to find a different court to address the fraud in the mortgage loan or the usury. The legal/equitable argument distinction needs to be abolished. If the homeowner has a defense to a foreclosure, it should be raised in a foreclosure hearing. The clerk should be allowed to step aside in favor of a trier of fact who can weigh and balance the arguments that the parties seek to bring. The State Home Foreclosure Prevention Project helps to ensure that some predatory loans get scrutiny before the foreclosure. This project has been extended to 2013. However, the scope is not broad enough. The project does not address all of the factors that can bring the legitimacy of the loan into question. There are servicing violations, bad faith negotiations, misrepresentations, and many other issues that are causing foreclosures but are beyond the scope of the project. Nevertheless, this is a great start. For the first time, attorneys are looking at the loans before the lender can foreclose and they are engaging in an analysis to determine if the loan violates state law. The commissioner of banks is also empowered to encourage negotiations and postpone some foreclosures.

Implementing any new rules or policies will never eradicate foreclosures. This is not anyone's goal. However, the goal should be to prevent foreclosures that are preventable, ensure homeowners are making informed

decisions when purchasing a home, allow all the legal and equitable defenses to be raised at the time of the foreclosure hearing, and ensure all parties operate in their respective roles and maintain their fiduciary duties. If these concepts are followed, the result will be fewer foreclosures and more homeowners keeping their homes and more lenders making an honest profit. ■

Professor Timothy J. Peterkin is a legal writing professor at North Carolina Central University School of Law. He is a former staff attorney for the Mortgage Foreclosure Defense Project, a statewide project of Legal Aid of North Carolina, Inc. Professor Peterkin also works with the NCCU Law Foreclosure Prevention Project, a student-run project that assists homeowners facing pending foreclosure actions.

Endnotes

1. The Mortgage Bankers Association estimated that 2.2 million home mortgages would start the foreclosure process in 2009. Lynn Adler, "Late Mortgage payments and foreclosures hit record," www.reuters.com/article/idUSTRE4B442320081205, Dec. 5, 2008. Loans in the foreclosure process rose to a record 2.97% up from 2.75% in the prior quarter and 1.69% a year earlier. *Id.* Florida, Nevada, and Arizona had the highest foreclosure rates
2. In June 2011 there were 3,073 notices of foreclosure filed in NC, representing 1 in every 1,386 housing units. See www.realtytrac.com/trendcenter/. Last visited July 19, 2011.
3. N.C. Gen. Stat. § 45-21 (2009).
4. *See Wilson v. Green*, 47 S.E.2d 469, 470 (N.C. 1904). "While, under our present procedure, we have but one form of action, the difference between actions at law and suits in equity having been abolished, yet the distinction between legal and equitable principles has been fully retained, and equity has no jurisdiction when there is an adequate, complete, and certain remedy at law; and it is equally well settled as a rule of the court of equity, which still obtains, that there will be no interference by injunction when there is a sufficient remedy at law."
5. There are a few legal defenses that are available for arguments before the clerk. *See In re Hudson*, 182 N.C.App. 499, 642 S.E.2d 485 (2007). In this case, the homeowner argued that he had not signed the Deed of Trust, as it was presented by the lender. Failure to sign the Deed of Trust or statute of frauds is a proper legal defense.
6. N.C. Gen. Stat. § 45-21.16 (2009) is the primary statute that most foreclosures are filed under in North Carolina.
7. *Id.* This is a process that lends itself to an administrative environment. There is basically a checklist for the clerk to follow. If the trustee presents a Deed of Trust, affidavit of default from the lender, a promissory note, and a proper notice of hearing, along with proof of service, the statute is satisfied.
8. Case says lender does not need to provide evidence of a sum certain that is owed; just show the homeowner is behind and the burden is satisfied. The amount alleged as owed can be for a "sum certain or for a sum which can by computation be made certain." N.C. R. Civ. Pro 55 (b)(1). However, s*ee Hecht Realty, Inc. v. Hastings*, 45 N.C. App. 307 (1980). The court held that the clerk was without jurisdiction to enter the default order because the pleadings did not allege a sum certain, nor did they provide for a reasonable method of ascertaining the sum.
9. Judicial foreclosure is a longer process in which a lender can seek foreclosure. Unlike the foreclosures that are done under power of sale, this process involves filing complaints, answers, etc. This process is rarely used. N.C. Gen. Stat. § 1-339.1.
10. The record owners of the property are to receive notice of the proceedings in a manner that complies with the Rules of Civil Procedure. *See* N.C. Gen. Stat. § 45-21.16. *See In the Matter of the Foreclosure of R. Woodrow Norton, Jr., Unmarried.* 255 S.E. 2d 287 (1979). NC Gen Stat 45-21.16 (2009).
11. *In re Hudson*, 182 N.C.App. 499, 642 S.E.2d 485 (2007).
12. While this is an actual case in North Carolina, the parties names have been changed to preserve their privacy interests.
13. *In the Matter of Foreclosure Godwin*, 121 N.C. App. 703, 468 S.E.2d 811, (1996).
14. *Id.*
15. *Id.* at 705, 813.
16. *Id.*
17. *In re Watts*, 38 N.C. App. 90 (1978).
18. *Id.* at 94.
19. *Id.* at 92.
20. The National Foreclosure Rate was 250,000 in 1979 as opposed to over 2 million in 2007. http://bettyjung.wordpress.com/2008/12/06/historial-foreclosure-rates-1979-2007.
21. N.C. Gen. Stat. § 1-485 (2007) and § 45-21.34.
22. NC ST RCP § 1A-1, Rule 65. The temporary restraining order will be granted if "it clearly appears from specific facts shown by affidavit or by verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or that party's attorney can be heard in opposition."
23. N.C. Gen. Stat § 45-21.16(d1) (2007) provides that there is no standard for amount of the bond.
24. N.C. Gen. Stat. § 1-485.
25. *In re Foreclosure by McNeely v. Moab Tiara Cherokee Kituwah Nation Chief* F.Supp.2d, 2008 WL 2679975.
26. N.C. Gen. Stat. § 1-485 provides the effect of getting a preliminary injunction.
27. *Freedom Baptist Church v. Watson*, 81 N.C. App 478,344 S.E.2d 337 (1986). *Melton v. Family First Mortgage Corp.*, 156 N.C. App. 129, 133, 576 S.E.2d 365,368 (2003). (Protects the third party purchaser.)
28. *Little v. Stogner*, 140 N.C.App. 380, 536 S.E.2d 334 (2000). For a defendant "to have a right of appeal from a mandatory preliminary injunction, 'substantial rights' of the appellant must be adversely affected. Pg. 382. *See Dixon v. Dixon*. Generally, a right is "substantial" only if it would be lost if the ruling or order is not reviewed before final judgment. 62 N.C.App. 744, 303 S.E.2d 606. N.C.App.,1983. (In this case, the applellant appealed the injunction granted by the trial judge. The appellate court found that the injunction entered was only to maintain the status quo and no rights were substantially affected.)
29. *See Carolina Bank v. Chatham Station, Inc.,* 186 N.C. App. 424, 228 (2007). "There is generally no right to appeal from an interlocutory order, because most interlocutory appeals tend to hinder judicial economy by causing unnecessary delay and expense."
30. Anyone who buys a property at a foreclosure sale will be considered an innocent purchaser. *Jones v. Percy*, 237 N.C. 239, 74 S.E.2d 700 (1953).
31. *See Carolina Cooling & Heating, Inc. v. Blackburn*, 267 N.C. 155, 148 S.E.2d 18 (1966).
32. The homeowner could file a Notice of Lis Pendens so that potential buyers will know that the property is the subject of ongoing litigation. N.C.G.S. A. §1-116.
33. N.C. Gen. Stat. § 45-21.16(d).
34. *In re Espinosa*, 135 N.C. App. 305, 520 S.E.2d 108 (1999). Bank instituted action for foreclosure under power of sale against putative mortgagors. The superior court, Jackson County, J. Marlene Hyatt, J., dismissed action, and bank appealed. The court of appeals, Horton, J., held that: (1) finding that there was no valid debt was supported by evidence that putative mortgagors' signatures were forged on loan documents; (2) putative mortgagors did not ratify loan transactions; and (3) superior court correctly declined to address bank's equitable argument. *In re Hudson*, 182 N.C.App. 499, 642 S.E.2d 485 (2007). *Phil Mechanic Construction Co., v. Haywood*, 72 N.C.App. 318, 325 S.E.2d 1 (1985.), provides what is and is not included in the four issues that the clerk can hear.
35. N.C. Gen. Stat. § 24-1.1E(d) specifically states that "any person seeking damages or penalties under the provisions of this section may recover damages under either this Chapter or Chapter 75, but not both."
36. N.C. Gen. Stat. § 24-1.1E (2009).

The Political Nature of John Marshall's Fight for the Court in *Marbury v. Madison*

By Ward Zimmerman

Justice wears a blindfold. That is how we know her. That is how we expect her. It is with covered eyes that this personification has proudly marched down the annals of our jurisprudence.[1] By obscuring her vision, she has been granted a greater insight and power—for it is this covering vestment that breathes life into the allegory of impartiality and bestows authority to the tools in her hands: the scale of judgment and the sword of dominion. Without it, she remains a marble ghost.

In Federalist 51, a young James Madison writes: "If men were angels, no government would be necessary."[2] Likewise, if judges were perfect, they would not need to don figurative blindfolds. But as justice's ambassadors are human, they take pains to preserve impartiality. For even a perceived bias weakens the force of a judicial ruling. As the Preamble to our North Carolina Code of Judicial Conduct counsels: "An independent and honorable judiciary is indispensable to justice in our society."[3]

Judicial recusal is one of the chief means of ensuring impartiality. If a judge has a personal interest in the matter before her, she takes a pass. We want her to take a pass. We admonish that a judge:

> disqualify himself/herself in a proceeding in which the judge's impartiality may reasonably be questioned, including but not limited to instances where. . . [t]he judge has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceedings.[4]

This practice preserves confidence in our system.

Yet, can circumstances justify setting aside this bedrock legal principle of judicial impartiality, potentially shaking the very public confidence upon which the court's authority is built? Indeed, to engage in such heresy would require a counterweight of the heaviest magnitude. Despite this great burden, it seems that just such a weight was present for those involved in *Marbury v. Madison*.[5]

Yes, that *Marbury v. Madison*. The seminal case that established the foundational American principle of judicial review: the power of the judiciary to pass judgment upon the constitutionality of the actions of the legislature and of the executive.[6] This is a monumental power, and just the sort of leaden counterweight to tip the scales away from preserving impartiality above all else. Without exaggeration, the power of judicial review forever resculpted our nation's political landscape by elevating the judiciary to a commensurate position among its fellow, coequal branches of government.

Just as judicial impartiality breathes life into justice, so too does judicial review into our political system of separation of powers, which includes a vibrant judiciary. Without judicial review, our high court is merely the last appellate stop on the track. With judicial review, the Supreme Court is conferred as the great protector of our most noble document, the United States Constitution. Armed with this power, the judiciary can brandish justice's sword against unconstitutional dragons.

From where did this mighty power spring? Judicial review is absent in English common law. Even to this day, our robed—and wigged—cousins across the Atlantic cannot sit in judgment on Acts of Parliament.[7] Likewise, this power is nowhere to be found in the Constitution. So, then, from where? John Marshall's pen.

Chief Justice Marshall was the first to apply the principle of judicial review in *Marbury*.[8] In accomplishing this great feat, Marshall's leadership and statesmanship were on full display. Foremost, the chief justice understood political nature. He fully grasped the importance of the court presenting a unified position and slowly worked his associate justices into a banded whole, through a mix of reason and charm.[9] In the end, Marshall attained unanimous support from his brethren for his opinion.

Thus, from this most undemocratic of origins, the judiciary was bestowed with its greatest power. However, if the principle of judicial impartiality had been strictly applied, through the practice of recusal, Marshall would have lost the opportunity to write this famous opinion. For he was intimately involved in the specific events that led to the suit later before him as chief justice.

To appreciate fully Marshall's involvement, it is necessary to grasp the greater historical landscape. The opinion in *Marbury* was but one skirmish in a protracted political war. This was a war for the very soul of our young nation; and the veteran soldier Marshall, who had experienced the intense suffering at Valley Forge, once again placed himself squarely among the fiercest fighting.

The election of 1800 pitted the rising tide of Thomas Jefferson's Republicans against incumbent President John Adams' Federalists. After 12 years of Federalist control, the national political pendulum had finally swung. The result was a drubbing. Thomas Jefferson won the presidency. The Federalists were routed in the "People's House;" even the stalwart Senate, whose members were chosen by the various state legislatures, was torn from Federalist hands.[10] This "Revolution of 1800"[11] left the banished Federalists grasping for power on their retreat from the battlefield. They set their sights on the federal judiciary.

Jefferson's inauguration date was set for March 4, 1801, leaving only a short time for the lame-duck Federalists to entrench themselves within the third branch. However, these veterans of the Revolution were far from timid folk. Not limiting themselves to simply stacking available vacancies, they moved with unrepentant audacity to reshape the very body itself. On February 13, they passed the Judiciary Act of 1801,[12] which fortified their hold on the Supreme Court by eliminating one seat, upon the retirement of the next justice, so as not to be filled by an incoming Republican. Furthermore, they doubled the number of federal circuit courts, paving the way for the lifetime appointment of 16 new judges.[13]

But these holdover Federalist insurrectionists were not finished. On February 27, with five days left in power, they passed the Organic Act of the District of Columbia,[14] which authorized, among other things, the appointment of "such number of discreet persons to be justices of the peace, as the president of the United States shall from time to time think expedient." President Adams thought it expedient to appoint 42 of his friends. Moreover, these were five-year, remunerative posts that allowed the recipients to hold courts "in personal demands to the value of twenty dollars, exclusive of costs." On March 3, the last day of Adams' presidency, the Senate stamped the appointment list given to them the day before. The final step in the confirmation process was to have the secretary of state affix the great seal of the United States and to deliver the commissions to the appointees.[15] This is where the story gets really interesting.

For central among the Federalist judicial strategy was the placement of a political apostle to lead the high court. The Federalists did not have to look far. On February 4, 1801, Secretary of State John Marshall[16] was sworn in as chief justice of the Supreme Court.[17] Upon assuming his seat on the Court, however, Marshall did not relinquish his position as secretary of state. In fact, he served simultaneously as both United States Secretary of State and chief justice of the Supreme Court for the next month—until his second cousin once removed, Thomas Jefferson, became president.[18]

To thicken matters further, as secretary of state, John Marshall was responsible for certifying and delivering the commissions to the "midnight judges" of the newly-enlarged judiciary. Upon affixing the nation's seal, Marshall's brother, James, volunteered to help with delivery.[19] Fraternal loyalty aside, this was a bad choice. By the next day when Thomas Jefferson repeated the presidential oath of office given by none other than John Marshall (this time, in his role as chief justice), James had failed to deliver a handful of the justice of the peace commissions, including one made out to William Marbury.

History is replete with individuals plucked from certain obscurity to serve a greater purpose. Such was William Marbury.[20] By 1801, Marbury was a middling political loyalist of the party in exile. Originally from down the road at Annapolis, Marbury was among the first batch of political staffers drawn by the potential for patronage to the nascent capital. Before the election of 1800, he had served loyally as an aide to the first secretary of the navy. Now shunned by the new principals, he hung all hope upon the consolation prize granted by the former president for allegiance rendered. But his promised judicial commission seemed to have gotten lost in transit. Marbury petitioned the new secretary of state, James Madison, for delivery. At the direction of President Jefferson, Madison refused.

Marbury then turned to the courts. On December 17, 1801, he, through his lawyer, former-attorney general and close friend of the chief justice, Charles Lee, filed suit in the presumably-sympathetic United States Supreme Court seeking a writ of mandamus to compel delivery of his signed and certified commission.[21] This matter met a responsive crowd, and the following day, Marshall delivered the Court's preliminary ruling: (1) Marbury's suit could proceed, (2) Secretary Madison must "show cause," if "any he hath," why the Court should not compel delivery, and (3) a formal hearing, consisting of the presentation of evidence and argument, was calendared for the Court's next term in June 1802.[22] Marbury, however, would have to wait for intervening events to run their course, for the new Republican majority was presently engaged in a frontal assault on their vanquished opponent's remaining bastion.

To the new president, the federal judiciary posed the greatest threat to the democratic will of the people. Writing the day after Marshall announced the high court's preliminary ruling in *Marbury*, Jefferson despondently observed that the Federalists "have retired into the judiciary as a stronghold . . . and from that battery all the works of Republicanism are to be beaten down and erased."[23] While this prediction may have been a bit inflated, his reason for fear was tangible. Whereas the elected branches of government blow in political winds, the appointed branch is more firmly rooted.

Moreover, apart from the competitive political rivalry, the two parties held a fundamental disagreement as to the role of the courts. The Republicans held a visceral distrust for imperious fixtures, such as a non-

elected judiciary, which they dismissed as remnants from the Anglo split.[24] Furthermore, the federal courts were seen to promote the interests of a strong national government, so feared by Republican proponents of states' rights.[25] In his first annual message to Congress, President Jefferson placed the third branch of government directly in his party's crosshairs: "The judiciary system of the United States, and especially that portion of it recently erected, will, of course, present itself to the contemplation of Congress."[26] These words were understood by all as a rallying cry against this last Federalist holdout. The Republican Congress marched into action.

In 1802, the Circuit Judge Act of the previous year was repealed, abolishing the recently-created circuit court judgeships now stacked with Federalists—including a post held by the chief justice's brother, James, who had failed to deliver Marbury's commission the year earlier.[27] Additionally, not to be outdone by their opponent's earlier brazenness, the Republicans attacked the high court itself. In an act of retribution and intimidation, Congress passed a law that sent the high court into recess for the entire year of 1802.[28]

Therefore, it was not until 1803, two years after first being filed, that the Court finally heard the matter of William Marbury's appointment. By this time, however, the Court's authority sat upon shifting sand. It had only just survived its most recent onslaught, and could expect much more to follow. Moreover, without the support of either the executive's sword or the legislature's purse to enforce its rulings, the Court was left impotent. Thus, the branch of government created by the third article of the Constitution was relegated to an administrative afterthought, eclipsed by the shadows of its two siblings.

How then to proceed? During his time in exile, Marshall had contrived a brilliant strategy that involved a retreating feint. If properly executed, this maneuver would turn the enemy upon itself—conscripting his opponents into the Court's own ranks by issuing a ruling that would not, could not, be evaded.

Marbury's logic began with the premise that it is fundamental to our society that the Constitution is "the supreme law of the land."[29] Hence, the "constitution controls any legislative act repugnant to it [and, as such, . . .] an act of the legislature, repugnant to the Constitution, is void."[30] Since "[i]t is emphatically the province and duty of the judicial department to say what the law is"[31] and since the Supreme Court is the final arbiter of the judicial department, it is therefore the duty of the Supreme Court to define as null (i.e., judicially review) any political act that violates the Constitution. Such was the case, said Marshall, when the Federalist Congress attempted to enlarge the high court's authority to issue writs of mandamus to the political branches. Thus, the Court was left powerless to order Madison to deliver Marbury's commission. Into this conclusion, Marshall's opponents would eagerly sink their teeth.

In accepting this result, however, the Republicans were forced to swallow the decision whole, including what Jefferson termed the "*obiter* dissertation."[32] By this hook, Marshall had them. By stripping itself of power, the Supreme Court could publically condemn the president's actions, which it did vigorously, without being exposed to the calamitous situation of issuing an order that would be disregarded.[33] Therein was the beauty. They would cede victory to the Republicans in the minor skirmish to reestablish a footing in the greater war. In one masterstroke, Marshall reconstituted the authority of the judiciary in our system of governance by formalizing the power of judicial review; and *Marbury* set off down the path of fame.

But what about the initial question of why the chief justice sat for the case in the first place? Under even the mildest standard of judicial recusal, Marshall should have stepped away from *Marbury*.[34] He had "a personal bias or prejudice concerning"[35] not just one, but all parties involved. Moreover, he clearly had "personal knowledge of disputed evidentiary facts concerning the proceedings," for it was Marshall himself who certified the very judicial commission in dispute and it was his brother, James, who failed to make delivery. So why then did those involved in this case allow Justice's blindfold to slip from her eyes?

The answer to this question may be more easily gleaned from the pages of *The Prince* than from the annals of law.[36] Marshall was allowed to sit for *Marbury* because all of those involved wanted him there. These were men, not angels, who came laden with experience, personality, and bias. They were active political founders, who tended to place pragmatism above theory. They understood that while government can exist without justice, it can never be the other way around. Therefore, when thrown into conflict, political principle won out over judicial principle. Consequently, each of the four main actors believed that having the chief justice participate in the ruling better served their interests.

First, William Marbury's wishes go without saying.

Second, the Republicans thought that Marshall's presence could result in a final, fatal misstep by the Court. By 1803, the Supreme Court was so emaciated politically that few took their actions seriously. The first chief justice, John Jay, remarked that the Court by the turn of the century lacked "the energy, weight, and dignity which are essential to its affording due support to the national government, nor [the] public confidence and respect which, as the last resort of the justice of the nation, it should possess."[37] Thus, Marshall's presence on such an enfeebled panel seemed inconsequential. But there was more. The Republicans' desire to have Marshall remain may have also come from the belief that his presence was better than just a neutral variable—it could turn into a fortuitous positive. For the power of the executive and the legislature was so overwhelming relative to the judiciary that the Republicans seemed to be arrogantly savoring a showdown with the Court and its chief justice. By ignoring or, better yet, acting directly against an opinion that ordered the political branches into action, the Republicans could decisively undercut the Court's authority.[38] If this opportunity arose, the victory would be a more resounding swipe if it included the entire bench, with its head attached.

