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FEATURES







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# Mentors and Mentoring

By M. Keith Kapp

I grew up in Rural Hall—a small town in northern Forsyth County—in a family of mostly farmers and businessmen who avoided lawyers as much as possible. To my knowledge, I met only three lawyers before I left home for college. The first—and probably the most important in my life—was Annie Vest Russell, my great-grand-aunt. Aunt Annie graduated from Salem College in 1903, taught for several years, and then moved to Washington, DC, where she earned her law degree during the Depression from the night school of George Washington University. She joined the office of the United States Solicitor General, where she wrote tax briefs to be argued before the Federal Circuits and the United States Supreme Court during the Roosevelt, Truman, and Eisenhower administrations.

During my growing-up years, Washington shut down for most of August, and Aunt Annie would come south for several weeks and "hold court" in the old family home. She intimidated plenty of people, including most of the males in that part of the county. I will never forget one Sunday when, during a particularly boring harangue masquerading as a sermon, she leaned over to me and whispered, "Bull****!" I wasn't quite sure whether I wanted to be just like Aunt Annie, but I was impressed that a grown-up, particularly a woman, would make her views known so confidently.

I met my second lawyer in high school, when I served as regional lieutenant governor of the Key Clubs and had the responsibility of hosting the convention for the Key Clubs of North and South Carolina. John D. Eller, a well-respected tax, estate, and business attorney in Winston-Salem, was lieutenant governor of the Kiwanis, which sponsors Key Clubs. He provided valuable guidance during convention planning and, as I spent time with him, opened for me a new understanding of the many opportunities a law degree can offer, and an appreciation for civic contributions lawyers make.

Hamilton C. Horton was the third lawyer I remember meeting. A fine attorney as well as a respected and effective member of the legislature, Senator Horton was on the local committee that interviewed me for the Morehead Scholarship and took an interest in my advancement. Our personal and professional friendship continued until he passed away.

At UNC-Chapel Hill I had the good fortune to encounter lawyers from several generations, in large part through shared interests in the Di-Phi Societies and Di-Phi Foundation. John Sanders, then vice-president of the University of North Carolina and former director of the Institute (now School) of Government, was exceptionally generous in sharing his vast knowledge of law and government and discussing our shared interest in North Carolina history. Charles Neely, a young lawyer in Raleigh, impressed me with his determination to make his family's century-old firm into a major player.

Despite these fine examples, the first year of law school was a tough time for me, and I was not certain I would be back for the second. My mind was made up, however, by a terrific experience as summer clerk with Hall, Booker, Scales and Cleland in Winston-Salem. In 1978, first-year clerkships were rare, and my opportunity to learn from good, versatile lawyers engaged in the day-to-day reality of legal practice convinced me that I had chosen the right career. The next summer with White and Crumpler sparked my interest in trial and appellate law and persuaded me that criminal practice was not my first choice.

I have some empathy with new lawyers having trouble starting their careers during the "Great Recession." The "Carter malaise" did not cause as deep a trough, but it did put a dent in legal job opportunities the year I graduated and passed the bar. Fortunately, I found two short-term positions that had long-term impacts on my career. I started my practice clerking for Judge Earl Vaughn of the North Carolina Court of Appeals and, because my wife had a good job with state government and we wanted one more year in Raleigh, moved to the North Carolina Supreme Court for a clerkship with Justice J. Frank Huskins. Two years with excellent appellate judges opened a window to two lifetimes of wisdom about law, government, politics, and life.

Two years in Raleigh turned into three decades and counting, as Charles Neely—the young lawyer who impressed me on the Di-Phi Foundation—recruited me to Maupin, Taylor and Ellis (now the North Carolina offices of Williams Mullen). What novice North Carolina lawyer could possibly have better legal mentors than Armistead Maupin, T. Taylor, and Tom Ellis?

This is a short list of the fine lawyers who have been my mentors thus far. Perhaps you have a similar list of men and women who have encouraged, advised, and inspired you. I fear, however, that many of today's young attorneys do not and will not have the chance to learn the profession under the generous wings of mature colleagues. With summer clerkships drying up and numbers of law school graduates far outstripping jobs, lawyers are hanging out their shingles and learning "on the job" as solo practitioners. Sadly, the State Bar is seeing a rise in complaints, grievances, and Disciplinary

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# We want your fiction!

## *Tenth Annual Fiction Writing Competition*

### Rules for the Fiction Writing Competition

1. The competition is open to any member in good standing of the North Carolina State Bar, except current members of the Publications Committee, as well as North Carolina State Bar Certified Paralegals. Authors may collaborate, but only one submission from each member will be considered.

2. Subject to the following criteria, *the story may be on any fictional topic and may be in any form—the subject matter need not be law related)*. Among the criteria the committee will consider in judging the articles submitted are: quality of writing; creativity; extent to which the article comports with the established reputation of the *Journal*; and adherence to specified limitations on length and other competition requirements. The committee will not consider any article that, in the sole judgment of the committee, contains matter that is libelous or violates accepted community standards of good taste and decency.

3. All articles submitted to the competition become property of the North Carolina State Bar and, by submitting the article, the author warrants that all persons and events contained in the article are fictitious, that any similarity to actual persons or events is purely coincidental, and that the article has not been previously published.

4. ***Articles should not be more than 5,000 words in length*** and should be submitted in an electronic format as a text document.

5. Articles will be judged without knowledge of the identity of the author's name. Each submission should include the author's State Bar or certified paralegal ID number, placed only on a separate cover sheet along with the name of the story.