Third, the chief justice wanted the fight.[39] As one historian writes, Marshall "ought to have disqualified himself, but his fighting spirit was aroused, and he was in no mood to back out."[40] Prior to assuming his seat on the high court, John Marshall had been a soldier and statesman, founder and partisan, but never a judge. Foremost, he was a political realist.[41] By the spring of 1803, Marshall thought that his beloved government, with a fully-participating judiciary, hung in the balance.[42] In this time of exigency, he made the cool calculation that the gains to be had by pursuing the political principle of establishing judicial review outweighed the harms to be suffered by setting-aside the judicial principle of impartiality through recusal.

Fourth, Marshall's robed brethren wanted their friend and able leader on the field at this

decisive moment.[43] The philosophical question of whether Marshall's presence would weaken the Court's resulting authority seems to have been sent to the rear during the urgency of combat.

Thus, all interests pointed towards burying the question of recusal—and that is precisely what happened. The judicial principle of preserving impartiality was temporarily set-aside to make way for the political principle of establishing judicial review. Marshall remained and a momentous battle ensued whereby the Republicans' superior political forces were outflanked by a more nimble opponent. But for Marshall's strategic genius, *Marbury* could have been a deathblow. Instead, Marshall brought the Court back from the edge of exhaustion and reestablished it among the governing trinity created in the first three Articles of our founding document. The Supreme Court had found its first champion. The United States Constitution was conferred an intrepid institutional protector. Justice was bestowed her political sword. ■

Ward Alexander Zimmerman is an assistant attorney general in the North Carolina Department of Justice. He can be reached at (919) 716-6600 or wzimmerman@ncdoj.gov.

Endnotes

1. The artist Hans Gieng's 1543 statue in Bern, Switzerland, is the first known allegorical representation of blindfolded justice. Since then, the blindfold "has become a ubiquitous element in western portrayals of justice." William Kloss & Diane K. Skvarla, S. Doc. 107-11: *United States Senate Catalogue of Fine Art,* 228 (US GPO 2002). As one eminent iconographer has explained this symbolism: "The white robes and bandage over her eyes allude to incorrupt justice, disregarding every interested view, by distributing of justice with rectitude and purity of mind, and protecting the innocent." Id. quoting George Richardson, *Iconology* (1789) as found in Vivien Green Fryd, *Art and Empire: The Politics of Ethnicity in the United States Capitol, 1815–1860* 179 (Yale Univ. Press 1992).
2. *The Federalist,* No. 51 (James Madison).
3. NC Code of Judicial Conduct (amend. 2006).
4. *Id.* at Canon 3C(1)(a); *see also* 28 U.S.C. § 455 (2011).
5. 5 US (1 Cranch) 137 (1803).
6. *See Cooper v. Aaron*, 358 U.S. 1, 17 (1958) ("[Marbury] declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the country as a permanent and indispensable feature of our constitutional system."); *United States v. Nixon*, 418 U.S. 683 (1974); William H. Rehnquist, *The Supreme Court*, 34-5 (Knopf new ed. 2006) ("The proposition for which [Marbury] stands in United States constitutional law—that a federal court has the authority under the Constitution to declare an act of Congress unconstitutional—was not seriously challenged by contemporary observers, and has remained the linchpin of our constitutional law ever since [it] was handed down."); but cf. Samuel R. Olken, *The Ironies of Marbury v. Madison and John Marshall's Judicial Statesmanship*, 37 J. Marshall L. Rev. 391, 394 (2004) (noting that a more accurate interpretation of Marbury's importance was its ability to crack the door through which the firm establishment of judicial review would later pass, through subsequent cases).
7. Erwin Chemerinsky, *Constitutional Law,* 1 (Aspen 2001).
8. Cf. Olken, *supra* note 7, at 403-9 (noting that the theory of judicial review had predated its application in Marbury); *see, e.g.*, *The Federalist*, No. 51 (James Madison), No. 78 (Alexander Hamilton).
9. *See* R. Kent Newmyer, *John Marshall as an American Original: Some Thoughts on Personality and Judicial Statesmanship*, 71 U. Colo. L. Rev. 1365, 1376-82 (2000); Olken, *supra* note 7, at 414-5; Cliff Sloan and David McKean, *The Great Decision: Jefferson, Adams, Marshall, and the Battle for the Supreme Court*, 80-1, 83 (Public Affairs 2009).
10. *See Biographical Directory of the United States Congress*, 1774-2005 (Joint Comm. on Printing rev. ed. 2006).
11. Many years after leaving the office of the presidency, Thomas Jefferson mused on the electoral victory that heralded his party into power as the "Revolution of 1800,. . . as real a revolution in the principles of our government as that of 1776 was in its form." Letter from Thomas Jefferson to Spencer Roane (Sept. 6, 1819), in vol. 10 *The Writings of Jefferson*, 140 (Paul L. Ford ed., 1892-1899); *see generally* Susan Dunn, *Jefferson's Second Revolution: The Electoral Crisis of 1800 and the Triumph of Republicanism* (Houghton Mifflin 2004).
12. Judiciary Act of Feb. 13, 1801, ch. 4, 2 Stat. 89 (1801), repealed by Judiciary Act of Mar. 8, 1802, ch. 8, 2 Stat. 132 (1802). Prior to assuming his post as secretary of state, Congressman Marshall had been a prominent voice on a US House committee tasked with review of the judiciary, whose recommendations later formed the basis for the Judiciary Act of 1801. *See* R. Kent Newmyer, *John Marshall and the Heroic Age of the Supreme Court*, 134 (Louisiana State Univ. Press 2001).
13. In Jefferson's view, any judicial appointment made by President Adams following his electoral defeat on December 12, 1800, was to be considered an "outrage of decency" and a perversion of the democratic process. Letter from Thomas Jefferson to Henry Knox (Mar. 27, 1801), in vol. 10 *The Writings of Jefferson*, 241, at 247 (Andrew A. Lipscomb ed., 1903); *see also* Letter from Thomas Jefferson to Benjamin Rush (Mar. 24, 1801), in vol. 10 *The Writings of Jefferson*, 241, at 241-4 (Andrew A. Lipscomb ed., 1903). Furthermore, among these newly appointed circuit judges was James Marshall, brother of the current secretary of state and chief justice, John. *See* Sloan & McKean, *supra* note 10, at 61 (offering a brief biographical sketch of James Marshall).
14. Judiciary Act of Feb. 27, 1801, ch. 15, 2 Stat. 103 (1801).
15. *Marbury*, 5 US at 157-9.
16. After achieving national fame for his role in the XYZ affair, John Marshall served in the Sixth Congress as a representative from the Richmond area of Virginia before being nominated on May 7, 1800, by President John Adams to serve as secretary of war. Two days later, however, President Adams changed Marshall's nomination to that of secretary of state. *See* Newmyer, *supra* note 13, at 141.
17. President Adams' initial choice for this chief post was the first chief justice, John Jay, who was now serving as governor of New York. Before Jay's letter declining the offer reached Washington, however, the president had taken the step of submitting his name to the Senate, who had subsequently confirmed his reappointment. Avoiding a second such awkward moment, the president next turned to someone able to confirm acceptance in person: his closest advisor, the secretary of state. *See* Lawrence Goldstone, *The Activist: John Marshall, Marbury v. Madison, and the Myth of Judicial Review,* 150-2 (Walker 2008).
18. Marshall's great-grandfather and Jefferson's grandfather were brothers, hailing from one of the elite dynasties of Virginia: the Randolphs. *See* Sloan & McKean, *supra* note 10, at 42. Moreover, they both studied law in Williamsburg under the esteemed legal scholar George Wythe. *See* James F. Simon, *What Kind of Nation: Thomas Jefferson, John Marshall, and the Epic Struggle to Create a United States*, 24 (Simon & Schuster 2002).
19. James Marshall assumed the role of courier under his authority as one of the recently-commissioned federal circuit judges—a supposedly life-tenured position that was to be shortly abolished, along with his 15 new brethren, by the incoming Republican Congress. *See* Newmyer, *supra* note 13, at 159, 161. While many of the specifics of this enigmatic failed-delivery have been lost to history, one piece of evidence to support its occurrence is found in the Reporter's Notes of *Marbury* at 1803 U.S. LEXIS 352, 17-8, whereby an affidavit of James Marshall is noted to have been read into the court record, recounting that on March 4, 1801, "finding [that James] could not conveniently carry the whole [of the commissions], he returned several of them. . ." Presumably, Marbury's commission was among this lot.
20. *See* Rehnquist, *supra* note 7, at 35 ("Madison, of course, would have been remembered equally well in American history as the father of the Constitution, drafter of the Bill of Rights, and two-term Republican president, even if he had delivered William Marbury's commission and thereby avoided the lawsuit of the latter. But William Marbury has been saved from historical obscurity only by the fact that he was the plaintiff in the most famous case ever decided by the United States Supreme Court."); *see generally* David F. Forte, *Marbury's Travail: Federalist Politics and William Marbury's Appointment as Justice of the Peace*, 45 Cath. U.L. Rev. 349 (2001) (setting forth an excellent biographical sketch of William Marbury).
21. In fact, William Marbury was one of four plaintiffs, along with Dennis Ramsay, Robert Hooe, and William Harper, to file suit for being denied delivery of a certified justice of the peace commission. *See* Sloan & McKean, *supra* note 10, at 94-5. Regarding Marbury's decision to sue directly in the high court, former-Attorney General Lee argued that under the authority of Section 13 of the Judiciary Act of 1789, the Supreme Court had both original jurisdiction for claims arising thereunder and the power to issue a writ of mandamus to "persons holding office, under the authority of the United States" (i.e. Secretary Madison). Reporter's Notes at 1803 U.S. LEXIS 352, 21-2, Marbury, 5 U.S. (1 Cranch) 137.
22. *See* Sloan & McKean, *supra* note 10, at 99.
23. Letter from Thomas Jefferson to John Dickinson (Dec. 19, 1801), in vol. 10 *The Writings of Jefferson*, 241, at 302 (Andrew A. Lipscomb ed., 1903).
24. *See* Newmyer, *supra* note 13, at 150-1.
25. James A. O'Fallon, Marbury, 44 Stan. L. Rev. 219, 222 (1992).
26. 11 A*nnals of Congress*, 11, 15 (1801). Moreover, in private correspondence, Jefferson was even more open about his true antipathy towards Marshall and the Federalist

Court: "nothing should be spared to eradicate this spirit of Marshallism." Letter from Thomas Jefferson to James Monroe (Apr. 12, 1800), in vol. 14 *The Writings of Jefferson* (Andrew A. Lipscomb ed., 1903).

27. Judiciary Act of Mar. 8, 1802, ch. 8, 2 Stat. 132 (1802).

28. Judiciary Act of Apr. 29, 1802, ch. 31, 2 Stat. 156 (1802); *see* Newmyer, *supra* note 13, at 153.

29. *Marbury*, 5 U.S. at 180.

30. *Id.* at 177.

31. *Id.*

32. Letter from Thomas Jefferson to Benjamin Rush (Mar. 24, 1801), in vol. 16 *The Writings of Jefferson* 241 (Andrew A. Lipscomb ed., 1903).

33. As characterized by one prominent, and often cited, legal scholar, Marshall's opinion in *Marbury* was a "masterwork of indiscretion, a brilliant example of Marshall's capacity to sidestep danger while seeming to court it, to advance in one direction while his opponents are looking in another." Robert G. McCloskey, *The American Supreme Court,* 40 (Univ. of Chicago Press 1960); *see also* Olken, *supra* note 7, at 414.

34. In fact, Marshall did recuse himself in a case decided six days after *Marbury, Stuart v. Laird*, 5 U.S. (1 Cranch) 308 (1803), due to his involvement in the lower court proceedings. Additionally, in *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816), Marshall recused himself due to personal involvement, along with his brother James, in the potential purchase of a portion of the realty at issue in the case. Thus, the idea of recusal seems to have been alive and well in the Chief Justice's mind. *See* Sanford Levinson and Jack M. Balkin, *Marbury at 200: A Bicentennial Celebration of Marbury v. Madison: Marbury as History: What Are the Facts of Marbury v. Madison?*, 20 Const. Commentary 255, 260 (2003) ("The juxtaposition of Marshall's recusal in *Stuart v. Laird* with his notable failure to recuse himself in *Marbury v. Madison* is particularly striking."); Sloan & McKean, *supra* note 10, at 170.

35. While the NC Code of Judicial Conduct was certainly not in existence at the time of *Marbury*, its fundamental underpinnings are timeless guards of judicial authority. *See* Michael Stokes Paulsen, *Marbury at 200: A Bicentennial Celebration of Marbury v. Madison: Marbury's Errors?: Marbury's Wrongness*, 20 Const. Commentary 343, 350 (2003) ("[T]he principle that makes it self-evident, today, that a judge should not sit on a case in which the propriety or legal effect of his own acts or omissions in a different, non-judicial capacity, on precisely the same specific transaction at issue in the case, are themselves the basis for the legal claim, was just as sound a principle in 1803 as it is today. That principle should have led Marshall not to participate.").

36. *See* O'Fallon, *supra* note 26, at 221 ("To understand *Marbury* fully, we must appreciate it not simply as a case deciding a legal dispute between William Marbury and James Madison, but as a political act contributing to the establishment of a discourse of constitutionalism in which the realms of law and politics merge.").

37. Letter from John Jay to John Adams (Jan. 2, 1801), in *The Correspondence and Public Papers of John Jay* 284 (Henry P. Johnston ed., 1890-3); accord Simon, *supra* note 19, at 138-9, 151 (noting the weakness of the early Court); *see also* Olken, *supra* note 7, at 392.

38. *See* Newmyer, *supra* note 13, at 160 ("Certainly the Court's dilemma was readily visible: If it issued a mandamus, as Marbury requested, the president and secretary of state would delight in ignoring it, leaving the Court helpless and humbled; if it didn't, the justices would be damned by their own caution."); *see also* Jean Edward Smith, John Marshall: Definer of a Nation, 318 (Holt & Co. 199).

39. *See* Sloan & McKean, *supra* note 10, at 170; Simon, *supra* note 19, at 182.

40. John A. Garraty, *Marbury v. Madison: The Case of the 'Missing' Commissions,* American Heritage Magazine (June 1963; Volume 14, Issue 4).

41. *See* Olken, *supra* note 7, at 410-23; accord Levinson & Balkin, *supra* note 35, at 262.

42. Newmyer, *supra* note 13, at 150 (Marshall "saw Jefferson as the evil genius behind the rising states' rights movement, which Marshall sincerely believed threatened to destroy the Constitution and the federal Union.").

43. *See* Newmyer, *supra* note 10, at 1378 ("Ironically, Jefferson's determination to crush the Court and exterminate the spirit of 'Marshallism' was an important factor because it encouraged the justices to 'circle the wagons.'").

President's Message (cont.)

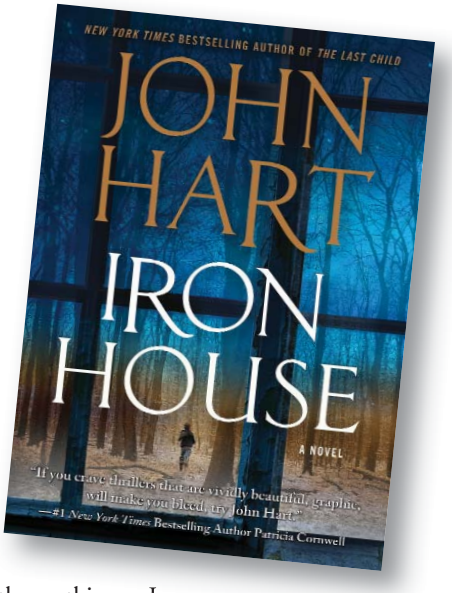
funding for programs such as the Equal Access to Justice Commission and the Legal Aid offices throughout North Carolina. It is during these difficult times that we can participate even more than we have in the past to assure that our most vulnerable citizens have access to justice. Fulfilling your obligation of Rule 6.1 regarding Pro Bono Publico Service with a commitment to enabling equal access to justice is crucial at this time. Participation in the "Call4All" program of the North Carolina Bar Association, which coordinates private attorney involvement with Legal Aid of North Carolina, is an opportunity that will provide invaluable legal assistance to those in need, fulfill your Rule 6.1 obligation, enhance professionalism within our practice, and simply make you feel better for doing so.

This is the last time that I will have the pulpit to address the more than 24,000 lawyers who are licensed to practice law in North Carolina. With an editorial deadline of one week after the conclusion of each quarterly meeting, and with the demands of a small town general practice in Boone, I must admit that I am not saddened to pass the pulpit to my well-qualified successor, Jim Fox of Winston-Salem. However, I can truly say that it has been an honor and privilege for me to serve as your president. I will cherish the experience, the friendships, and the knowledge that has been verified by the experience that the lawyers of the state of North Carolina are dedicated to the polar star of our practices—professionalism—and we do so each day when we turn the lock to open the door of our offices to help the citizens of our state in their time of need. ■

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

An Interview with Author John Hart

By John E. Gehring



Is there life after the law? This question is being asked more often these days, especially by those among us being long of tooth and with graying hair. For one answer to this question I asked my friend, John Hart, the *New York Times* best-selling author, to talk about life after the law. This interview took place during a round of golf with the strict PGA rules, and those not so strict, being waived. The do-over mentality resulted in an excellent, non-stressful round with plenty of conversation. Purists please note, the scores were not posted but the interview is contained herein.

Question: Your personal history indicates your varied interest in many things, from being a helicopter mechanic, a bartender in a London pub, an explorer of the Loire Valley in France, a stock and securities broker, a practicing attorney specializing in Criminal District Court work, and now an acclaimed author of three books (all of which have appeared on the *New York Times* bestseller list). With such acclaim has come three nominations for the Edgar award and winning two Edgar awards. Obviously, you have made a life after the law. Please comment.

Hart: I'm delighted to be where I am in life—writing full-time, no longer worried with the many challenges of a law practice—but know for fact that I could never have made it here without my time in the law. It was such a focused, powerful experience: the grueling study, the pressure to bill, the in-the-trenches work with criminal clients. Practicing law gave me unique insights into the human condition. It made me a hard worker and a deeper person, all of which help drive the writing.

Question: Your books, *The King of Lies, Down River*, and *The Last Child*, reflect a keen insight into everyday America (in particular, North Carolina). They also reflect a darkness in each of your character's lives. Why such a dismal view of life?

Hart: Many people initially misperceive the thrust of my books. While there is ample darkness—murder, betrayal, deceit—the core of my stories is about our ability to rise above those things. I paint the world dark so a light that is often dim has a better chance to shine. What's the light? All the things that made humanity great: love and faith and hope, courage, sacrifice, endurance. Much of it goes back to things I saw in criminal court, to the victims and innocent families, to the few who always try to do right, even when the people around them are rotten to the core. I always marveled at those who sacrifice in the pursuit of what truly matters.

Question: *The King of Lies* and *Down River* have included glimpses into the everyday workings of our court system. A great portion of *Down River* centers on the abuse of women. Also, *Down River* brings us an ugly reminder that many people are unjustly accused and many endure the horror of a trial. Is this an example of being guilty until proven innocent? Is this a reminder that gender discrimination is alive and well in this day and time?

Hart: It's more a reminder that underneath bad behavior is a cause of some sort. Not the kind of cause that justifies evil—I'm no apologist—but the kind that bears further exami-

nation before a rush to judgment or punishment. Women, at times, do great evil in my books. Yet it is the men in their lives whose actions set events into terrible, irrevocable motion. There's no political statement in the way I've used such devices. For me it's all about storytelling, about motives and layers.

Question: Your soon-to-be-released new book, *Iron House*, appears to raise another issue which faces us all. How do we treat juveniles and orphans? The vision of Stonewall Jackson training school comes to mind. Any comment on this issue?

Hart: Any lawyer with time in juvenile court knows how bad the problems can become: abuse and neglect, indifference or worse. My job, however, is not to indulge in social commentary, but to find credible, strong drivers to motivate my characters. Abuse is a powerful force in shaping a child. It makes a compelling back-story for the adult that child becomes. That being said, good fiction should provoke meaningful thought. If heightened awareness is a side effect of what I do, then great.

Question: Has your continuing legal education been of benefit in your writing? And does a current law license mean that you might return to the practice of law? What CLE courses help you the most?

Hart: I continue CLE because I can't imagine giving up my law license. I love the chance to learn and be with other lawyers. At the moment, though, I have the best job in the world and no plans to ever do anything different.

Question: Many current authors borrow the names of their friends for inclusion in their books. Do you follow this practice? Just what is a charity launch and how does this help your work?

Hart: Some writers use naming rights to go after their enemies. They shoot them in the kneecaps, maim them horribly, kill them off in meaningful, gruesome ways. I've met a lot of those writers, heard the very humorous stories of who and why. Sadly, I have no enemies. So, yes, I use my friends shamelessly. I've killed off brothers-in-law and old friends. I've made cops of lunch buddies and neighbors; made a heroine of one lucky lady who won a raffle for the privilege. And I do use the launch of new books as an opportunity to raise money for good causes. To date, we've raised almost $250,000. It's good for the cause and I get a great party for the book launch.

Question: Are you happy to have left your practice of law at a standstill while you pursue a life of fiction writing? Of course, there are those who think that the practice of criminal law and the practice of fiction are somehow related.

Hart: Hah. I can think of at least one lawyer in Salisbury who would agree with you, at least tongue-in-cheek. I have often said that I'm delighted to be a recovering attorney, and the reasons for that are legion. Bottom line, I would never have been great at the law. I think I have a shot at that in my writing career.

Question: Any further comments for the readers of the North Carolina State Bar *Journal*?

Hart: Only that I remain a proud member of the bar, and that my fans who are also lawyers have special meaning to me. Whenever I meet one at a signing, I like to use the same inscription: "A friend in the law…" ■

John E. Gehring is a State Bar Councilor representing Judicial District 17B. He is also a member of the Bar's Publications Committee.

Blackbeard's Last Raid

By Robert F. Stamps

The wind picked up and roughed the water as Applebee put down his quill pen and glanced out the window. The Adventure, Blackbeard's sloop, was on the sound practicing gunnery and the roar from a broadside of cannons was loud. He smiled, admiring his clothes in the mirror. He was proud of his silk coat, wool waistcoat and breeches, and silk stockings. It was the color of the red wild flowers the settlers called Indian Blankets, or Fire-Wheels. The tips of the petals of the Indian Blankets offered a splash of yellow, as did his handmade leather shoes, buttons, and ornate belt buckle. He was proud that his clothes matched any of the wealthy gentry.

Applebee was pleased with his legal practice. His copy of Sir Matthew Hale's *Analysis of the Common Law* had arrived from London in time for him to add some persuasive passages to a brief.

The new spring leaves danced and hummed in the breeze. Applebee walked outside and down the wooden dock. Two shapely barmaids, in blouses and flowing skirts, were nursing flagons of rum. He squinted and reached a hand to steady his fashionably large, high parted wig and wide flowing hat. Nearing the end of the dock, tacking against the current on the Pamlico River was Blackbeard's two-mast sloop of war. Brightly polished brass cannons protruded from a half dozen openings in the side. Sailors scampered up the rigging, checking and furling the sails.

The wharf bustled with activity, as shirtless, barefoot sailors in scruffy canvas pants scurried around, ogling the barmaids and waiting to load supplies. Some carried crates, while others rolled large casks to the ship's gangplank. Applebee was looking forward to going to sea.

Applebee laughed as he saw the British flag. Blackbeard was too cagey to fly his black pendant in port. He reached into a pocket in his waistcoat and removed a small silver box. Opening the lid, he pinched a bit of finely ground snuff between his thumb and forefinger. He slowed his stride, placed his thumb beneath his right nostril, and inhaled deeply. He sneezed, careful not to stain the fine lace ruffled cuff of his scarlet silk coat.

He smiled approvingly as the wind rattled lines and halyards in the beautifully rigged and freshly varnished ship. A pair of Cormorants dove into the water. One emerged with a fish in its mouth. It flew rapidly towards the shore, chased by the other.

Alongside the dock, barely above the debris deposited by the last high tide, an African man in dusty canvas pants and a cast-off shirt sweated profusely as he tended an open cooking fire. Above the flames, six skewered chickens cooked slowly on an inch-thick piece of wood. In the smoke above the chickens, another rack held freshly caught Red Drum and eel. The chickens, covered with spices from the Caribbean islands and dripping fat into the fire, sent forth a savory aroma.

"Mo'ning to you, Mas'sa Applebee," called the African. He smiled and flipped his head so that Applebee would notice his huge gold hoop earrings and thick gold necklace.

"Amos," Applebee replied, "you are decked out, indeed. The chicken smells marvelous. And the fish and eels look marvelous. When will they be ready?"

"Oh, Mas'sa Applebee, I 'spec they be ready mos' any time," Amos replied, smiling broadly, "mos' any time a'tall."

"You are too good, Amos," Applebee snorted. "For a bloodthirsty pirate you are one admirable cook."

"I 'spec so, Mas'sa Applebee. It make 'ol Amos proud, you be good 'nuf to notice. Amos be right 'long wid dem chickens in no time. No time t'all."

Applebee swept off his hat and bowed low in Amos' direction. "My hat is off to you, sir."

Still holding his hat, Applebee extended his arm in a sweeping gesture and called to a tall muscular man on the deck of The Adventure. "Captain Teach, permission to board, please."

Captain Teach, a huge man, fearsome in appearance, raised one foot to the gunwale and grasped the rigging with a giant hand. His skin was fair, but his hair was jet black and flowed wildly under a scarlet bandana. His beard was rich and dark. He wore a long leather topcoat over bare skin, and ragged canvas pants reaching only to his knees. On his feet were wooden shoes in the style of the Dutch.

"What's that behind you?" Teach's voice boomed, followed by a cackling peal of laughter. "Have you bought freedom for William?"

Applebee turned around and nearly dropped his hat in surprise. A huge African man was hobbling down the dock, supported by a carved wooden crutch. He wore a finely embroidered silk and gold coat, his waistcoat and knee breeches gleamed, and his stockings showed calves as big as Applebee's waist. Although the man was dark as mahogany, he was wearing a long wig, finely powdered white like the judges in the courthouse.

"That's Mistuh William, Captain Teach," he said proudly, raising his right hand to show a huge gold ring topped with a cluster of precious stones. "I got 'da ring, Captain Teach," the man roared. "I got 'da ring, and now I'm a gentleman. Ain't no mo' shuckin' and jivin' like 'ol Amos. I gots 'da ring. Yeah, 'da ring."

The Results Are In!

This year the Publications Committee of the State Bar sponsored its Eighth Annual Fiction Writing Competition. Eight submissions were received and judged by a panel of nine committee members. The submission that earned first prize is published in this edition of the *Journal*.

"You lucky I don' rip it off an' toss it in'na river," Amos snarled good naturedly, turning his back and giving a quarter turn to the chickens on the spit.

"I gots 'da ring. I gots 'da ring." William shouted, holding his hand high above his head and, using the crutch for balance, hopping down the pier.

"Pipe down and get aboard," Captain Teach yelled. "We sail with the tide and it's beginning to turn." Then, to Applebee, he asked, "Where's Marcus? He's the only one that hasn't reported in."

As Applebee and William neared the end of the pier, a loud rumbling and shrieking came from the road leading to the pier. A horse whinnied in fear. Suddenly, a black sport utility vehicle appeared and slammed on its brakes. A man in a sharply creased grey business suit and matching fedora hat emerged, slammed the door and raced down the pier. He carried a brown suitcase and a briefcase.

"Marcus," Blackbeard yelled, anger in his voice, "you know we were all supposed to be in late-17th century period costume. What gives?"

"Sorry, Hank—I mean Blackbeard—be glad I'm here," Marcus called, panting from the exertion of running with his suitcase. "Some of us didn't make the cut for the NFL and have real jobs with limited vacation."

"Yeah," Applebee snorted, "like the FBI can't spare you for a week or two."

"The Lady Giraffe wouldn't listen to reason," Marcus gasped, flinging his suitcase over the gunwale. "She nearly wouldn't let me go."

"The Lady Giraffe, huh," Blackbeard laughed. "Why do you call her Lady Giraffe? And since when do you let a chick tell you what to do?"

"When she's my six-foot-three boss, and has the strength of an ox." Marcus gave William a hand to steady him as he boarded the gangplank.

"Um," Blackbeard raised his eyebrows and held his hands wide in a simulated grasping motion, "I like my women big. I hung out last month with a former beach volleyball champion. Very tall. And strong. Oh, yeah."

"Good for you. Lady Giraffe and I have been tailing a suspected terror cell and we have indications that they might be making a move. That's why," he said, pulling an oversized cell phone from his brief case, "I carry this satellite phone. We followed them from New York to Fayetteville. We think they may try something at Fort Bragg, or are waiting to meet someone. Lady Giraffe has some locals staking out their house. She said as long as I have the satellite phone, I can take some time off." Then, chuckling as Applebee and William curtsied for the crew, he whispered loudly, "Wish it had a camera so I could send a picture of William and Applebee to the media."

"Exciting as that sounds, Marcus," Blackbeard grinned, winking at Amos who was now standing on the pier, "remember we all agreed that we are going to pretend that it is 1700 and we are pirates on the prowl. I'm counting on you and Amos. With an FBI agent and Amos—a Navy SEAL—swinging their cutlasses, our video is going to be great. And the cannons fire real lead balls. And our marksmanship is spot on."

"What a kick," Marcus exclaimed, waving his briefcase in a joyous circle. "If you got the powder, ball, and beer we can do this."

"Yo, Marcus," Amos chuckled, "get dressed and help me get the food on board. Then we'll see how the crew fires these cannons."

Several hours later, The Adventure was under sail. William, at the helm on the stern deck, looked down to the main deck where the crew chatted and laughed around tables of food. In the panel before him, cleverly concealed, was a screen with a compass, radar, a continuously updated weather forecast, and a GPS image of the sound. Behind a closed panel was a digital communication system. "Storm coming, Captain," he called to Blackbeard. "Nothing we can't handle."

"Avast, mateys," Applebee shouted, "'tis time to celebrate. More than a decade ago we were the best college football team ever in North Carolina history."

The men, most wearing canvass pants and waist coasts, cheered and clapped. Several hoisted tankards of ale and yelled "GO PIRATES!"

"As we began to win," Applebee continued, "Hank decided it was bad luck to shave. After two more games, he had a thick beard. The press began to call him 'Blackbeard.' The press decided that we, the rest of the team, needed a nickname, too, and somehow, we became 'The Pirates.' After the season ended with us in the top 10 nationally, we decided we needed to actually sail a pirate ship. Now, with the help of Amos and his Navy training, and with Blackbeard and William drawing outrageous money in the NFL..."

"I got 'da ring!" William yelled from the stern deck, raising his hand to show the gem-encrusted ring.

"And William has his Super Bowl ring," Applebee acknowledged. "With the help of everyone we have recreated Blackbeard's original ship, The Adventure."

Marcus, now wearing buckskin pants and linen shirt, wiped chicken from his fingers. He muttered under his breath as his satellite phone, carried in a buckskin pouch at his belt, rang shrilly.

"Lady Giraffe, huh," teased Blackbeard.

"Probably," Marcus called, heading out of the wind. Within minutes, he was back and motioned for Blackbeard to join him.

"Giraffe has bad news," Marcus said slowly. "The terrorists left the farm. Our locals were tailing them, but the terrorists sprung an ambush with AK-47 assault rifles. Killed both locals and stole their weapons and phones. The phones have GPS. The Bureau is trying to track them. Is it possible to head to shore?"

"Maybe," Blackbeard shrugged. "William says there's a storm coming, so its better for us to be at sea. Keep me posted."

"OK," Marcus said. They walked back out to the deck. The wind was much stronger. William motioned for Blackbeard to join him at the helm. Blackbeard raced up the stairs to the upper deck. Marcus followed.

"Storm is worse then we thought," William yelled, pointing to the radar screen. "It is going to get rough."

As they scanned the weather information and radar screen, Marcus' satellite phone began to ring. "Jane, anything new?" he asked.

"We've located them through the GPS coordinates. They're headed east, maybe towards I-95. We've notified the state. The local cops should be able to find them easily, so just keep your phone handy." Jane paused, and Marcus could hear her talking, but could not make out the words. After several minutes Jane said, "I've just been told a huge storm is brewing off the coast. If it starts pouring rain, the killers may be able to use back roads to slip past the local cops. Got to go," Jane said hurriedly.

On deck, Blackbeard and Amos, the most experienced sailors, were ensuring that the hatches and doors were closed, and that the cannons were properly covered with tarpaulins. "Amos," Blackbeard yelled, "do we need to take in, or trim the sails?"

"Not yet," Amos called. Rain began to spatter on the deck. The sea roughened and the wind whipped white caps that sprayed the deck with salt water. "We need to maintain steerage. Good thing the bowsprit gives us maneuverability."

"Get the food, beer, and tables below deck," Blackbeard hollered. He and Amos began moving the tables into the galley. "This is turning into a bad blow and we need to clear the area and string lines so no one washes overboard."

"Aye aye, sir," one of the men yelled, grabbing several platters and heading into the galley. The other men helped, and soon the deck was clear and strung with safety lines.

The Adventure was encountering long rolling waves that lifted the bow before plunging into a trough. William reached down and unhooked a panel to raise a seat from the deck. He snapped the seat into place, sat down firmly and fastened a seatbelt around his waist.

"We good, Captain," William called, laughing and filled with excitement. "Those lessons I took when I bought this rig included rough weather sailing." William motioned for Blackbeard and Marcus to lean close. They put their ears close to William. "Now, don't go telling nobody, but The Adventure has a diesel engine if we need it."

"Wow, William," Marcus whistled softly, "this baby is hot. I guess having the tar beat out of you in the NFL every week has its rewards."

"Yes, indeed," William grinned. "It do, it do."

After weathering the initial shock of the storm, The Adventure settled into a regular rhythm, rising and falling as she cruised through the waves.

"This is good weather for training SEALs," Amos said, looking out over the water. "My special warfare unit concentrates on counter-terrorism."

"You mean like when the USS Cole was bombed over in Yemen?" Marcus asked.

"No," Amos said sadly, "that was a terrorist attack, all right. We just didn't anticipate it and didn't have any teams in place." Amos thought a moment before continuing. "We have teams that can penetrate a hostile coast line and insert themselves. Storms like this are good cover for black ops."

Hopping down the stairs and entering the galley, Blackbeard cautioned the feasting men not to have too much rum or beer.

Standing at the helm near William, Marcus looked out over growing swells, and watched as the bow sliced into the grey-green seas and the frothy waves surged over the forward deck. A dark curtain of heavy rain raged towards The Adventure and burst upon the sails with a staccato percussion and occasional loud snap of canvas. Marcus could not hear his satellite phone above the snarl of the wind and the throbbing chatter of rain on the sails. Instead, he sensed, or felt its rhythm. Hastily drawing it from his pouch, he pressed it against his ear.

"Marcus, here," he yelled.

Jane's voice was edgy and he could tell she was disturbed. "Marcus," she said, "we've lost them. We found their cars near a dock outside New Bern on the Neuse River. Locals said they saw two high-speed cabin cruisers with deep-vee hulls for fast, rough water travel. We think the terrorists knew the boats were there. They may be using the rough weather as cover for an operation. We're trying to figure out their objective. Over." Marcus heard a click as Jane hung up.

"What gives, Marcus," Amos shouted. He and Blackbeard were snapping a Plexiglas windshield into place above the instrument panel. The windshield blocked the rain and created a small cocoon of calm air.

Huddling close to the windshield, Amos and Blackbeard listened as Marcus relayed Jane's update.

"That's just 20 miles from here," Blackbeard yelled, bringing up a map of the sound on the instrument panel.

The satellite phone rang again. Marcus held it to his ear, but could not hear. In frustration, he shouted, "Wait a minute," and crouched down between William and the instrument panel.

"Jane, is that you?" Marcus leaned close to the panel. Blackbeard and Amos tried to block the wind and rain, which was now sluicing over the windshield in wet sheets. Marcus listened carefully, and then grabbed William's waterproof notepad and pencil. He scribbled some coordinates, handed them to Blackbeard, and yelled, "Find where this is on the chart."

Blackbeard entered the coordinates and a small red "X" appeared on the south of Ocracoke Island. Marcus spoke into the phone and hung up.

"A marine amphibious company is there for a landing exercise," Marcus yelled. "The exercise rules prohibit radio contact. Its classified, but an internet leak site is carrying the date, time, and coordinates for the landing." Marcus pointed to the red "X" on the screen. "That is the only potential terrorist target anywhere around here."

"William..." Blackbeard shouted over the wind, "change course..."

"Already done, Captain," William said, spinning the wheel. "Course set for south Ocracoke."

"Hot damn," Amos yelled. "Bring it on!"

The wind neared gale force as The Adventure rose, twisted, and broke into each succeeding swell. William gripped the wheel tightly, and the others clung to rails. Salt was beginning to cake on their faces and arms and their hair was sloppy wet. The rain sheets were impenetrably thick, so William stared at the instrument panel to navigate.

"William," Blackbeard hollered loudly, "what are these blue dots on the radar?"

"Those must be the craft for the amphibious landing exercise," Amos shouted.

"And these?" Blackbeard pointed to two blue dots several miles west of the marines.

"Crap," Amos stared hard at the screen, "those must be the terrorists. They are closing fast. Get your boss on the phone, Marcus. She's got to warn the Marines about what's coming their way."

Marcus dialed the phone and struggled to hear above the raging elements.

"Marcus," William yelled, pointing to a headphone wire, "can you plug that phone into the on-board radio? If so, I can crank up the speakers and you can speak into the mic."

"Let's try," Marcus said. Suddenly, there was a loud crackling.

"What's up, Marcus?" Jane asked. Her voice was clearly audible. "Am I on a speaker phone?"

"You are," Marcus yelled. "Listen, our radar is showing blips off the south of Ocracoke that we think is the marine force. And two blips several miles to the southwest, heading straight towards the marines. We think it's the terrorists. We are headed there as well, with an ETA of..." Marcus looked at William. William glanced at the screen and shouted "...20 to 30 minutes."

"Why are you headed there?" Jane asked sarcastically.

"In case we can help," Marcus responded. "Have you contacted the marines?"

"No," Jane answered slowly, "they are under radio silence."

"We thought as much," Marcus shouted. "I've got a navy SEAL here with me."

"Let me put you on the speaker," Jane said, "I've got a navy liaison on my conference line listening in, and I'm using the county sheriff's office. She is here, too."

"OK, Marcus," Jane continued, "I don't care if you have a whole SEAL team with you, I don't want you taking a bunch of civilian

party-boys anywhere near terrorists."

"What do you mean 'SEAL Team'?" a man's voice boomed. "What's that got to do with anything?"

"Admiral Tungsten," Amos interrupted, "is that Admiral Tungsten?"

"Yeah," he answered gruffly, "who wants to know?"

"This is Amos Bracket. Lieutenant Bracket. We worked together," he paused to find the words, "on the pilot extraction in southwest Asia."

"Amos," Tungsten exclaimed, "are you near the marines?"

"Yes, sir. On a boat with some buddies from my old college football team. You remember I told you I played with some guys who are in the NFL. Hank and William. They are here, too. And, of course, Marcus, the FBI Agent who works for the lady on the phone."

"Marcus," Jane sniffed, irritated at being referred to as "the lady" "you've got to change course. You can't take civilians into danger."

"Rubbish," Tungsten broke in, "SEALS and NFL players are not ordinary civilians. Amos is one of the best. If anything can be done to help the marines, Amos can do it."

"I can't..." Jane said, but Tungsten continued.

"Do you have any weapons?"

"I've got a nine millimeter with three 20-round clips," Marcus said.

"Six shotguns," William added.

"Thirty-ought-six," Blackbeard yelled.

"That's not enough," Jane said vehemently, "you can't do it."

Blackbeard reached over and took the phone from Marcus. "Hey," he said slowly, "are you by any chance a former beach volleyball player?"

There was surprise in Jane's voice. "What?"

"Janey," Blackbeard said slowly, "this is Hank. You never told me you were an FBI agent when we partied at the Pro Bowl."

"Oh, crap," Jane muttered, momentarily speechless. "Hank, I...Oh, crap, Hank, I... I...I have no excuse. I was going to tell you. I should have told you." For a moment she couldn't seem to find the right words. "I just... I just didn't think you'd want to be with me if you knew I was... ."

"Enough," Tungsten interrupted, "you love birds figure it out on your own time. We need Amos to keep on course to the marines. Look, Jane," he said solicitously, "why don't you call Washington and get a read from them. The boys can always back off if Washington says 'no'."

"C'mon, Janey," Blackbeard urged, "no harm, no foul. Ask Washington."

"I will call Washington," Jane conceded without enthusiasm. "And, Hank, we need to talk."

"Agent Hutton," Tungsten interjected, "let's keep this line open. Amos, do you have enough battery?"

Marcus plugged the phone into an outlet on the console. "This is Marcus," he said, "we're plugged into the ship's electric system."

The men watched anxiously as the hostile radar blips closed inexorably on the marine landing craft.

Fifteen minutes later, as the radar showed The Adventure closing to within a few miles of the marines, the telephone crackled and Tungsten's voice, clearly emotional, announced, "The marines have just broken radio silence. They are taking automatic weapons fire. The terrorist's bullets are unable to penetrate the skin of the landing craft, but the marines are sitting ducks." Tungsten took a deep breath. "Amos, the marines have no live ammo. Repeat, the marines have no live ammo. Do you copy?"

"Aye aye, admiral." Amos replied gravely. "We will intercept within ten minutes. For some reason the terrorists have slowed down. Do we have permission to engage?"

"Agent Hutton," Tungsten called, "you got your ears on?"

"Yes," Jane answered.

"Do you have word from Washington?"

"Any minute now." Jane answered.

At the helm of The Adventure, William wiped water from his face and squinted at the instruments. "We're closing fast," he called. "Blackbeard, you better check with the team. If they gon'na be real pirates they need to know what's happening and sign up for the fight, or we got'a pull the plug."

Blackbeard shot a quick glance at Amos and Marcus, and then bounded down the stairs and disappeared into the galley. William flipped a switch and brought up a Doppler radar screen.

"Admiral, this is William. Doppler radar shows a break in the rain. The terrorists are riding a clear weather patch. That must be why they slowed down. I'm going to break out the shotguns and have Blackbeard—I mean Hank—get his rifle. Unless you or Agent Hutton order otherwise, we are going in."

"Agent Hutton here," her voice cracked, "Washington won't authorize you to move in."

Blackbeard emerged from the galley, gave a "thumbs up," and raced up the stairs. Behind him, running out of the galley and taking position along the deck were the rest of the team. He carried his rifle, and several of the men carried William's shotguns.

"But," she continued, "they won't order you to stand down. It is up to you."

"Hutton," Tungsten barked, "you can't put the crew of The Adventure in that kind of pickle. If they take action you've got to back them."

"I'm sorry," Jane said slowly, "I have no authority."

Marcus and Amos looked at William. Blackbeard leaned in close to them and said, "The men are up for it. Let's get Applebee up here."

"Admiral," Amos asked, "what happens if we go in with weapons?"

"I don't know, Amos," Tungsten sighed.

Applebee, stripped to the waist and without his hat and wig, was standing outside the galley with a long cutlass in his hand. Blackbeard beckoned him up to the helm.

"What's up?" Applebee asked.

Amos leaned in, fighting to make his words heard above the wildly blowing rain. "There is a company of unarmed marines in landing craft out there being fired upon by terrorists with automatic weapons. What are the legalities if we go in with weapons?"

"If the terrorists are using deadly force against the marines, I think we have legal justification to use deadly force to protect them," Applebee said slowly.

The rain, which had been so fierce that it limited their view, suddenly slacked. Ahead, through the mist, a number of small boats were now clearly visible. With the abating wind, they could clearly hear the automatic rifles. Two cabin cruisers loomed above the other craft.

"Janey," Blackbeard said questioningly, "we have to fish or cut bait. What's your recommendation?"

"I'm sorry," Jane said slowly, "I have no authority."

"Well, I do," a woman's voice interrupted. "Hank, this is Sheriff Amy Tzu. You are in my county. Consider yourself deputized. If you can help the marines, go for it with my blessings. If Washington doesn't have the guts,

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Bruno's Top Tips: Protect Yourself from Financial Con-Artists

By Bruno DeMolli

"Dear Sir, I am contacting you to seek your assistance and cooperation in the actualization of this rare business opportunity…"

Many, if not all, of us have received an email over the past few years from someone who appears to be a barely literate Nigerian or Saudi prince begging us for assistance with a financial matter and offering sizeable compensation for doing so. While many immediately recognized this email as a money scam, there are some who jump at the chance of a quick payoff and suffer major financial loss as a consequence. Apparently, when the siren song of a fast buck plays loud enough, it can drown out even the most obvious sounds of warning. In these difficult economic times, lawyers are not immune to falling prey to fraudulent money schemes in the pursuit of an easy and seemingly lucrative payday.

The upsurge of electronic communications over the past decade improved efficiency, saved costs, and allowed for faster information sharing. Unfortunately, the benefits of this new era are tempered by an alarming rise in attempts to defraud law firms. Scam artists have aggressively targeted law firms and lawyers across the country since 2008. Until recently, North Carolina was relatively insulated from this fraudulent activity. However, given the ever-increasing number of reports to the State Bar, it is clear that North Carolina lawyers are now major targets for Internet financial criminals. Lawyers and their trust accounts are consistently targeted by scam artists who pose as potential clients, counterfeit trust account checks, steal account numbers, and forge signatures. Failing to recognize a scam could not only cost a lawyer hundreds of thousands of dollars, it could also result in the use of funds belonging to the lawyer's other clients to cover a counterfeit check—potentially violating the Rules of Professional Conduct.

The most common fraud scheme follows this pattern: Lawyer receives an email from a prospective client from out of the country but with "ties" to the jurisdiction in which the lawyer practices. Most of these schemes propose representation in either a simple debt collection or a divorce settlement. The "client" retains the lawyer to collect a debt from a local company, subtract attorney's fees, and wire the remaining funds back to the "client's" account. Amazingly, before a demand letter is even sent to the bogus debtor, a cashier's check arrives at the lawyer's office paying the debt in full. The lawyer deposits the check in the trust account, receives provisional credit from the firm's bank, subtracts the attorney's fees for a job well done, and, assuming that the cashier's check represents good funds, wires the remaining funds to the "client." By the time the cashier's check is returned by the bank as counterfeit, the "client" has laundered the wired funds through multiple accounts and is long gone.

This scheme has cost lawyers across the country hundreds of thousands of dollars in losses and, in one case, a federal money laundering charge.[1] The State Bar has received reports of this scheme from multiple lawyers and law firms across North Carolina. For example, a firm in Fayetteville was retained on a contingency fee basis by an out-of-state company to collect a debt from a local business. The firm received a bank check for $300,000 from the debtor and was told to deduct a 10% legal fee and issue a trust account check for the remainder to the client.[2] Smartly, the firm examined the bank check and found it to be fraudulent before depositing the check or making any disbursements, saving the firm's lawyers hundreds of thousands of dollars and a potential serious problem with the State Bar.

Another example: a lawyer in Durham was retained via email by a woman to aid in the collection of a divorce settlement from her ex-husband who allegedly lived out of the country. The lawyer had to do "very little haggling" with the ex-husband before he remitted a certified bank check in the amount of $297,500, because he did "not want this case to go further involving a lawyer." The lawyer, rightly suspicious, opened a new IOLTA account to protect the lawyer's other clients and deposited the check in the new account. The lawyer attempted to confirm the validity of the check but was only able to verify that the account number, not the actual check, was valid. Thankfully, before the lawyer wired any funds to the "client," the check was returned as counterfeit and the lawyer shut down the IOLTA account without losing the money of his other clients.

Sometimes these schemes occur without the willing participation of the lawyer. The State Bar has received reports of persons printing fraudulent checks on law firm accounts and using them all over the country. For example, a firm in Charlotte was contacted by the fraud department of its depository bank because recently-cashed checks had check numbers that had been previously used. The criminals forged the signature of one of the firm's lawyers on 12 different checks totaling over $7,000. The firm was reimbursed by the bank for the stolen funds and is working with the bank to prevent similar occurrences in the future.

No lawyer can be 100% protected from criminal activity, but these tips can help safeguard you and your firm against check scams and fraud:

• "Available funds" does not equal collected funds. Even if the bank makes a check's funds available within two days, it does not guarantee that the actual check will be paid. Fake checks often take up to a week to get returned because scammers put fake routing numbers on the checks.

• Be sure to wire only "collected funds"

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An Interview with New LAP Director Robynn Mortaites

Just after being on the job a few days in early July, Robynn Moraites, the new LAP director, sat down with outgoing Director Don Carroll. Here are her answers to questions about her background and her new job. If you would like to contact Robynn with a thought or suggestion you may reach her at rmoraites@ncbar.gov.

Question: Robynn, you have had a very varied career before being selected as the LAP director. Tell us a little about some of the experiences you've had that you feel are pertinent to this position.

Robynn: "Varied" is a nice way to put it. I was a second career law student. Prior to law school, I did all sorts of things—event coordinating, marketing and sales, teaching. You never drop the skills you gain from each work experience. My seemingly random work history has given me a skill set that is really well suited to this position. One of the most significant work experiences I had was running a public health program at the University of Miami, which combined the skills I gained from those prior event coordinating, marketing and sales, and teaching jobs. I developed continuing education programs for medical professionals focused on the subject matter of interdisciplinary geriatric medicine. I developed curriculum, selected presenters and speakers, organized events and targeted hard-to-reach professional populations. I also developed some programs for the general public, specifically the senior population, that had an enormous response. There are many parallels with what I will be doing as the director of the LAP.

Question: Which programs were most interesting to you?

Robynn: The programs I personally found most interesting were a program on alternative medicine, a program on alcoholism in the elderly, and a program concerning end-of-life issues. Each program was very compelling in its own way.

Question: Most of these programs were presented to doctors?

Robynn: Doctors and 16 affiliated healthcare professions, like physical, occupational, and speech therapists, psychologists, nurses, pharmacists. The list goes on. We targeted a whole range of healthcare disciplines and providers.

Question: What did you enjoy most in this educational setting?

Robynn: The collaborative nature of the work—it was incredibly creative and rewarding. Also, the wealth of information. Interestingly, that one job has had a major ongoing impact on my personal life and my family that continues to this day. After having attended hundreds of hours of continuing medical education, I coincidentally wound up serving as a healthcare advocate for several family members while they were critically ill or dying. Because I knew the medical jargon and the lingo, I was able to help those family members get really good care and get answers where we hadn't been able to before. I was able to get some family members into comprehensive interdisciplinary care programs that they might not have otherwise been able to get into. I have no doubt they lived healthier for longer and had a far better quality of life for having received that care. Those folks I worked with were also immensely helpful to me when my father was dying.

Question: When you're dealing with patients who are at the end of their life, it seems like you're in one of the most real and compelling places to be present and to help people. Do you mind sharing what that experience was like?

Robynn: As I mentioned, one of the training programs that I enjoyed creating the most dealt with helping healthcare professionals understand end-of-life issues. So I was involved in understanding these issues from an educational point of view and then these issues were all right before me in real life when my father passed away. And, yes, it was the single most compelling experience of my life. I think it is one of the most real experiences we can have in life, if we can show up for it, which is hard to do. It is excruciatingly hard to be with a loved one and tend to their needs when there is little that can actually be done. All we can do is just be with them and love them. And as hard as it was, I would not trade a minute of it.

As for the story of my dad's passing, I had been waiting by my father's bedside, keeping watch, waiting for "the moment" for days on end, weeks really. I kept wondering, "Is it now?" because he was in a coma-like state and his breathing was very shallow and at times it would stop. On the day he passed, the hospice nurse told me that she thought he had at least another week and that I should go on and run errands and do what I needed to do. So I left his bedside and I called a former colleague from the University of Miami, a psychologist specializing in end-of-life issues. During that conversation, she asked me, as had about 50 other people already, whether I had told my dad that it was OK for him to go. I had done that many times and told her so. I was on the phone for over an hour.

After we ended the call, I was hungry, so I came back into his room and ate a sandwich. As I was eating the sandwich, I thought, "I need to tell my dad one more time, but I'll tell him in a different way." My dad was a very tough man from the streets of Boston and was not into anything transcendental, or as he

might say, "airy fairy." So between bites, rather irreverently, I told him the old-fashioned Irish farewell used to urge a friend who has stayed too long to leave. "Hey dad, everyone keeps asking me if I have told you it is OK for you to go. And I have. But just to make sure, I'll say it again: Don't let the door bang you on the butt. Bon voyage. Fare thee well." About two minutes later I finished my sandwich and stood up and said, "I'll be right back. I'm gonna throw this sandwich wrapper away…" then I immediately said, "No, I'm not." And I pulled a chair up to his bedside because every part of me knew without question that he was going to pass at that very moment. I put one hand on his heart and one on his forehead and began to say prayers like, "Dad, may you have peace. May you have joy. May you have love. May you have happiness." And because of all the reading that I'd done while waiting for this moment, I also welcomed everyone in the room by name who I thought was probably there and encouraged my dad to go with them. I said, "Dad, I'll see you when I see you." And then he took his last breath. And I was crying by that point and saying, "Thank you, Dad. Thank you for letting me be here with you. I love you." Then I just sat there like that with him for maybe 10 or 15 more minutes until I felt like the room was empty. It was the strangest feeling because when I looked down at my dad, it was really obvious to me that my dad had gone and what remained in the hospice bed was not actually my dad. That's the only way I can explain it. Then I went and alerted the hospice staff.

Question: What has this personal experience with your own father and the experiences with your prior work collectively taught you that will be meaningful to you as director of the LAP?

Robynn: I have had the chance to be in tough life situations with many people and to be present and open to whatever was happening with them, and to honestly try to help them in any way I could to navigate their particular situation. We all go through messy times in life—things that don't look good on the outside but that we all have to get through and deal with. And when we go through these times, we usually cannot do it alone. I also have a real appreciation for the value of advocacy. Education and advocacy go hand-in-hand in terms of better resources and outcomes for everyone involved. All of this is very relevant to being the LAP director.

Question: Oftentimes people suffer from depression or addiction, and because these two illnesses tend to thrive in isolation, folks have difficulty reaching out to get the resources they need to get well. How might your University of Miami experience relate to the challenges that the LAP faces?

Robynn: I hope that the LAP can create compelling educational programs that de-stigmatize depression and addiction and other real world issues that everyone faces. In-person programs and groups really open the door for greater communication. It is amazing when people hear their own story through another's experience, or some aspect of their story, and realize that they are not alone in struggling with issues, issues and obstacles that others have also come up against. For a lot of mental health and addiction issues, it can be a matter of degree. Lawyers like to talk about the slippery slope. To the extent that folks can identify potential problems earlier in the process and reach out for assistance in less critical phases, the greater the chance for long-term success. But that only happens when there is a bridge of trust, communication, and transparency with all of our humanness.

Question: Switching gears here, you've also practiced law. Tell us a little about the legal environment you practiced in.

Robynn: My first position was with what is now Maguire Woods, formerly Helms Mulliss & Wicker. I split my time between the litigation and the environmental groups. I experienced what it was like to practice law in a big firm with all the pressure and stress that that entails. I was able to meet and get to know a lot of lawyers and was involved with the Charlotte Women's Bar during that time. I then transitioned to an in-house counsel position with Premier, Inc. and moved to a transactional practice. I had a good opportunity to experience the unique stress and pressure that an in-house position entails. I then moved to a small firm, Bringewatt & Snover. There I developed a general commercial practice and specialized in municipal and general commercial law and continued the group purchasing and health-care-related work I had begun at Premier. I became a partner there, which helped me to understand the pressures and stressors involved with a small firm. So I am fortunate to have had a range of experience in various settings and understand both the rewards and inherent difficulties associated with various types of legal practice and settings.

Question: In addition to work with bar organizations like the Charlotte Women's Bar, you've also had the chance to work as a LAP volunteer. Could you share with us a little bit about what your experience was like?

Robynn: It's especially wonderful to work with people one-on-one and see them get better. Not only get better, but become stronger, healthier, more content, and more joyous than they were before. Watching folks overcome obstacles in their lives in a new and different, more healthy and successful way is very rewarding. So I am very grateful for my experience in working one-on-one with other lawyers as a mentor and monitor. I've also really enjoyed getting to know the large network of volunteers who work with lawyers suffering from depression and addiction. As the LAP has expanded its mission to address all manner of issues facing folks in the profession that can impair their legal practices, whether stress, living with an alcoholic spouse or child, dealing with eating disorder issues, gambling, suffering in various ways from dealing with economic stress…whatever it may be, it's very exciting to talk with new volunteers and potential volunteers who have had similar experiences. Our greatest strength is each other. This may sound like a cliché, but it's really true. I am really looking forward to becoming more involved in the numerous lawyer support group meetings across the state because I know this is one of the ways the LAP program has been most effective in helping lawyers who have had difficulties.

Question: What is your vision for some new things the LAP can do?

Robynn: There is a brand new ADD support group that's meeting in Charlotte, and if it proves effective and successful, I'd like to expand that to other areas of the state. I have known for a while through friends working in trauma-related legal fields that some of them have begun to suffer from the condition of secondary post-traumatic stress disorder. Interfacing with trauma victims or perpetrators day in and day out can actually create the effects of the trauma in others. This can be particularly true for ADAs, public defenders, legal aid attorneys, and district court judges—particularly those lawyers and judges who serve in areas of domestic violence and child abuse. I'd really like to pull together support groups for that particular issue. I would also like to see the LAP do a better job utilizing technology to interact with volunteers and the general Bar population.

Question: Although the LAP program operates entirely separately from the other

parts of the Bar, what is your vision for increasing the understanding among Bar councilors about the LAP?

Robynn: I look forward to meeting as many Bar councilors as I can and building relationships with them so that I and the LAP can be a resource to help the lawyers in their districts. I've always worked in a very collaborative setting. I think the strongest approach is relationship-based, building trust and understanding.

Question: What do you see are some of the challenges facing the LAP during the next few years?

Robynn: Maintaining strong community and relationship ties with a growing, diverse Bar population is a big challenge. We need to find effective and meaningful ways to reach out to underrepresented lawyers who are suffering from the same stresses and illnesses that our majority population deals with. Some of our minority and underrepresented Bar members may not feel as comfortable reaching out to us, so we need to reach out to them. I think that continued public awareness is also crucial. It has been demonstrated through other states that track liability data that a robust LAP greatly reduces the chance of ethical violations and malpractice, thereby greatly increasing protection for the public. I think a robust LAP is the greatest protection we can offer the public because it has the potential to get to the core of problems which result in behavior that is problematic. Discipline is essential, but it's not going to get to the core issues that lead a lawyer to fail to return client calls or become apathetic in client representation. The LAP is the Bar's proactive way to help lawyers before issues that impact the public arise, and the best way to get to the core of the remedy for those issues.

Question: The number of law students in NC has increased dramatically in the past couple of years with two new law schools coming at Elon and Charlotte. What is the role for the LAP with law students?

Robynn: I'd like to see the LAP become more meaningfully and interactively involved with the law schools. I think the incidence of alcoholism and substance abuse in law schools is probably higher than the incidence within the current population of practicing attorneys. Binge drinking in college and law school has become a norm which is culturally approved of by students. In other words, if you don't go out and get smashed every weekend, you're not seen as a regular gal or guy. So I think there is a dual role that the LAP has: 1) to reach out to law school administrations to let them know that there are things that they can do to create a more positive culture than the default binge-drinking culture that we so often have, on the one hand; and 2) to reach out to law students who have gotten into difficulty because of their use of alcohol or other drugs. I know in the past the LAP has had some sporadic recovery meetings for law students in some of the law schools. I would hope we could do more of that throughout the state.

Question: Robynn, anything else you would like to add in closing?

Robynn: Just that I appreciate the warm welcome I have gotten from Mark Merritt, the chair of the LAP Board; Tom Lunsford, the executive director of the Bar; Alice Mine, assistant executive director of the Bar; Katherine Jean, bar counsel; the LAP staff, especially Ed Ward and Towanda Garner; and so many of the LAP board members and volunteers. As we do this interview I have only been on the job a few days, but I already see the possibility to work with so many diverse stakeholders in really exciting and positive ways. I am so delighted to have been given this opportunity and I hope to contribute meaningfully to our Bar through the LAP and maintain our LAP as one of the strongest and most well-respected and robust programs in the nation. It truly is an honor. ■

The North Carolina Lawyer Assistance Program is a confidential program of assistance for all North Carolina lawyers which helps lawyers address problems of stress, depression, addiction or other problems that may lead to impairing a lawyer's ability to practice. If you are a North Carolina lawyer, judge or law student and would like more information, go to www.nclap.org or call toll free: Robynn Moraites (for Charlotte and areas West) at 1-800-720-7257, Towanda Garner (in the Piedmont area) at 1-877-570-0991, or Ed Ward (for Raleigh and down East) at 1-877-627-3743. If you have a personal story that you would like to submit for consideration for publication in the LAP column, please forward it to Don Carroll at nclap@bellsouth.net.

Trust Accounting (cont.)

from your trust account. Wired funds are very hard to recover if a check is returned as counterfeit.

• Closely examine cashier's checks. Scammers are now counterfeiting certified bank checks from nearly every major and minor bank. For a complete list of counterfeit check alerts, go to the US Treasury Dept. website at www.occ.treas.gov/news-issuances/alerts/2011/index-2011-alerts.html.

• Be wary of doing business with out-of-state clients via email. Look for suspicious generic terms in the emails like "your jurisdiction" and for poor grammar.

• Question how the client found you. If the client is requesting services from you which are out of your area of expertise that is a warning sign that something may be awry.

• MONITOR YOUR TRUST ACCOUNT REGULARLY! If someone is writing fraudulent checks on your trust account, you should be able to catch it during your monthly review. If you are suspicious of illicit activity, daily or weekly make reviews of your trust account. Keep your staff informed of these scams so they can spot the tell-tale signs of fraud.

• If something seems fishy, it probably is.

By following these tips, knowing your clients, and monitoring your trust account, you can protect your firm and yourself from attacks by Internet financial criminals.

If you believe that your firm has been subject to an attempted or successful fraud, contact the State Bar at (919) 828-4620 and the North Carolina Attorney General's Office at (919) 716-6000.

Where Bruno is Headed

Bruno will be auditing Judicial District 28 (Buncombe County), and Judicial District 30 (Cherokee, Clay, Graham, Haywood, Jackson, Macon, and Swain Counties) this quarter. ■

Endnotes

1. Martha Neil, *Lawyer Victimized in $300K Check Fraud is Charged with Money-Laundering*, ABA Journal (Aug. 27, 2010).
2. The amount of the check was actually $298,750. Scam artists will often avoid round numbers in order to make the amount in question appear legitimate.

You Can't Touch This—A Look at the Anti-Contact Rule

By Suzanne Lever

You can't touch this
Look man you can't touch this
You'll probably get hyped boy
'Cause you know you can't touch this
Ring the bell school's back in
(Oh-oh-oh oh-oh)
You can't touch this
—MC Hammer

Like MC Hammer's legendary dance moves, there are certain persons or entities that cannot be "touched" by lawyers when they are representing a client. Rule 4.2, commonly known as the "anti-contact" rule, generally prohibits a lawyer who is representing a client in a matter from communicating about the subject matter of the representation with a person the lawyer knows is represented in the same matter unless the represented person's lawyer consents.

(*Break it down.*) First, the rule only applies if the lawyer knows that the person is represented. The lawyer has to have "actual knowledge" of the fact of representation. However, knowledge may be inferred from the circumstances and the lawyer cannot ignore facts suggesting that the person is represented. The lawyer does not have an affirmative duty to ask whether the person is actually represented. However, the better practice is to ask to avoid possibly violating the rule. What if the opposing party tells you that he has fired his lawyer? If retained counsel has entered an appearance in a litigated matter, you may not communicate with the person until the court has granted the opposing lawyer's motion to withdraw. If no motion is forthcoming, you may make a motion to have the lawyer for the opposing party disqualified by the court (because he has been fired) in order to negotiate directly with the (now) unrepresented opposing party.

Second, the rule only applies if the communicating lawyer is also representing a client in the matter. Therefore, Rule 4.2 does not preclude communication with a represented person who is seeking a *second opinion* from an independent lawyer. Comment [2] to Rule 4.2 states that a lawyer from whom such a second opinion is sought "should, but is not required to, inform the first lawyer of his or her participation and advice." However, if the person asks you not to disclose the request for a second opinion, this becomes confidential information that you may not disclose.

Third, the rule only prohibits communications "about the subject of the representation." The rule does not apply if the lawyer is communicating with a represented person about a matter outside the subject matter of the representation.

Fourth, the rule only applies if the person has legal representation in "the same matter." This element of the rule is perhaps the most difficult to understand and apply. Clearly, if a person is represented by a domestic lawyer in a divorce case, and that person is also proceeding *pro se* in a breach of contract action against his landlord, the landlord's lawyer does not need the consent of the domestic lawyer to speak to the person about the breach of contract case. The issue becomes murky if one set of facts gives rise to more than one action and a party is represented in one of the actions but not the others. In this situation, the lawyer should consider the public policies advanced by Rule 4.2: preserving the client-lawyer relationship; preventing lawyer overreaching; and reducing the likelihood that privileged or confidential information will be disclosed. Where the answer is still unclear, the lawyer should err on the side of obtaining consent.

(*Oh-oh oh oh oh-oh-oh.*) What if the represented "person" is actually an organization? There is a distinction between communications with management and "blue collar" employees and between current and former employees. Rule 4.2's protections extend only to those employees who should be considered the lawyer's clients because of the authority they have within the organization or their degree of involvement in the legal representation. A lawyer generally may interview rank-and-file employees without the knowledge or consent of the organization's lawyer. RPC 67.

There are four situations where a current employee is considered off-limits: (1) the employee supervises, directs, or consults with the organization's lawyer concerning the legal matter; (2) the employee has authority to obligate the organization with respect to the matter; (3) the employee's act or omission in connection with the matter may be imputed to the organization; or (4) the employee participated substantially in the legal representation of the organization.

There is a different standard for *former* employees. Rule 4.2 *generally permits ex parte* communications with former employees. This is true even though the former employee's acts or omissions may be the subject of the representation. A lawyer may communicate directly with a former employee of a represented organization, *unless* the former employee participated substantially in the legal representation of the matter. 97 FEO 2. According to our ethics opinions, if a former employee was privy to privileged communications with the company's lawyer as to the strategy and objectives of the representation, the management of the case, or other matters pertinent to the representation, the former employee is off-limits and consent of the represented organization's counsel is required. 97 FEO 2.

If a former employee is not considered off-limits by the standard above, the lawyer should determine whether the former employee has separate counsel. If the former employee does not have counsel, the lawyer should follow the requirements for communicating with an unrepresented party that are set out in Rule 4.3. In addition, when communicating with former employees of a party-opponent, the lawyer may not solicit information that is reasonably known or

which reasonably should be known to the lawyer to be protected from disclosure by statute or by an established evidentiary privilege. *See* Rule 4.4

(*Oh-oh oh oh oh-oh-oh.*) What if the represented organization is a government entity? Our ethics opinions provide that Rule 4.2 only applies to communications with a government employee related to a specific claim of a client. 2005 FEO 5. Routine communications on general policy issues or administrative matters do not require consent. A lawyer representing a party in a controversy with the government may communicate directly with elected officials who have authority to take action in the matter. The lawyer must, however, give government counsel reasonable advance notice. Rule 4.2(b) permits communications with a represented elected official under the following circumstances: (1) in writing, if copied to the opposing lawyer; (2) orally, upon adequate notice to the opposing counsel; or (3) in the course of official proceedings.

You *can* touch this. There are some scenarios where Rule 4.2 does not prohibit communication. For instance, the rule does not prohibit represented parties from communicating directly with each other. And the rule does not prohibit a lawyer from encouraging his client to communicate with the opposing party "in a good faith attempt to resolve the controversy." Rule 4.2, Cmt. [4]. *But see* (in this publication) Proposed 2011 FEO 11, *Communication with Represented Party by Lawyer Who Is the Opposing Party*. Rule 4.2 also allows communications with represented parties when those communications are "authorized by law or court order." *See, e.g.*, RPC 218 and (in this publication) Proposed 2011 FEO 15, *Communication with Adverse Party to Request Public Records*. As noted above, direct communications with elected governmental officials are permitted under certain conditions.

Now back to "Hammer Time."

Wave your hands in the air
Bust through the moves run your fingers through your hair
This is it for a winner
Dance to this and you're gonna get thinner
Move slide your rump
Just for a minute let's all do the bump ■

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

Blackbeard's Last Raid (cont.)

I do."

"All right, sheriff," Tungsten cheered. "Men, God be with you. It takes an awful lot of guts to face automatic weapons with shotguns."

Applebee looked puzzled. Speaking to the telephone, he said, "Didn't these boys tell you? The Adventure has a dozen cannons, six on each side. And the guys have been practicing. We'll blow the crap out of them."

Amos raced to the deck and directed the men to uncover the cannons. Blackbeard took his rifle, slung a rucksack over his shoulder, and climbed the rigging to the crows nest. On the deck the men used ramrods to push in loads of powder and lead ball.

The terrorists' boats were now within a hundred yards of the marines. The noise of the firing, and the whine of the bullets ricocheting off the sides of the landing craft, echoed loudly. High in the crows nest, Blackbeard opened his rucksack and took out a large American flag. Grabbing a line, he raised it to the top of the mast.

On board the landing craft, the marines peering through slits on the side of the craft saw The Adventure emerge from the mist and sail towards the cabin cruisers. Silently, The Adventure approached, the American flag illuminated by a lone ray of sun breaking through the clouds. The marines cheered as the ports on The Adventure opened and the cannons poked out.

Amos ordered half the cannons to fire when The Adventure passed the first cabin cruiser and the rest to fire on the second. The Adventure closed in. If the terrorists saw The Adventure approaching, they could easily sweep its deck with automatic weapons and prevent the cannons from firing.

Amos, steely eyed and firm, raised his right arm. "On my signal," he called, and then lowered his arm.

Three of the cannons roared to life, belching flame and hurling their lead balls into the first cruiser. "Again," called Amos, raising his arm, "on my signal."

The first cruiser, ripped by two of the lead balls, began to list sharply with its deck towards The Adventure. A terrorists fired, bullets raked the ship and spit splinters of wood. Blood appeared on the top of Amos' shirt, darkening it. Amos did not move. Blackbeard, high in the crows nest, took careful aim and shot the terrorist.

Amos shouted, "Now!" and lowered his arm. The cannons spit their lead and flame. One ball was a direct hit, puncturing the side of the second cruiser. A second ball hit the water and skipped like a stone into the bow of the cruiser, tearing a hole. The motion threw the terrorists into the water.

"Lower the sail," William roared. Men slipped ropes from pinions, lowering the sails. William pressed a button to start the diesel engine. He put the lever into reverse and brought The Adventure to a stop.

"What's happening?" Tungsten yelled.

"All da bad guys in da water," William yelled, exultantly.

"All right," Jane cheered.

"Good job," said Sheriff Tzu.

The pirates on The Adventure smiled at each other. Amos, ripping off his shirt, pulled a wood splinter from his shoulder and held up his arms to show he was not badly hurt.

Blackbeard, descending from the crow's nest, looked at William who was still clothed in his English finery. William's finely embroidered silk and gold coat, waistcoat, and knee breeches were now wet and bedraggled. His fine white wig looked like he had placed an old mop on his head. His stockings draped over his shoes. Blackbeard began laughing hysterically. The pirates, appreciating William's bedraggled state of dress, began laughing, too.

"Laugh all you want," William yelled, holding up his right hand. "I gots 'da ring. I gots 'da ring." ■

Robert Stamps consults on federal contracts and grants. He practiced international law with the air force, served as the staff judge advocate for the air force district of Washington, and as a prosecutor in the Office of Military Commissions. He retired as a colonel.

Comparability Halts Income Slide but Income Still Low

Income

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 on July 1, 2010. Under comparability lawyers must 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. Income for the first quarter of 2011 is up 39% over that period last year, but we are not quite meeting our hoped-for projection of $200,000 per month.

We are continuing discussions with SunTrust Bank regarding its decision to stop waiving service charges on IOLTA interest, which caused a dramatic drop in income as SunTrust is one of the largest banks (in number of IOLTA accounts). We appreciate the fact that a number of their attorney customers have let their North Carolina bank representatives know that IOLTA is important to them and have asked that the bank revisit this policy change.

Settlement Agent Accounts Added to NC IOLTA

An amendment to the Good Funds Settlement Act passed in the recent legislative session requires interest-bearing accounts of settlement agents handling closing and loan funds to be set up as IOLTA accounts and directed the NC State Bar to adopt rules to administer such accounts. The requirement takes effect on January 1, 2012. We hope that some additional income will be generated from these accounts.

Grants

NC IOLTA is administering just over $2.7 million in grants for 2011 (compared to $3 million in 2010 and a high of $4.1 million in 2009) using $1 million from the IOLTA reserve for a second year. Grants have been restricted for two years to a core group of grantees at the forefront of access to justice work. Even so, grants to legal aid organizations were decreased by approximately 20% in 2010 and another 11% in 2011. Grant applications for 2012 will be available in August. It is expected that grants will again be restricted. The IOLTA reserve fund now holds $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. In 2010-11, NC IOLTA administered $5 million in state funds. Appropriated funds for legal aid have already suffered decreases. Although proposals in the House would have dramatically cut the filing fee allocation for general legal aid (from $2.05 per case to $1 per case), the work of the Equal Access to Justice Commission, the NCBA, and the legal aid programs along with many individual attorneys resulted in a smaller decrease to $1.50 per case. The $.95 filing fee allocation for domestic violence work remained the same. A new fee added for cross claims and counter claims in district and superior court will also yield the $1.50 and $.95 legal aid allocations.

NC IOLTA Trustees and Leadership

At their July meeting, the NC State Bar Council appointed IOLTA leadership for 2011-12 and IOLTA trustees to three-year terms that begin on September 1, 2011. The council reappointed the Honorable Linda M. McGee of the NC Court of Appeals to a second three-year term as an IOLTA trustee and appointed two new trustees: Hope H. Connell, who served as the first female chair of the NC Bankers Association (2005-06) and is vice-chair of First Citizens BancShares Inc., and John B. McMillan, former president of the NC State Bar (2008-09) who is in private practice in Raleigh. Former NC State Bar President Irving W. (Hank) Hankins III was appointed chair and former NC Bar Association President Michael C. Colombo was appointed vice-chair of the NC IOLTA Board of Trustees for 2011-2012. ■

Profiles in Specialization—Jeri Whitfield

AN INTERVIEW BY DENISE MULLEN, ASSISTANT DIRECTOR OF LEGAL SPECIALIZATION

I recently met with Jeri Whitfield, a board certified specialist practicing in Greensboro, to talk about her certification in workers' compensation law as well as her recent appointment as chair of the Board of Legal Specialization. Jeri attended Cornell for her undergraduate degree in Design and Environmental Analysis, and attended George Washington University for her law degree, finishing her last year at Duke to accommodate her husband's residency program. Following law school she went to work in Greensboro for Smith Moore Smith Schell and Hunter (now Smith Moore Leatherwood), handling general litigation cases. She became a board certified specialist in workers' compensation law in 2000.

Jeri served on the inaugural specialty committee that drafted and graded the first specialization exam for workers' compensation law. She served on the committee from 1997–2003. Jeri was to the board in 2006 and was recently appointed chair of the board at the State Bar Council meeting in July 2011. Following are some of Jeri's comments about the specialization program, the impact it has had on her career, and her thoughts about leading the board.

Q: Why did you pursue certification?

I had served on an earlier committee that focused on exploring the possibility of creating a specialty in civil litigation. We ultimately determined that litigation wasn't a good fit at that time, but I learned a lot about specialty certification. Based on that experience, I was asked to join the initial committee for workers' compensation law. We wrote the standards for the specialty and once it was approved, began to draft the initial examination. It was a very interesting and challenging process! We spent a good deal of time drafting questions, writing model answers, and debating about open book options. I felt honored to be a part of the group and very proud of what we created.

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

Yes, it was. As we spent time developing exam questions, I learned a tremendous amount about areas of the law in which I did not practice. I found it to be really valuable to learn about the differences in each attorney's practice. As a group, we realized that no one practice had depth in all areas. Even within workers' compensation law, our practices had specialized further. We were able to use that information to help us tailor the exam questions and to give us a reasonable expectation for how examinees would handle the variety of questions.

Q: Has certification been helpful to your practice?

It has been helpful to my practice overall. I know that when I need to make a referral, I look for board certified specialists throughout the state and in other states. I am a real believer in credentialing. Beyond the legal field, I look for professionals with the most initials behind their names. I know that this person takes his or her profession seriously and wants to achieve the highest level of knowledge and recognition. I know that my certification shows potential clients and other lawyers that I am highly dedicated to this practice and value the knowledge and skill that I've gained.

Q: What have your clients said about your certification?

One of my largest corporate clients interviewed many attorneys before selecting me. It turned out that I was the only board certified attorney being considered. I think that clients appreciate the additional evidence of competence and expertise.

Q: How does your certification benefit your clients?

I have dedicated my career to workers' compensation law, and the defense side in particular. In North Carolina, we have an excellent plaintiff's bar—well organized and with great leadership. They have often been able to move the law in a particular direction through an organized effort over the years. As a defense lawyer, I need to be aware of how the law is changing and the plaintiffs' bars agenda to move the law in a new direction. My years of experience and commitment to a more narrow practice area allow me to have a depth of knowledge about not only the practice, but also the history of case law and why certain changes were made. That aids my ability to analyze the public policy considerations and see the bigger picture. All of this helps me to develop a strategy for the representation of my client's interest, which benefits my clients.

Q: Is certification important in your practice area?

Board certification is incredibly important in workers' compensation law for plaintiffs' work. The directory of board certified specialists and the online listings are tremendously valuable for the public. For the defense side, it hasn't traditionally been as popular. I do think it's becoming more popular and that we'll get there someday. I think about the path that certification has followed in the medical field and think that's where we're headed as well.

Q: Does certification benefit the public?

Absolutely. One of the main reasons for the existence of legal specialization is service to the public. The board takes that mission very seriously and it is one of the main areas of focus. Providing objective information to potential clients is a reliable yet easy way for them to locate a qualified attorney. The program also encourages lawyers to deepen their knowledge of their practice area. This promotes competence among the members of the bar as well.

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

I would encourage lawyers to look beyond the marketing aspect of certification; to take their careers seriously and gain all of the credentials they can. Yes, it is hard to take another

CONTINUED ON PAGE 42

What's the Bright Idea?

BY TARA J. WILDER

The Board of Paralegal Certification is looking for some bright ideas for resolving a dilemma the certification program is facing due to the economic downturn. The board is considering how to assist certified paralegals who are not eligible for renewal because they were unable to pay for the required annual continuing legal education (CLE/CPE).

The renewal process is administered as follows: renewal applications are sent by mail 60 days before they are due back to our office; certified paralegals complete the renewal application by updating contact information, completing CLE/CPE course information from the past 12 months, disclosing any criminal convictions or charges within the past 12 months, signing the form in the presence of a notary, and mailing it to the NC State Bar with the required $50 renewal fee. The board has a grace period that allows late filing of the application and completion of the required educational credits.

When certified paralegals change or lose jobs or leave the legal field but want to maintain certification, their number one complaint is the expense of obtaining the educational credits required for renewal. The board allows certified paralegals to complete all continuing education online. A list of accredited courses can be found at www.nccle.org or www.nccertifiedparalegal.gov. Despite this convenience, the issue is COST. When the course registration fee must be paid by the paralegal, and especially if the paralegal is unemployed, the cost of the required educational credits becomes prohibitive and many certified paralegals allow their certifications to lapse. To date, 1,053 of 5,287 total paralegals who have been certified have allowed their certification to lapse. This is nearly 20% of the paralegals certified since the program began. (Not all of those lapses are a result of lack of CLE/CPE.)

The registration fees for CLE/CPE courses are controlled solely by CLE/CPE sponsors. It has been suggested, however, that the board set up some form of scholarship fund that could assist qualified CPs. Another idea is for the board to sponsor a limited number of free CPE hours for qualified CPs. These options are being researched, but other bright ideas are welcomed.

The board is also considering creating an "inactive status" for certified paralegals who are unemployed, experiencing financial hardship, or following a military spouse to a location outside of North Carolina. This status would be similar to the inactive status for NC lawyers. We currently do not have an inactive status since the renewal requirements are minimal. We are drafting a proposed rule that, if approved by the board, would be published for comment in the State Bar *Journal* before taking effect.

Paralegal certification promotes proper utilization of paralegals and assures that legal services are professionally and ethically offered to the public. The renewal requirements maintain certification validity through required continuing education. A better educated paralegal is able to better perform his or her job responsibilities. We welcome your input on how to help certified paralegals to maintain certification despite personal financial difficulties. Contact Tara Wilder at twilder@ncbar.gov with your ideas for board consideration.

For those unemployed CPs who are looking for work, NC certified paralegals have an online community where information on paralegal job openings is shared. This is a members-only group on LinkedIn that can be found by searching for "NC Certified Paralegal." Any member of the LinkedIn group can post a job opening for free to a captive audience composed only of certified paralegals. Many of our state and local paralegal associations also have job banks for their members. Other ideas on how to assist unemployed certified paralegals to return to the legal filed are appreciated. ■

Tara Wilder is the assistant director of the Paralegal Certification Program.

Specialization (cont.)

exam, but it should be just another part of a strong career plan. Board certification provides an excellent way to be recognized in your area of expertise and an excellent personal achievement goal.

Q: How has your experience been serving on the Board of Legal Specialization?

I have really enjoyed working with the staff and the other lawyers and public members of the board. It's a great group of dedicated professionals. I have enjoyed being a part of the group, learning about the different practice areas and being involved in some great discussions and plans. There have been opportunities to consider some challenging issues and I've been proud of our ability to think deeply about a situation and find a creative solution.

Q: How do envision your leadership of the board?

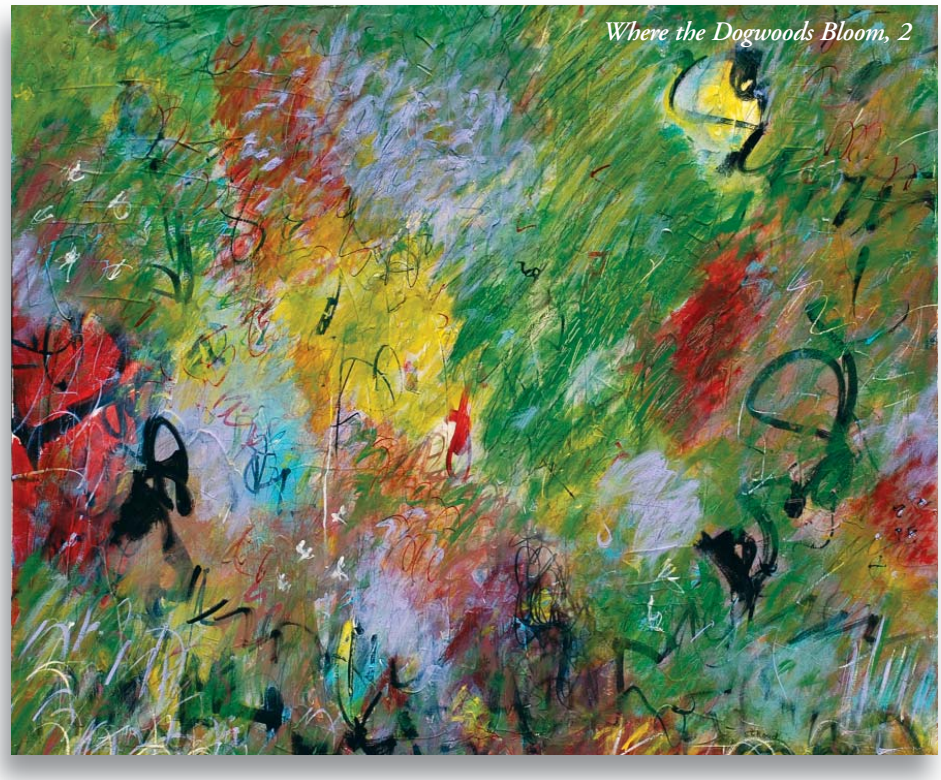
I am most proud of the work we've done over the past years with making our examinations stronger and even more valid and reliable. I want to continue those efforts and also move forward on working with other state programs and national programs to establish some common ways to identify board certified lawyers, including initials. I think that would only enhance the program for both lawyers and potential clients. I take the responsibility of leading the program very seriously and am honored to have the opportunity. ■

For more information on the State Bar's specialization programs, please visit us on the web at nclawspecialists.gov.

Featured Artist—Lisa M. Stroud

As an artist and writer, I am always looking for a feeling, a phrase, a story, a line from poetry or music, a snatch of conversation—the catalysts that inspire my work. I step up to the easel and work intuitively with colors, shapes, textures, and gestural drawing.

Most recently, my work has been in the tradition of abstract expressionism with heavy reliance upon drip making and mark making. Between multiple layers of paint, colors shift and words or calligraphic marks weave in and out with mystery and emotion, often evoking a dialogue between the real and the imagined. What is or what could be.


Where the Dogwoods Bloom, 2

Lisa Stroud did not grow up wanting to be an artist. Her parents, children of the depression, saw art as an indulgence. Stroud's mother described her as the kid "without an artistic bone in her body." Her parents encouraged her to pursue a legal career—to make money, not art.[1]

Stroud did not become a lawyer but she did pursue several different career paths, including work at a large insurance company, before recognizing her desire to create. She explains her metamorphosis on her website, http://lisastroudartist.com:

> I freelanced for magazines and newspapers, for politicians and corporations. I worked as a garden designer. When I went through an extended period of caregiving, I yearned for another creative outlet. One day I signed up for a painting class. I was hooked.

Since following her muse, Stroud's work has received numerous awards and honors. In June, her painting "If Only" was proclaimed Best in Show at the 54th National Juried Art Show at the Maria V. Howards Art Center in Rocky Mount and was purchased for the museum's permanent collection. In 2010 and again in 2011, she won the People's Choice Award, First Friday, from the Artspace Artists Association in Raleigh. Also in 2010, from among 6,200 artists, she was selected as a finalist in the abstract/experimental category in The Artist's Magazine's 27th Annual Art Competition.

Of her many shows, exhibitions, and acquisitions by collections, Stroud may take the most pleasure in the selection of her painting "Honor by Any Measure" for the permanent collection of The National Museum of the Marine Corps in Triangle, Virginia. The painting honors the memory of Stroud's father-in-law, Master Gunnery Sergeant Luthor P. Stroud Sr., USMC. It is also the first abstract painting ever selected for the museum's permanent collection.

Stroud's creative story is not unlike that of her abstract paintings which she describes as follows:

> As I begin the quest for resolution, I use a host of mixed media processes….With time, luck, and patience, my story begins to unfold on the canvas. My hope is that somewhere between the obvious and the hidden, viewers will be enticed to create stories of their own. ■

Each quarter, the works of a different contemporary North Carolina artist are displayed in the storefront windows of the State Bar building. 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 in Raleigh representing national, regional, and North Carolina artists, and provides residential and commercial consulting. 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. Stroud's college roommate and good friend, former State Bar councilor and Asheville lawyer Sara Davis, confirms that "being an artist is the last thing I ever thought Lisa would do." Davis, now an admirer, suggested that Stroud's artwork be featured at the State Bar.

Grievance Committee and DHC Actions

Disbarments

David Bayard of Cary prepared false HUD-1 Settlement Statements to facilitate fraudulent real estate closings. Bayard consented to disbarment by the DHC.

W. Rickert Hinnant of Winston-Salem surrendered his law license and was disbarred by the Wake County Superior Court. Hinnant admitted that he misappropriated entrusted funds totaling at least $10,000.

R.C. Hunter of Durham surrendered his law license and was disbarred by the Wake County Superior Court. Hunter failed to report a foreign bank account to the Internal Revenue Service.

Don Sam Neill of Hendersonville surrendered his law license and was disbarred by the Wake County Superior Court. Neill admitted that he misappropriated entrusted funds.

Raleigh lawyer **Charles Ruffin Poole** pled guilty to the felony offense of federal income tax evasion in violation of 26 U.S.C. § 7201. He surrendered his law license and was disbarred by the State Bar Council.

Samuel Thomas of Statesville misappropriated $500 in legal fees belonging to his law firm employer. He was disbarred by the DHC.

Suspensions & Stayed Suspensions

Perry Martin of Ahoskie made unwanted sexual advances to a client on numerous occasions. The DHC suspended him for three years. The suspension is stayed on numerous conditions.

Raleigh lawyer **John Kirby** used another lawyer's identity on a commercial website to provide legal advice for profit to members of the public and provided legal advice about state law in jurisdictions where he was not licensed to practice law. The DHC suspended him for two years.

Asheville lawyer **Porter Staples** did not reconcile his trust account. A bank mistakenly wired $80,000 to Staples' trust account and when the bank discovered its error four years later, Staples refused to return the funds. The DHC suspended him for three years.

Censures

Durham lawyer **Robert C. Ekstrand** was censured by the Grievance Committee for changing the terms of a plea transcript previously agreed upon by one assistant district attorney and tendering the changed transcript to a different assistant district attorney.

Eric Levine of Charlotte was censured by the Grievance Committee for failing to appeal an arbitrator's decision, failing to inform his client that he did not file the appeal, and filing a false verification.

Camilla J. Davis of Durham was censured by the Grievance Committee. Davis did not perfect a client's appeal, misled the client to believe the appeal was progressing, and tried to dissuade the client from pursing the appeal in an effort to conceal her error.

Reprimands

David L. Best of Jacksonville was reprimanded by the Grievance Committee. Best hired a disbarred lawyer as a paralegal and did not properly supervise him, resulting in the disbarred lawyer engaging in the unauthorized practice of law.

The Grievance Committee reprimanded China Grove lawyer **Keith C. Booker**. Booker did not communicate with clients, neglected one client's case, did not notify clients that he had closed one of his offices and disconnected the telephone number, did not participate in the State Bar's mandatory fee dispute process, and did not timely respond to the Bar.

David Erdman of Charlotte was reprimanded by the Grievance Committee. Erdman had improper *ex parte* communications with a judge and did not provide a written order to the opposing party before he submitted it to the court.

George F. Goosmann IV of Asheville was reprimanded by the Grievance Committee. He notarized signatures he had not witnessed.

Charles D. Mooney of Raleigh was reprimanded by the Grievance Committee. Mooney did not obtain service of a complaint, as a result of which the complaint was dismissed and his client lost any available remedy. Mooney did not respond to his client's requests for status reports and did not notify his client that the case had been dismissed.

Goldsboro lawyer **Robert M. Smith** was reprimanded by the Grievance Committee. Smith failed to appear for trial and was found in criminal contempt of court. He also made misleading statements to the Grievance Committee.

New York lawyer **Anthony A. Pearl** was reprimanded by the Grievance Committee for assisting another New York lawyer in the unauthorized practice of law.

Reinstatements

John Austin of Raleigh was reinstated from suspension by the secretary.

The DHC recommended that the reinstatement petition of **Larry R. Linney**, formerly of Asheville and presently of Charlotte, be denied. Linney was disbarred in 1996 for misappropriation and making false statements in the investigation. Linney has 30 days from service of the DHC order to appeal the decision to the council.

Nikita V. Mackey, formerly of Charlotte, was reinstated from suspension by the secretary. The remaining two years of his suspension are stayed upon compliance with numerous conditions.

S. Vann Sauls of Johnston County was reinstated from suspension by the secretary. The remaining two and a half years of his suspension are stayed upon compliance with numerous conditions.

Jack McLamb of Johnston County was reinstated from suspension by the secretary.

CONTINUED ON PAGE 57

Committee Applies the Anti-Contact Rule to Lawyer-Litigants

Council Actions

At a meeting on July 15, 2011, upon the recommendation of the Ethics Committee, the State Bar Council adopted the opinions summarized below:

2011 Formal Ethics Opinion 5

Representation of Lender in Contested Foreclosure When Corporate Trustee is Owned by Spouse and Paralegal

Opinion rules that a lawyer may not represent the beneficiary of the deed of trust in a contested foreclosure if the lawyer's spouse and paralegal own an interest in the closely-held corporate trustee.

2011 Formal Ethics Opinion 8

Utilizing Live Chat Support Service on Law Firm Website

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

2011 Formal Ethics Opinion 9

Use of Letterhead by Person Who Is Not Employed or Affiliated with Firm

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.

Ethics Committee Actions

At its meeting on July 14, 2011, the Ethics Committee voted to 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*; Proposed 2011 FEO 4, *Participation in Reciprocal Referral Agreement*; Proposed 2011 FEO 6, *Subscribing to Software as a Service While Fulfilling the Duties of Confidentiality and Preservation of Client Property*; and Proposed 2011 FEO 7, *Using Online Banking to Manage a Trust Account.* Six new proposed opinions are published for comment. The comments of readers are welcomed.

Proposed 2011 Formal Ethics Opinion 10
Lawyer Advertising on Deal of the Day or Group Coupon Website
July 14, 2011

Proposed opinion rules that a lawyer may advertise on a website that offers daily discounts to consumers where the website company's compensation is a percentage of the amount paid to the lawyer if certain disclosures are made and certain conditions are satisfied.

Inquiry:

Lawyer would like to advertise on a "deal of the day" or "group coupon" website. To utilize such a website, a consumer registers his email address and city of residence on the website. The website company then emails local "daily deals" or coupons for discounts on services to registered consumers. The daily deals are usually for services such as spa treatments, tourist attractions, restaurants, photography, house cleaning, etc. The daily deals can represent a significant reduction off the regular price of the offered service. Consumers who wish to participate in the "deal of the day" purchase the deal online using a credit card that is billed.

The website company negotiates the discounts with businesses on a case-by-case basis; however, the company's fee is always a percentage of each "daily deal" or coupon sold. Therefore, the revenue received by the business offering the daily deal is reduced by the percentage of the revenue paid to the website company.

May a lawyer advertise on a group coupon website and offer a "daily deal" to users of the website subject to the website company's fees without violating the Rules of Professional Conduct?

Opinion:

Yes. Although the website company's fee is deducted from the amount paid by a purchaser for the anticipated legal service, it is paid regardless of whether the purchaser actually claims the discounted service and the lawyer earns the fee by providing the legal services to the purchaser. Therefore, the fee retained by the website company is the cost of advertising on the website and does not violate Rule 5.4(a) which prohibits, with a few exceptions, the sharing of legal fees with nonlawyers. The purpose for the fee-splitting prohibition is not confounded by this arrangement. As noted in Comment [1] to the rule, the traditional limitations on sharing fees prevent interference in the independent professional judgment of a lawyer by a nonlawyer. There is no interaction between the website company and the lawyer relative to the legal representation of purchasers at any time after the fee is paid online other than the transfer of the proceeds of the "daily deal" to the lawyer. Rule 7.2(b)(1) allows a lawyer to pay the reasonable cost of advertisements. As long as the percentage charged against the revenues generated is reasonable compensation for the advertising service, a lawyer may participate. *Cf.* 2010 FEO 4 (permitting participation in a barter exchange program in which members pay a cash transaction fee of ten percent on the gross value of each purchase of goods or services). There are, however, professional responsibilities that are impacted by this type of advertising.

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.

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 September 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.

First, a lawyer may not engage in misleading advertising. Rule 7.1. Therefore, the advertised discount may not be illusory: the lawyer must have an established, standard fee for the service that is being offered at a discount. Moreover, the lawyer's advertisement on the website must include certain disclosures. Clients should not make decisions about legal representation in a hasty manner. The advertisement must explain that the decision to hire a lawyer is an important one that should be considered carefully and made only after investigation into the lawyer's credentials. In addition, the advertisement must state that a conflict of interest or a determination by the lawyer that the legal service being offered is not appropriate for a particular purchaser may prevent the lawyer from providing the service and, if so, the purchaser's money will be refunded (see below for explanation of the duty to refund).

Second, a lawyer must deposit entrusted funds in a trust account. Rule 1.15-2(b). The payments received by the lawyer from the website company are advance payments[1] of legal fees that must be deposited in the lawyer's trust account and may not be paid to the lawyer or transferred to the law firm operating account until earned by the provision of legal services.

Third, a professional relationship with a purchaser of the discounted legal service is established once the payment is made and this relationship must be honored. The lawyer has offered his services on condition that there is no conflict of interest and the service is appropriate for the purchaser, and the purchaser has accepted the offer. At a minimum, the purchaser must be considered a prospective client entitled to the protections afforded to prospective clients under Rule 1.18.

Fourth, a lawyer may not retain a clearly excessive fee. Rule 1.5(a). If a prospective client fails to claim the discounted legal service within the designated time (before the "expiration date"), one might consider the advance payment forfeited. Even if it is assumed that this is a risk that is generally known to consumers, however, it does not justify the receipt of a windfall by the lawyer. As a fiduciary, a lawyer places the interests of his clients above his own and may not accept a legal fee for doing nothing. Such a fee is inherently excessive. Therefore, if a prospective client does not claim the discounted service within the designated time, the lawyer must refund the advance payment on deposit in the trust account for the prospective client or, if the prospective client still desires the legal service, the lawyer may charge his actual rate at the time the service is provided but must give the prospective client credit for the advance payment on deposit in the trust account.

Last, a lawyer has a duty of competent representation pursuant to Rule 1.1. The lawyer must consult with each prospective client to determine what service the prospective client actually requires. If competent representation requires the lawyer to expend more time than anticipated to satisfy the advertised service, the lawyer must do so without additional charge. Similarly, if upon consulting with a prospective client the lawyer determines that the prospective client does not need the legal service or that a conflict of interest prohibits the representation, the lawyer must refund the prospective client's entire advance payment, including the amount retained by the website company, to make the prospective client whole.

Endnote

1. In light of the many uncertainties of a legal representation arranged in the manner proposed, a lawyer may not condition the offer of discounted services upon the purchaser's agreement that the money paid will be a flat fee or a minimum fee that is earned by the lawyer upon payment. *See* 2008 FEO 10.

Proposed 2011 Formal Ethics Opinion 11
Communication with Represented Party by Lawyer Who Is the Opposing Party
July 14, 2011

Proposed opinion rules that a lawyer who is himself a party in a lawsuit, whether pro se *or represented by counsel, may not communicate with the represented opposing party without obtaining the consent of the opposing party's lawyer.*

Inquiry #1:

Attorney A is the plaintiff in his own equitable distribution case. He is representing himself. Attorney A's former wife, Ms. A, is represented by Lawyer S. Attorney A would like to communicate directly with his former spouse in an effort to settle the case. Lawyer S believes that Attorney A's direct communications with Ms. A violate Rule 4.2, which prohibits a lawyer from engaging in direct communications with a party who is represented in a particular matter. Lawyer S does not consent to Attorney A's direct communications with Ms. A.

Without obtaining the consent of Lawyer S, may Attorney A communicate directly with his former spouse in an effort to resolve the litigation?

Opinion #1:

No, Attorney A must obtain the consent of Lawyer S prior to communicating with his former wife about the litigation.

Rule 4.2(a) provides that "[d]uring the representation of a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law

or a court order." The purposes of Rule 4.2 are: (1) to prevent lawyers from circumventing opposing counsel to obtain statements from adverse parties; (2) to protect the integrity of the client-lawyer relationship; (3) to prevent the inadvertent disclosure of privileged information; and (4) to facilitate settlement by channeling disputes through lawyers. *See* Rule 4.2, Cmt.[1].

In *In re Discipline of J. Michael Schaefer*, 117 Nev. 496, 25 P.3d 191 (2001), the Nevada Supreme Court concluded that the purposes served by the rule against communicating with represented persons are equally present when a lawyer appears *pro se*. The Nevada Supreme Court noted that, "the lawyer still has an advantage over the average layperson, and the integrity of the relationship between the represented person and counsel is not entitled to less protection merely because the lawyer is appearing pro se." *Id.* at ___, 25 P.3d at 199.

We agree with the reasoning of the Nevada Supreme Court. *Accord* DC Bar Legal Ethics Committee, Op. 258 (1995), and Disciplinary Board of the Hawaii Supreme Court, Formal Op. 44 (2003). Obtaining the consent of opposing counsel is a small burden in light of the protection provided to the client-lawyer relationship by the prohibition on direct communications in Rule 4.2.

This opinion overrules Ethics Decision 2000-8.

Inquiry #2:

The facts are the same as in Inquiry #1 except that Attorney A is represented by Lawyer H.

Without obtaining the consent of Lawyer S, may Attorney A communicate directly with his former spouse in an effort to resolve the litigation?

Opinion #2:

No. A direct communication by a lawyer regarding the subject of the litigation poses the same threats to the interests of the adverse party whether the lawyer is representing a client, proceeding *pro se*, or being represented by another lawyer. In each scenario, the lawyer may use his legal training to influence or intimidate the adverse party and to interfere with the client-lawyer relationship. Although Rule 4.2, by its own terms, applies only "[d]uring the representation of a client," the prohibition on conduct that is prejudicial to the administration of justice in Rule 8.4(d) justifies the extension of the anti-contact rule to a lawyer/litigant who is represented by counsel.

Inquiry #3:

Rule 4.2(a) permits a lawyer "to encourage his or her client to discuss the subject of the representation with the opposing party in a good-faith attempt to resolve the controversy."

Does this provision authorize direct communications with Ms. A by Attorney A, without Lawyer S's consent, when Attorney A appears *pro se* or through counsel?

Opinion #3:

No. Direct communication presents the same potential harms, as described in Opinion #1, regardless of Attorney A's motives.

Nevertheless, resolutions of a client's dispute should be facilitated whenever possible, especially in domestic relations cases where matters of child custody, visitation, and property distribution may be handled more efficiently and economically outside the courtroom. When a lawyer is asked to consent to a direct communication with his or her client, the lawyer should behave reasonably and grant such requests whenever the interests of his or her client will not be harmed. Moreover, consent may be granted broadly by the lawyer to facilitate direct communications between the parties if the lawyer deems it beneficial to his or her client. The authority to deny consent should never be used to gain a tactical advantage by delaying a resolution and increasing the costs of litigation.

Inquiry #4:

May Attorney A communicate directly with his former wife in the absence of an express request by Lawyer S to refrain from communicating directly with the former wife?

Opinion #4:

No, he must obtain the consent of Lawyer S to communicate with Ms. A. *See* Opinions #1 and #2.

Proposed 2011 Formal Ethics Opinion 12
Disclosing Clerk's Error to Court
July 14, 2011

Proposed opinion rules that a lawyer must notify the court when a clerk of court mistakenly dismisses a client's charges.

Inquiry:

Lawyer has a client in custody who has numerous cases pending in district court. Lawyer negotiates a plea agreement with the assistant district attorney (ADA) whereby all but two of the charges will be dismissed. Lawyer asks for the client to be brought into the courtroom to enter his plea. At that time, Lawyer is informed that the client has already been taken back to the jail. Lawyer and the ADA agree to continue the case to the next business day. When Lawyer subsequently goes to visit his client in jail, he is told that the client was released because all of his charges were dismissed.

Upon investigation, Lawyer confirms that all of the client's charges had been voluntarily dismissed. The dismissals are clearly the result of an error by the clerk of court and do not reflect the plea agreement entered into by Lawyer and the ADA.

Must lawyer inform the clerk of court of the error?

Opinion:

Yes. The preamble to the Rules of Professional Conduct provides that as a member of the legal profession, a lawyer is an "officer of the legal system." Rule 0.1. Rule 8.4(d) states that it is professional misconduct for a lawyer to "engage in conduct that is prejudicial to the administration of justice." Similarly, Comment [2] to Rule 3.3 (Candor Toward the Tribunal) refers to the special duties of lawyers as officers of the court to "avoid conduct that undermines the integrity of the adjudicative process."

Under Rule 3.3, for example, a lawyer has a duty to disclose a client's false testimony even though it may have grave consequences for the client, where the alternative is that the lawyer cooperate in deceiving the court thereby subverting the truth-finding process which the adversary system is designed to implement. Rule 3.3, Cmt. [11]. Thus, if a conflict arises between a lawyer's duty to his client and his duties as an officer of the court, the lawyer's duty to the court must prevail.

This inquiry differs from that addressed in 98 FEO 5, which provides that a defense lawyer does not have a duty to inform the court of an inaccurate driving record presented by the prosecutor. In the situation

addressed in 98 FEO 5, both advocates are present in court and each is expected to present evidence and carry his burden of proof. The opinion states that the burden of proof is on the state to show that the defendant's driving record justifies a more restrictive sentencing level and that the defense lawyer is not required to volunteer adverse facts when the prosecutor fails to bring them forward.

In the instant inquiry, Lawyer knows that his client's charges were dismissed in error and that "justice" (in the form of a negotiated plea to which Lawyer and the client agreed) was not carried out. Therefore, Lawyer has an obligation to inform the court or the clerk of court of the apparent error. *Accord* Wis. Formal Ethics Op. E-84-7 (1984)(defense attorney has obligation to inform the court or the court's staff of clerk of court's error).

Proposed 2011 Formal Ethics Opinion 13
Retaining Funds in Trust Account to Pay Disputed Legal Fee
July 14, 2011

Proposed opinion rules that client funds or the funds of a third party that are placed in the lawyer's control for the purpose of being safeguarded, managed, or disbursed in connection with a transaction, but which were not designated or identified as funds for the payment of legal fees, may not be retained in the trust account, pursuant to Rule 1.15-2(g), as disputed funds to which the lawyer may be entitled.

Inquiry:

Attorney agreed to represent the Estate of E. E was a North Carolina lawyer who conducted his practice through a professional limited liability company (PLLC), in which he was the sole member. Attorney's representation included collecting the assets and paying the claims of the PLLC with the intention that the PLLC would eventually be dissolved and any remaining assets of the PLLC would be distributed to the estate.

The funds of the estate, approximately $3,000, were deposited in the general trust account for Attorney's law firm and a ledger card for the estate was established. The funds of the PLLC, in excess of $100,000, were also deposited in the trust account and a separate ledger for the PLLC was established. Attorney billed his work for the PLLC separately from his work for the estate in order that the legal fees for the resolution of the PLLC issues would be paid from funds of the PLLC.

Administrator recently terminated the representation and demanded return of the remaining funds of the estate (approximately $2,500) and of the PLLC (approximately $100,000) held in the general trust account of Attorney's law firm.

Attorney contends that his firm is owed $29,000 in legal fees for the representation of the PLLC. Administrator contests these legal fees and did not authorize Attorney to pay the fees from any of the money held in trust.

Rule 1.15-2(g) states:

> [w]hen funds belonging to the lawyer are received in combination with funds belonging to the client or other persons, all of the funds shall be deposited intact. The amounts currently or conditionally belonging to the lawyer shall be identified on the deposit slip or other record. After the deposit has been finally credited to the account, the lawyer may withdraw the amounts to which the lawyer is or becomes entitled. If the lawyer's entitlement is disputed, the disputed amounts shall remain in the trust account or fiduciary account until the dispute is resolved.

May Attorney retain $29,000 in his firm's trust account and transfer only the difference to Administrator until the dispute over the legal fees is resolved?

Opinion:

No, the funds must be returned to Administrator and Attorney may file a claim with the Estate for payment for his legal services.

Rule 1.15-2(g) permits a lawyer to withhold only funds to which the lawyer has a claim to entitlement such as funds deposited as a client's advance payment of a legal fee or funds from a settlement negotiated by the lawyer that, by prior agreement, include a contingent fee. However, client funds or the funds of a third party that are placed in the lawyer's control for the purpose of being safeguarded, managed, or disbursed in connection with a transaction, but which were not otherwise designated or identified as funds for the payment of legal fees, may not be retained in the trust account as disputed funds pursuant to Rule 1.15-2(g). As explained in Comment [14] to Rule 1.15, "[a] lawyer is not required to remit to the client funds that the lawyer reasonably believes represent fees owed. However, a lawyer may not hold funds to coerce a client into accepting the lawyer's contention."

Regardless of whether the funds are identified as funds of the Estate of E or funds of the PLLC, the funds in this inquiry are the property of the Estate of E[1] and were delivered to Attorney for the purpose of being managed by Attorney as a part of his legal services to the estate. The funds are subject to legal requirements to pay the claims of the creditors of the PLLC and of the estate.[2] Moreover, payment of administrative expenses of an estate from estate assets, including attorney's fees, is only permitted on the issuance of an order of the clerk of superior court and requires the clerk to exercise judicial discretion in such matters.[3] A personal representative must file a petition seeking an order from the clerk enabling the payment of attorney's fees by an estate.[4] These legal restrictions on the assets of an estate demonstrate that Attorney had no claim of entitlement to the funds. Therefore, when the representation ended, Attorney was obliged to deliver all of the funds as directed by Administrator. Rule 1.15-2(m)(a lawyer shall promptly pay or deliver to the client, or to third persons as directed by the client, any entrusted property belonging to the client and to which the client is currently entitled).

Rather than deposit the funds of an estate in a general trust account, estate funds should, in most instances, be deposited in a fiduciary account maintained solely for the deposit of fiduciary funds or other entrusted property of a particular person or entity. Rule 1.15-1(e)(defining "fiduciary account"). In a fiduciary account, the funds can be invested as usually required for prudent management of fiduciary funds. The comment to Rule 1.15 explains that:

> [c]lient funds must be deposited in a general trust account if there is no duty to invest on behalf of the client. Generally speaking, if a reasonably prudent person would conclude that the funds in question, either because they are nominal in amount or are to be held for a short time, could probably not earn sufficient interest to justify the cost of investing, the funds should be deposited in the general trust account. In determining whether there is a duty to invest, a lawyer shall exercise his or her professional judgment in good faith and shall consider the following:
>
> a) The amount of the funds to be deposited;

b) The expected duration of the deposit, including the likelihood of delay in the matter for which the funds are held;
c) The rates of interest or yield at financial institutions where the funds are to be deposited;
d) The cost of establishing and administering dedicated accounts for the client's benefit, including the service charges, the costs of the lawyer's services, and the costs of preparing any tax reports required for income accruing to the client's benefit;
e) The capability of financial institutions, lawyers, or law firms to calculate and pay income to individual clients;
f) Any other circumstances that affect the ability of the client's funds to earn a net return for the client.

Generally, the funds of an estate are of sufficient quantity or will be held for a sufficiently long period of time that deposit in a fiduciary account is required.

Endnotes

1. N.C. Gen. Stat. §57C-6-01(4) provides that E's PLLC dissolved by statute on the 90th day following E's death. E's PLLC and all of its assets are assets of the estate.
2. *See* N.C. Gen. Stat. §57C-6-05(1) and N.C. Gen. Stat. §28A-19-6.
3. *See Wachovia Bank & Trust Co. v. Waddell*, 237 N.C. 342, 75 S.E. 2d 151 (1953).
4. *See In re Estate of Longest*, 74 N.C. App. 386, 328 S.E. 2d 804, cert. denied and appeal dismissed, 314 N.C. 330, 333 S.E. 2d 488 (1985).

Proposed 2011 Formal Ethics Opinion 14
Outsourcing Clerical or Administrative Tasks
July 14, 2011

Proposed opinion rules that lawyer must obtain client consent before outsourcing its transcription and typing needs to a company located in India.

Inquiry:

Law Firm would like to outsource its transcription and typing needs to a company located in India. Specifically, voice files would be sent via email and some documents would be scanned to the company via email. The communications would, in turn, be transcribed to paper. The files would include information about client matters and work product regarding client matters. Law Firm investigated the security measures the company utilizes and found them to be extensive.

Is Law Firm required to disclose the outsourcing of these clerical tasks to its clients and obtain their informed written consent as contemplated by 2007 FEO 12?

Opinion:

Yes. 2007 FEO 12 provides that a lawyer has an ethical obligation to disclose the use of foreign, or other, legal assistants and to obtain the client's written informed consent to the outsourcing. The opinion notes that, in the absence of a specific understanding between the lawyer and client to the contrary, the reasonable expectation of the client is that the lawyer, using resources within the lawyer's firm, will perform the requested legal services. 2007 FEO 12 (citing 2002 FEO 9; San Diego County Bar Ass'n. Ethics Opinion 2007-1).

2007 FEO 12 does not differentiate between administrative support services and legal support services in finding a duty to disclose the use of foreign assistants and to obtain client consent. Based on concerns as to confidentiality, ABA Formal Opinion 08-451 (2008) similarly provides that "where the relationship between the firm and the individuals performing the services is attenuated, as in a typical outsourcing relationship, *no information protected by Rule 1.6* may be revealed without the client's informed consent" (emphasis added). The bar associations of New York and Ohio have reached similar conclusions. NY State Bar Ass'n. Comm. on Prof'l Ethics, Op. 2006-3 (2006); Ohio Ethics Op. 2009-6 (2009). *But see* VA State Bar Standing Comm. on Legal Ethics, Op. 1850 (2010)(certain "rudimentary functions" that are truly clerical or administrative can be outsourced without client consent).

Proposed 2011 Formal Ethics Opinion 15
Communication with Adverse Party to Request Public Records
July 14, 2011

Proposed opinion rules that, pursuant to the North Carolina Public Records Act, a lawyer may communicate with a government official for the purpose of identifying a custodian of public records and with the custodian of public records to make a request to examine public records related to the representation although the custodian is an adverse party, or an employee of an adverse party, whose lawyer does not consent to the communication.

Inquiry #1:

Adopted in 1995, RPC 219 rules that a lawyer may communicate with a custodian of public records, pursuant to the North Carolina Public Records Act, N.C. Gen. Stat. Chap. 132, for the purpose of making a request to examine public records related to a representation although the custodian and the government entity employing the custodian are adverse parties and the lawyer for the custodian and the government entity does not consent to the communication.

Has the ruling in this opinion changed in light of the comprehensive revisions to the Rules of Professional Conduct in 1997 and 2003?

Opinion #1:

No. RPC 219 relies upon Rule 7.4(a), the "anti-contact rule"[1] at that time, and specifically applies the provision in the rule that allows a lawyer to communicate with a represented opposing party without the consent of opposing counsel if the communication is authorized by law. Rule 7.4(1) provided at that time:

> [d]uring the course of his or her representation of a client, a lawyer shall not
> (1) communicate or cause another to communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

The essential provisions of the anti-contact rule were not changed when the Rules were revised and renumbered in 1997 and again revised in 2003. The current version of the rule, Rule 4.2(a), provides:

> [d]uring the representation of a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order. It is not a violation of this rule for a lawyer to encourage his or her client to discuss the subject of the representation with the opposing party in a good-faith attempt to resolve the controversy.

ABA Formal Ethics Opinion 95-396 (1995) observes that Model Rule 4.2's excep-

tion permitting a communication "authorized by law" is satisfied by "a constitutional provision, statute, or court rule, having the force and effect of law, that expressly allows a particular communication to occur in the absence of counsel."

> N.C. Gen. Stat. §132-6(a) requires that:
> [e]very custodian of public records shall permit any record in the custodian's custody to be inspected and examined at reasonable times and under reasonable supervision by any person, and shall, as promptly as possible, furnish copies thereof upon payment of any fees as may be prescribed by law.

The statute authorizes direct communication with a custodian of public records for the purpose of inspecting and furnishing copies of public records and remains an exception to the communications prohibited in current Rule 4.2(a).

Inquiry #2:

RPC 219 does not examine whether there are limitations on the content of the communications with the public records custodian. Apart from communications for the purposes of submitting a request for public records, arranging a convenient time to inspect the records, and inspecting the records, may the lawyer communicate with the custodian for the purpose of identifying the documents sought or for any other purpose related to the representation?

Opinion #2:

A lawyer may communicate with a custodian of public records for the purposes set forth in N.C. Gen. Stat. §132-6(a), to inspect, examine, or obtain copies of public records. To the extent that the lawyer must communicate with the custodian to identify the records to be inspected, examined, or copied, the communication is in furtherance of the purpose of the Public Records Act[2] to facilitate access to public records and is allowed without obtaining the consent of opposing counsel. Such communications should be limited to the identification of records and should not be used by the lawyer as an opportunity to engage in communications about the substance of the disputed matter.

Inquiry #3:

The identity of the custodian of public records may vary depending upon the nature of the records sought and the organization of the government entity. RPC 219 does not examine any limitations on the lawyer's inquiries of government employees or officials for the purpose of determining the identity of the custodian. May the lawyer speak to government employees for this purpose without the consent of the lawyer for the government?

Opinion #3:

> N.C. Gen. Stat. §132-2 provides that:
> [t]he public official in charge of an office having public records shall be the custodian thereof.

A lawyer may communicate with government employees, without obtaining the consent of the government's lawyer, for the purpose of identifying the public official in charge of an office and therefore the custodian of the records of that office. ■

Endnote

1. This term is used frequently by the ABA and others to refer to the rule that restricts lawyers from communicating directly with represented persons. *See e.g.*, ABA Formal Ethics Opinion 95-396 (1995).
2. The public policy for the Public Records Act is set forth in N.C. Gen. Stat. §132-1(b):
   > The public records and public information compiled by the agencies of North Carolina government or its subdivisions are the property of the people. Therefore, it is the policy of this state that the people may obtain copies of their public records and public information free or at minimal cost unless otherwise specifically provided by law. As used herein, "minimal cost" shall mean the actual cost of reproducing the public record or public information.

In Memoriam

Lemuel Showell Blades III
New Bern

William C. Blossom III
Wilmington

Howard S. Boney Jr.
Tarboro

John J. Carroll III
Wilmington

Thomas L. Cherry
Ahoskie

Vernon F. Daughtridge Jr.
Wilson

George L. Fitzgerald
Charlotte

Elizabeth Y. Fox
Apex

Forrest W. Goldston
Raleigh

Resa L. Harris
Charlotte

Jill B. Hickey
Harkers Island

John D. Hicks
Charlotte

Evelyn W. Hill
Raleigh

Robert A. Ingram Jr.
Delaware, OH

Douglas M. Jones
New Bern

Bennett H. Perry Jr.
Henderson

Robert F. Snipes
Wilson

Judith G. Stewart
Chapel Hill

Grady B. Stott
Gastonia

Leland Q. Towns
Wilson

Robert L. Warren
Concord

Richard L. Wharton
Greensboro

Robyn J. Williams
King

Richard A. Wood Jr.
Durham

Amendments Pending Approval of the Supreme Court

At its meeting on July 15, 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 Summer 2011 edition of the *Journal* or visit the State Bar website: www.ncbar.gov):

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.

Proposed Amendments to the Procedures for the Administrative Committee

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

The proposed amendments correct two erroneous references to the "period of suspension" rather than the "period of inactive status" in rule amendments approved in March that require a petitioner for reinstatement who has been inactive for one year or more to take 12 CLE credit hours for each year of inactivity or, if inactive or suspended for seven years or more, to pass the bar examination.

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 courses to include instruction on ethical decision-making and confirm the CLE Board's authority to determine how CLE credits are applied to satisfy a deficit.

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.

Proposed Amendments

At its meeting on July 15, 2011, the council voted to publish the following proposed rule amendments for comment from the members of the bar:

Proposed Amendments to the Membership Rules

27 N.C.A.C. 1A, Section .0200, Membership—Annual Membership Fees

A proposed new rule will define "good standing" and clarify when a certificate of good standing will be issued to a member of the State Bar. **The proposed rule is entirely new and is not, therefore, printed with bold, underlined font.**

.0204 Good Standing Definition and Certificates

(a) Definition

A lawyer who is an active member of the North Carolina State Bar and who is not subject to a pending administrative or disciplinary suspension order or an order of suspension that has been stayed is in good standing with the North Carolina State Bar. An administrative or disciplinary suspension order is "pending" if the order has been entered by the council or the Disciplinary Hearing Commission but has not taken effect. "Good standing" makes no reference to delinquent membership obligations, prior discipline, or any disciplinary charges or grievances that may be pending.

(b) Certificate of Good Standing for Active Member

Upon application and payment of the prescribed fee, the secretary of the North Carolina State Bar shall issue a certificate of good standing to any active member of the State Bar who is in good standing and who is current on all payments owed to the North Carolina State Bar. A certificate of good standing will not be issued unless the member pays any delinquency shown on the financial records of the North Carolina State Bar including outstanding judicial district bar dues. If the member contends that there is good cause for non-payment of some or all of the amount owed, the member may subsequently demonstrate good cause to the Administrative Committee pursuant to the procedure set forth in Rule .0903(e)(1) of subchapter 1D of these rules. If the member shows good cause, the contested amount shall be refunded to the member.

(c) Certificate of Good Standing for Inactive Member

Upon application, the secretary of the North Carolina State Bar shall issue a certificate of good standing to any inactive member of the State Bar who was in good standing at the time that the member was granted inactive status and who is not subject to any disciplinary order or pending disciplinary order. The certificate shall state that the member is inactive and is ineligible to practice law in North Carolina.

Proposed Amendments to the Rules Governing IOLTA

27 N.C.A.C. 1D, Section .1300, Rules Governing the Administration of the Plan for Interest on Lawyers' Trust Accounts (IOLTA)

Recently enacted legislation (N.C. Gen. Stat. 45A-9) requires the interest-bearing trust

and escrow accounts of settlement agents to be established as IOLTA accounts. The proposed rule amendments set forth the requirements for doing so.

.1301 Purpose

The IOLTA Board of Trustees (board) shall carry out the provisions of the Plan for Interest on Lawyers' Trust Accounts and administer the IOLTA program (NC IOLTA). Any funds remitted to the North Carolina State Bar from banks by reason of interest earned on general trust accounts established by lawyers pursuant to Rule 1.15-2(b) of the Rules of Professional Conduct **or interest earned on trust or escrow accounts maintained by settlement agents pursuant to N.C.G.S. 45A-9** shall be deposited by the North Carolina State Bar through the board in a special account or accounts which shall be segregated from other funds of whatever nature received by the State Bar.

….

.1312 Source of Funds

Funding for the program carried out by the board shall come from funds remitted from depository institutions by reason of interest earned on trust accounts established by lawyers pursuant to Rule 1.15 of the Rules of Professional Conduct and Rule .1316 of this subchapter **or interest earned on trust or escrow accounts maintained by settlement agents pursuant to N.C.G.S. 45A-9;** voluntary contributions from lawyers; and interest, dividends, or other proceeds earned on the board's funds from investments or from other sources intended for the provision of legal services to the indigent and the improvement of the administration of justice.

.1316 IOLTA Accounts

(a) IOLTA Account Defined. Pursuant to order of the North Carolina Supreme Court, every general trust account, as defined in the Rules of Professional Conduct, must be an interest or dividend-bearing account. (As used herein, "interest" shall refer to both interest and dividends.) Funds deposited in a general, interest-bearing trust account must be available for withdrawal upon request and without delay (subject to any notice period that the bank is required to reserve by law or regulation). **Additionally, pursuant to N.C.G.S. 45A-9, a settlement agent who maintains a trust or escrow account for the purposes of receiving and disbursing closing funds and loan funds shall direct that any interest earned on funds held in that account be paid to the NC State Bar to be used for the purposes authorized under the Interest on Lawyers Trust Account Program according to section .1316(d)**. For the purposes of these rules, **all** such accounts shall be known as "IOLTA Accounts" (also referred to as "Accounts").

(b) Eligible Banks. Lawyers may maintain one or more IOLTA Account(s) only at banks and savings and loan associations chartered under North Carolina or federal law, as required by Rule 1.15 of the Rules of Professional Conduct, that offer and maintain IOLTA Accounts that comply with the requirements set forth in this subchapter (Eligible Banks). **Settlement agents shall maintain any IOLTA Account as defined by N.C.G.S. 45A-9 and paragraph (a) above only at an Eligible Bank.** The determination of whether a bank is eligible shall be made by NC IOLTA, which shall maintain a list of participating Eligible Banks available to all members of the State Bar **and to all settlement agents**. A bank that fails to meet the requirements of this subchapter shall be subject only to termination of its eligible status by NC IOLTA. A violation of this rule shall not be the basis for civil liability.

(c) Notice Upon Opening or Closing IOLTA Account. Every lawyer**/** ~~or~~ law firm **or settlement agent** maintaining IOLTA Accounts shall advise NC IOLTA of the establishment or closing of each IOLTA Account. Such notice shall include (i) the name of the bank where the account is maintained, (ii) the name of the account, (iii) the account number, and (iv) the name and bar number of the lawyer(s) in the firm **and/or the names(s) of any non-lawyer settlement agents maintaining the account**. The North Carolina State Bar shall furnish to each lawyer**/** ~~or~~ law firm **or settlement agent** maintaining an IOLTA Accounts a suitable plaque explaining the program, which plaque shall be exhibited in the office of the lawyer**/** ~~or~~ law firm **or settlement agent**.

(d) Directive to Bank. Every lawyer or law firm **and every settlement agent** maintaining North Carolina IOLTA Accounts shall direct any bank in which an IOLTA Account is maintained to:

(1) remit interest, less any deduction for allowable reasonable bank service charges or fees, (as used herein, "service charges" shall include any charge or fee charged by a bank on an IOLTA Account) as defined in paragraph (e), at least quarterly to NC IOLTA;

(2) transmit with each remittance to NC IOLTA a statement showing for each account: (i) the name of the law firm**/** ~~or~~ lawyer **or settlement agent** maintaining the account, (ii) the lawyer**/** ~~or~~ law firm's **or settlement agent's** IOLTA Account number, (iii) the earnings period, (iv) the average balance of the account for the earnings period, (v) the type of account, (vi) the rate of interest applied in computing the remittance, (vii) the amount of any service charges for the earnings period, and (viii) the net remittance for the earnings period; and

(3) transmit to the law firm**/** ~~or~~ lawyer **or settlement agent** maintaining the account a report showing the amount remitted to NC IOLTA, the earnings period, and the rate of interest applied in computing the remittance.

(e) Allowable Reasonable Service Charges. Eligible Banks may elect to waive any or all service charges on IOLTA Accounts. If a bank does not waive service charges on IOLTA Accounts, allowable reasonable service charges may be assessed but only against interest earned on the IOLTA Account or funds deposited by the lawyer**/** ~~or~~ law firm **or settlement agent** in the IOLTA Account for the purpose of paying such charges. Allowable reasonable service charges may be deducted from interest on an IOLTA Account only at the rates and in accordance with the bank's standard practice for comparable non-IOLTA accounts.…

.1318 Confidentiality

(a) As used in this rule, "confidential information" means all information regarding IOLTA account(s) other than (1) a lawyer**/'s** ~~or~~ law firm's **or settlement agent's** status as a participant, former participant, or non-participant in NC IOLTA, and (2) information regarding the policies and practices of any bank in respect of IOLTA trust accounts, including rates of interest paid, service charge policies, the number of IOLTA accounts at such bank, the total amount on deposit in all IOLTA accounts at such bank, the total amounts of interest paid to NC IOLTA, and the total amount of service charges imposed by such bank upon such accounts.

(b) Confidential information shall not be disclosed by the staff or trustees of NC IOLTA

to any person or entity, except that confidential information may be disclosed (1) to any chairperson of the Grievance Committee, staff attorney, or investigator of the North Carolina State Bar upon his or her written request specifying the information requested and stating that the request is made in connection with a grievance complaint or investigation regarding one or more trust accounts of a lawyer**/** ~~**or**~~ law firm **or settlement agent**; or (2) in response to a lawful order or other process issued by a court of competent jurisdiction, or a subpoena, investigative demand, or similar notice issued by a federal, state, or local law enforcement agency.

.1319 Certification

Every lawyer admitted to practice in North Carolina shall certify annually on or before June 30 to the North Carolina State Bar that all general trust accounts maintained by the lawyer or his or her law firm are established and maintained as IOLTA accounts as prescribed by Rule 1.15 of the Rules of Professional Conduct and Rule .1316 of this subchapter or that the lawyer is exempt from this provision because he or she does not maintain any general trust account(s) for North Carolina client funds. **Any lawyer acting as a settlement agent who maintains a trust or escrow account used for the purpose of receiving and disbursing closing and loan funds shall certify annually on or before June 30 to the North Carolina State Bar that such accounts are established and maintained as IOLTA accounts as prescribed by N.C.G.S. 45A-9 and Rule .1316 of this subchapter.**

Proposed Amendments to The Plan of Legal Specialization

27 N.C.A.C. 1D, Section .1700, Minimum Standards for Certification of Specialists

The proposed amendments clarify that the evaluation of a specialization applicant's peer review information includes consideration of each peer reference's practice experience, particularly in the specialty, and relationship to the applicant. The proposed amendments also allow judicial service to satisfy the substantial involvement requirement for recertification.

.1720 Minimum Standards for Certification of Specialists

(a) To qualify for certification as a specialist, a lawyer applicant must pay any required fee, comply with the following minimum standards, and meet any other standards established by the board for the particular area of specialty.

(1) ….

(4) The applicant must make a satisfactory showing, as determined by the board after advice from the appropriate specialty committee, of qualification in the specialty through peer review by providing, as references, the names of at least five lawyers, all of whom are licensed and currently in good standing to practice law in this state, or in any state, or judges, who are familiar with the competence and qualification of the applicant as a specialist. None of the references may be persons related to the applicant or, at the time of application, a partner of or otherwise associated with the applicant in the practice of law. The applicant by his or her application consents to confidential inquiry by the board or appropriate disciplinary body and other persons regarding the applicant's competence and qualifications to be certified as a specialist.

(A) Each specialty committee shall evaluate the information provided by an applicant's references to make a recommendation to the board as to the applicant's qualification in the specialty through peer review. The evaluation shall include a determination of the weight to be given to each peer review and shall take into consideration a reference's years of practice, primary practice areas and experience in the specialty, and the context in which a reference knows the applicant.

(5) ….

(b) ….

.1721 Minimum Standards for Continued Certification of Specialists

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

(1) The specialist must make a satisfactory showing, as determined by the board after advice from the appropriate specialty committee, of substantial involvement ~~(which shall be determined in accordance with the principles set forth in Rule .1720(a)(2) of this subchapter)~~ in the specialty during the entire period of certification as a specialist. **Substantial involvement for continued certification shall be determined in accordance with the principles set forth in Rule .1720(a)(2) of this subchapter and the specific standards for each specialty. In addition, unless prohibited or limited by the standards for a particular specialty, the following judicial service may be substituted for the equivalent years of practice experience if the applicant's judicial service included presiding over cases in the specialty: service as a full-time state or federal trial, appellate, or bankruptcy judge (including service as a federal magistrate judge); service as a judge for the courts of a federally recognized Indian tribe; service as an administrative law judge for the Social Security Administration; and service as a commissioner or deputy commissioner of the Industrial Commission.**

(2) …. ■

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.

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 School and NC State University partner on law and master of business administration dual degree program—The Norman Adrian Wiggins School of Law at Campbell University and the Jenkins MBA program in the NC State Poole College of Management recently announced a partnership to provide students with the opportunity to obtain a dual Juris Doctor (JD) and Master of Business Administration (MBA) degree. Beginning with the fall 2011 semester, the JD/MBA degree will enable students to earn both degrees in four years of full-time study, with the option to take electives and specialization courses in both business and law.

Campbell Law hosts national conference on restorative justice—Campbell Law School hosted the 3rd National Conference on Restorative Justice in June 2011. The conference was a joint venture between universities, restorative justice practitioners, and the faith community to promote and refine the use of restorative justice in the United States.

The keynote address was given by Nontombi Naomi Tutu, daughter of Archbishop Desmond Tutu, and described South Africa's experience with restorative justice through the process of truth and reconciliation. Under the rules of the process, those who told the truth about their actions and demonstrated their acts were politically motivated were granted complete amnesty for their actions, however reprehensible. She also explained how the young country could not move forward until the truth had been told and the victims had had an opportunity to listen to and speak with those who had harmed them.

US solicitor general delivers commencement address at Campbell Law School—On Friday, May 13, Neal Katyal, acting solicitor general of the United States, addressed students of Campbell Law as they made the move from students to law school graduates. He is most noted for his work with the 2006 Supreme Court case *Hamdan v. Rumsfeld* by serving as lead counsel for the Guantanamo Bay detainees.

Charlotte School of Law

The American Bar Association awarded Charlotte School of Law full accreditation at its June 10, 2011, meeting. Through its accreditation process, the ABA determined that the Charlotte School of Law is in full compliance with its Standards for Approval of Law Schools, including those relating to bar passage, job placement, and diversity.

For Judge Shirley Fulton, the accreditation is the final step in a process that has been years in the making. When she began work as an early organizer and chair of the school's Board of Advisors in 2005, first-pass ABA approval was already the top priority. "I have watched this team of dedicated faculty, staff, students, and board members work tirelessly toward the goal with full support from the Charlotte community," said Fulton. "I salute all for a job well done and appreciate the opportunity to be part of a successful team."

To Dennis Stone, interim dean of Charlotte School of Law, the ABA's accreditation affirms the school's commitment to provide a legal education focused on achieving great student outcomes, preparing excellent lawyers who are ready for practice, and serving the underserved. "We are particularly pleased that the ABA gave CharlotteLaw its full approval in the minimum time required," said Stone.

The news of full accreditation culminated a year of noteworthy distinctions:

· Professor Sheryl Buske was selected as a 2011-2012 Fulbright Scholar and is currently on a lecturing and research appointment in Ghana.

· As of June 2011, CharlotteLaw students had completed over 70,000 hours of *pro bono* public and community service work in over 500 community sites since the school's opening.

· Charlotte School of Law became the third law school in the nation to have a Cooperative Legal Education Program, piloted this spring through its Corporate Counsel track which included partnerships with Compass Group, Family Dollar, Rack Room, and TIAA-CREF.

Duke Law School

Duke launches Center for Judicial Studies—Duke Law School has established a new Center for Judicial Studies to address a need for advanced educational opportunities for judges and to support scholarly research on judicial institutions and judicial decision making. The center will sponsor conferences, symposia, educational programs, and publications on a range of topics relating to judging and the judiciary. It will draw faculty from other Duke University schools and departments as well as distinguished visiting instructors from other institutions to teach and participate in programs and events.

A master's program in judicial studies, a core component of the center, will be open to an inaugural class of 10 to 15 judges entering in the summer of 2012. Offered over two intensive four-to-six week sessions in two summers, the program will examine the history, institutions, and processes that shape the judiciary and affect judicial decision making in the United States and abroad. Read more at www.law.duke.edu/judicialstudies.

Justice Antonin Scalia teaches at Duke Transnational Law Institute—US Supreme Court Associate Justice Antonin Scalia joined the faculty of the Duke-Geneva Institute in Transnational Law in July. He co-taught a course titled Separation of Powers. Duke's other summer residential summer program, the Asia-America Institute in Transnational Law, is headquartered in Hong Kong.

New faculty—Two top public law scholars joined the governing faculty on July 1. Margaret H. Lemos, a scholar of constitu-

tional law, federal courts, and civil procedure, joined the faculty as a professor of law. She came to Duke from the Benjamin N. Cardozo School of Law where she was an associate professor. Stephen E. Sachs is an emerging scholar in the areas of civil procedure, constitutional law, Anglo-American legal history, and conflict of laws. He previously was an associate in the litigation practice at Mayer Brown in Washington, DC.

Elon University School of Law

Elon Law secures full ABA approval—The American Bar Association on June 10 announced the full accreditation of Elon Law. Elon's approval was achieved at the earliest possible date under the ABA's accreditation guidelines.

Elon Law welcomes Peter T. Hoffman—Peter T. Hoffman, one of the nation's leading authorities on trial advocacy, depositions, and evidence, has been named professor of law and director of legal skills at Elon Law.

Hoffman held the Newell H. Blakely Chair in Evidence at the University of Houston Law Center from 2003 to 2011. At the center, he served as director of the Blakely Advocacy Institute and director of Clinical Legal Education.

Hoffman is co-author of the largest-selling book on deposition practice, *The Effective Deposition: Techniques and Strategies That Work*. His article, "Legal Education and the Changing Face of Practice" is forthcoming in the *New York Law School Law Review*.

Hoffman serves as a program director for the National Institute for Trial Advocacy. He has delivered more than 450 CLE presentations in 34 states and territories and 14 countries. From 1994 to 1996, Hoffman served as associate justice of the Supreme Court of the Republic of Palau. He is a two-time Fulbright Senior Specialist, having taught law and advised on the establishment of trial advocacy programs in Hong Kong and India.

***Mike Rich featured in* Wall Street Journal**—In the *Wall Street Journal's* June 18 front-page article, "Rogue Informants Imperil Massive US Gang Bust," Elon Law professor Mike Rich provides insights into police investigatory methods and the use of informants in federal criminal investigations. Rich's article, "Lessons of Disloyalty in the World of Criminal Informants," is forthcoming in the *American Criminal Law Review*.

Visit law.elon.edu for details about the news summarized above and reports on others news and events at Elon Law.

North Carolina Central University School of Law

The North Carolina Central University School of Law had a Spring 2011 graduating class of 167 people. Approximately 123 of these recent graduates are scheduled to take the July North Carolina bar exam. The law school concluded its Admissions season this year with 2,573 applications for 142 available seats in our day program and for 24 available seats in our evening program. Total enrollment for the law school is targeted at 550 students beginning Fall 2011.

The law school is moving forward with the development of its Low-Income Tax Clinic, which will provide tax services for financially challenged citizens in Durham County. This program is expected to add to the law school's expansive community outreach through legal services provided by the law clinic.

The law school is also proceeding with the development of a summer Maritime Law program to be held in Wilmington in partnership with the University of North Carolina Wilmington. This summer program is scheduled to begin in May 2012 and will be available to law students throughout the country along with practicing attorneys seeking instruction in the fundamentals of maritime law.

The NCCU School of Law is proud to report that Arenda L. Wright Allen, Class of '85, was appointed by President Obama and confirmed by the US Senate to serve as US District Judge. ■

Client Security Fund Reimburses Victims

At its July 14, 2011 meeting, the North Carolina State Bar Client Security Fund Board of Trustees approved payments of $20,650 to six clients who suffered financial losses due to the misconduct of North Carolina lawyers.

The new payments authorized were:

1. An award of $5,000 to a former client of W. Rickert Hinnant of Winston-Salem. The board found that Hinnant was retained to sue a client's former attorney for malpractice. Hinnant failed to provide any valuable legal services for the fee paid. Hinnant was disbarred on June 15, 2011.

2. An award of $4,000 to a former client of W. Rickert Hinnant. The board found that Hinnant was retained to recover executor fees and losses caused by the executor of the client's aunt's estate. Hinnant failed to provide any valuable legal services for the fee paid.

3. An award of $150 to a former client of William Noel, III of Henderson. The board found that Noel was retained to handle a client's traffic ticket. Noel failed to provide any valuable legal services for the fee paid.

4. An award of $3,500 to a former client of Marsha Stone of Asheville. The board found that Stone was retained by a client to file a motion for child support modification. Stone abandoned her practice without providing any valuable legal services for the fee paid. Stone was disbarred on September 9, 2008. The board previously reimbursed six other Stone clients $18,500.

5. An award of $5,000 to an applicant who suffered a loss because of Mark Waple of Fayetteville. The board found that Waple was retained by the applicant to represent his stepson in a court martial. Waple failed to complete the representation prior to abandoning his practice. The board previously reimbursed four other Waple clients $25,850.

6. An award of $3,000 to a former client of Lyle Yurko of Charlotte. The board found that Yurko was retained to represent a client on drug charges and a speeding ticket. Yurko abandoned his practice without providing any valuable legal services for the fee paid. The board previously reimbursed ten of Yurko's clients a total of $93,080. ■

John B. McMillan Distinguished Service Award

Recent Award Recipients

Judge Edwin L. Johnson is a recipient of the John B. McMillan Distinguished Service Award. Judge Johnson graduated from the University of North Carolina-Chapel Hill in 1963 and earned his law degree from UNC School of Law in 1966. A career public servant, Judge Johnson was a special agent for the FBI until 1970, when he became what is now known as an assistant district attorney for the 12th Judicial District. In 1973, Judge Johnson entered private practice in Fayetteville, NC, and remained in private practice until 1983. From 1983 until his retirement in 2010, Judge Johnson was resident superior court judge and then senior resident superior court judge in the 12th Judicial District. In addition to his dedicated service on the bench, Judge Johnson consistently gave back to the legal community by serving on countless committees and task forces, and by volunteering at local Law Day activities. His participation in Law Day activities served as a model for other lawyers to follow and boosted the image of the Fayetteville legal community. Judge Johnson worked tirelessly to refer lawyers who needed help to the PALS program and promoted ethics and professionalism in the courtroom without fanfare or grandstanding. Judge Johnson'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 12th Judicial District Bar and the broader legal community.

Robert L. McMillan Jr. is a recipient of the John B. McMillan Distinguished Service Award. A veteran of World War II and the Korean War, Mr. McMillan graduated from Wake Forest College and earned his law degree from the University of North Carolina School of Law. He received his law license in 1949 and has practiced primarily criminal defense law for 62 years. Mr. McMillan was a founding member and past-president of the Wake County Academy of Trial Lawyers, a past-president of the Wake County Bar Association, a past State Bar councilor, and was the first recipient of the Wake County Bar Association's Joseph Branch Professionalism Award. In recognition of his outstanding career, Mr. McMillan was inducted into the North Carolina Bar Association's General Practice Hall of Fame in 1992. In addition to his decades of service to the legal profession, Mr. McMillan is very active in his local Baptist Church, was a scoutmaster of Boy Scout Troop 306, served as president of his local Rotary Club, and was commander of an American Legion Post in Raleigh. Mr. McMillan has mentored and served as a role model to some of the finest lawyers in North Carolina, teaching every lawyer who comes in contact with him about a lawyer's duty of professionalism to his clients and to the legal profession. Mr. McMillan's distinguished career as a trial lawyer and his commitment to community service have earned him the title of "Dean of the Wake County Bar." ■

Thank You to Our Meeting Sponsor

Thank you to Lawyers Mutual Liability Company for sponsoring the July quarterly meeting of the State Bar Council.

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. ■

Baker Nominated as Vice-President

Ahoskie attorney Ronald G. Baker Sr. was selected by the State Bar's Nominating Committee to stand for election to the office of vice-president of the North Carolina State Bar. The election will take place in October at the State Bar's annual meeting.

As an undergraduate Baker attended the University of North Carolina as a Morehead Scholar, and he earned his JD with honors from the University of North Carolina School of Law.

Baker practiced with Henson, Donahue & Elrod in Greensboro from 1975-1978, then moved to Ahoskie and has since practiced with what is now Baker, Jones, Daly & Carter, PA.

Baker has substantial involvement in bar organizations. He is a member of the North Carolina Bar Association and the American Bar Association. He has served on the board and is past-president of the North Carolina Association of Defense Attorneys, and has been a North Carolina representative to the Defense Research Institute. As a State Bar Councilor, Baker has chaired the Grievance Committee. He has also served on the Client Assistance Committee, Authorized Practice Committee, Legislative Committee, Administrative Committee, Disciplinary Advisory Committee, Executive Committee, Program Evaluation Committee, Appointments Committee, Special Committee to Study Disciplinary Guidelines, and the Issues Committee.

Mr. Baker is active in numerous civic organizations. He is a past-president and life member of the Ahoskie Jaycees, is a US Jaycees ambassador, is a former Hertford county commissioner, and is past-chair of the Hertford County Board of Education and the Hertford County Committee of 100. ■

Disciplinary Department (cont.)

The remaining two and a half years of his suspension are stayed upon compliance with numerous conditions.

Notice of Intent to Seek Reinstatement

Individuals who wish to note their concurrence with or opposition to these petitions should file written notice with the secretary of the State Bar, PO Box 25908, Raleigh, NC 27611, before November 1, 2011 (60 days from publication).

In The Matter of Harry L. Southerland

Notice is hereby given that Harry L. Southerland intends to file a petition for reinstatement before the Disciplinary Hearing Commission. Southerland was ordered disbarred by the DHC by order dated August 5, 1994. ■

Classified Advertising

Positions Available

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Advertising Rates

If you would like to advertise in the State Bar *Journal*, please send your advertisement to the director of communications, the North Carolina State Bar, 6568 Towles Rd., Wilmington, NC 28409, telephone 910-397-0353. The cost of advertising is $75 for up to 35 words and $.50 for each additional word. Ads for the Winter (December) 2011 issue must be received by October 1, 2011.

The North Carolina State Bar and Affiliated Entities

Selected Financial Data

The North Carolina State Bar

	2010	2009
Assets		
Cash and cash equivalents	$6,549,628	$4,921,621
Property and equipment, net	2,435,514	1,999,039
Other assets	190,303	192,567
	$9,175,445	$7,113,227
Liabilities and Fund Equity		
Current liabilities	$4,118,464	$3,445,824
Long-term debt	188,927	289,596
	4,307,391	3,735,420
Fund equity-retained earnings	4,868,054	3,377,807
	$9,175,445	$7,113,227
Revenues and Expenses		
Dues	$7,019,115	$6,005,650
Other operating revenues	715,662	647,476
Total operating revenues	7,734,777	6,653,126
Operating expenses	(6,269,203)	(6,171,343)
Non-operating revenues	24,673	542,487
Net income	$1,490,247	$1,024,270

The NC State Bar Plan for Interest on Lawyers' Trust Accounts (IOLTA)

	2010	2009
Assets		
Cash and cash equivalents	$3,196,878	$4,578,898
Interest receivable	311,228	180,137
Other assets	323,350	361,368
	$3,831,456	$5,120,403
Liabilities and Fund Equity		
Grants approved but unpaid	$2,700,300	$3,079,446
Other liabilities	325,493	354,327
	3,025,793	3,433,773
Fund equity-retained earnings	805,663	1,686,630
	$3,831,456	$5,120,403
Revenues and Expenses		
Interest from IOLTA participants, net	$2,200,832	$2,262,514
Other operating revenues	2,171	-
Total operating revenues	2,203,003	2,262,514
Operating expenses	(3,125,183)	(3,443,125)
Non-operating revenues	41,213	114,421
Net loss	$(880,967)	$(1,066,190)

Board of Client Security Fund

	2010	2009
Assets		
Cash and cash equivalents	$1,755,261	$1,430,159
Other assets	4,699	3,600
	$1,759,960	$1,433,759
Liabilities and Fund Equity		
Current liabilities	$14,691	$17,206
Fund equity-retained earnings	1,745,269	1,416,553
	$1,759,960	$1,433,759
Revenues and Expenses		
Operating revenues	$752,073	$654,044
Operating expenses	(441,822)	(684,124)
Non-operating revenues	18,465	31,383
Net income	$328,716	$1,303

Board of Continuing Legal Education

	2010	2009
Assets		
Cash and cash equivalents	$249,915	$324,371
Other assets	239,950	194,576
	$489,865	$518,947
Liabilities and Fund Equity		
Current liabilities	26,635	27,186
Fund equity-retained earnings	463,230	491,761
	$489,865	$518,947
Revenues and Expenses		
Operating revenues	$665,757	$597,547
Operating expenses	(697,353)	(668,991)
Non-operating revenues	3,065	7,880
Net loss	$(28,531)	$(63,564)

Board of Legal Specialization

	2010	2009
Assets		
Cash and cash equivalents	$140,386	$123,539
Other assets	7,091	4,891
	$147,477	$128,430
Liabilities and Fund Equity		
Current liabilities	1,792	1,180
Fund equity-retained earnings	145,685	127,250
	$147,477	$128,430
Revenues and Expenses		
Operating revenues-specialization fees	$116,450	$110,444
Operating expenses	(99,215)	(87,561)
Non-operating revenues	1,200	2,288
Net income	$18,435	$25,171

The Chief Justice's Commission on Professionalism

	2010	2009
Assets		
Cash and cash equivalents	$146,332	$111,901
Other assets	88,174	73,821
	$234,506	$185,722
Liabilities and Fund Equity		
Current liabilities	446	861
Fund equity-retained earnings	234,060	184,861
	$234,506	$185,722
Revenues and Expenses		
Operating revenues-fees	$332,474	$294,665
Operating expenses	(284,519)	(292,847)
Non-operating revenues	1,244	2,281
Net income	$49,199	$4,099

Board of Paralegal Certification

	2010	2009
Assets		
Cash and cash equivalents	$323,027	$205,591
Other assets	6,733	14,838
	$329,760	$220,429
Liabilities and Fund Equity		
Current liabilities - accounts payable	8,850	8,201
Fund equity-retained earnings	320,910	212,228
	$329,760	$220,429
Revenues and Expenses		
Operating revenues-fees	$260,785	$252,970
Operating expenses	(154,514)	(166,916)
Non-operating revenues	2,411	(487,586)
Net income (loss)	$108,682	$(401,532)

The North Carolina State Bar
PO Box 25908
Raleigh, NC 27611

Fall 2011

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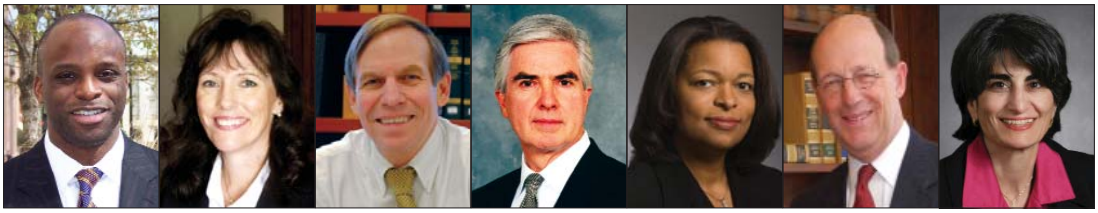

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