6. **All submissions must be received in proper form prior to the close of business on May 31, 2013**. Submissions received after that date and time will not be considered. Please direct all questions and submissions to: Fiction Writing Competition, Jennifer Duncan, 6568 Towles Rd., Wilmington, NC, 28409, ncbar@bellsouth.net.

7. Depending on the number of submissions, the Publications Committee may elect to solicit outside assistance in reviewing the articles. The final decision, however, will be made by majority vote of the committee. Contestants will be advised of the results of the competition. Honorable mentions may be announced.

8. The winning article, if any, will be published. The committee reserves the right to edit articles and to select no winner and to publish no article from among those submitted if the submissions are deemed by the committee not to be of notable quality.

# Hello! You Must Be Going!

By L. Thomas Lunsford II

A wise man once said, "A law license is easy to lose, hard to get back, and impossible to return." I made that statement on the eve of the State Bar Council's quarterly business meeting this past January in reference to three interesting items then pending: one fairly routine matter and two others that were rather extraordinary. The first and least remarkable case involved a lawyer who had confessed to misappropriating money from an estate. He was asking the council to accept the surrender of his license in contemplation of disbarment. The second case involved a disbarred lawyer's attempt to obtain the reinstatement of his law license after having been disciplined for stealing money from his employer, the first such petition to reach the council since 2000. The third and final matter concerned a lawyer's avowed intention to secede from the State Bar by way of voluntary resignation. Although others may have entertained such a notion in the past, this formal request was essentially unprecedented. My intention here is to discuss the fate of these three petitions. Allow me to begin by acknowledging that a wiser man, familiar with the most recent proceedings of the council, would probably wish to amend the introductory proverb thusly: "A law license is easy to lose, hard but not impossible to get back, and may be returnable in good condition."

The easiest way to lose your license is to steal money entrusted to you in the context of your law practice. Theft from the trust account is the offense most likely to be reported to the State Bar, the easiest case to prove, and the one offense for which disbarment is virtually guaranteed. In such cases, the only real question is whether the offending lawyer will put the State Bar to its proof in a contested trial before the Disciplinary Hearing Commission (DHC) or tender the surrender of his or her law license directly to the council along with a confessional affidavit fully acknowledging the intentional misconduct. As noted in the preceding paragraph, the council's January meeting featured a surrender and a consequent order of disbarment, as required by the rules. The whole thing took less than five minutes. It was very efficient and rather impersonal. The procedure is fairly common. This sort of thing happens several times a year. Surrenders are motivated by a variety of concerns. Most of the time lawyers see the handwriting on the wall and are reluctant to put themselves and their families through emotionally and financially exhausting trials. Sometimes the accused individual, facing the prospect of criminal prosecution in regard to the same misconduct, may prefer to exit on the basis of a carefully worded affidavit of surrender rather than the transcript of a three-day hearing. And some may hope that voluntary submission to disbarment will serve to mitigate an inevitable prison sentence. Whatever the reason, the summary nature of the procedure and the nondiscretionary penalty provide ready proof of the assertion that "a law license is easy to lose."

A law license, once lost, is much harder to get back. For the disbarred lawyer, there is no right to be reinstated. There is only a right to seek reinstatement. Once five years have elapsed since the effective date of disbarment, the former lawyer may petition for reinstatement by the council. This initiates a fairly lengthy process that features an evidentiary hearing before a panel of the DHC at which the petitioner has the burden of proving by clear, cogent, and convincing evidence that he or she "has reformed and presently possesses the moral qualifications required for admission to practice law in this state taking into account the gravity of the misconduct which resulted in the order of disbarment," and that the petitioner's resumption of the practice of law "will not be detrimental to the integrity and standing of the bar, to the administration of justice, or to the public interest, taking into account the gravity of the misconduct which resulted in the order of disbarment." After hearing the evidence, the panel makes a recommendation to the council as to whether the petitioner has satisfied the burden of proof in all respects and whether he or she ought to be reinstated. If the panel recommends that reinstatement be denied, that ends the matter, unless the petitioner files a timely appeal to the council. If an appeal is perfected, the record is settled and transmitted to the council for final decision. If the recommendation from the DHC is favorable to the petitioner, the matter is automatically referred to the council for determination. It is important to understand that reinstatement is different from all other matters that the DHC is required to adjudicate in one crucial respect. In all disciplinary cases and in all disability cases, its judgments are final, subject to appeal only as to matters of law or legal inference directly to the court of appeals. In reinstatement cases, the DHC only makes recommendations. The council, sitting as a committee of the whole, makes the actual decision.

It is somewhat unclear why the authority to determine reinstatement petitions was reserved for the council. The members of the DHC's hearing panels have the advantage of observing the demeanor of witnesses and living with the evidence as it unfolds in real time, often over a period of several days. They also have the opportunity to ask the witnesses questions and have very ample time for deliberation. The councilors, on the other hand, are dependent upon a cold written record and are called upon to make their

decisions in the context of business meetings in which myriad other matters of significance must be determined. That being the case, it would be hard to argue that the council is better situated or otherwise more able to do justice in such matters. My own feeling is that the division of responsibility in regard to reinstatement has less to do with fact finding—of which there is often little to do in reinstatement cases—and more to do with maintaining the integrity and credibility of the profession. It's one thing to impose such discipline as seems necessary to protect the public in regard to a particular act of malfeasance. It's quite another to ascertain reformation of character that is fully consonant with the high standards of moral fitness required of all licensed attorneys. Authority to make that sort of judgment is quite properly invested in a body that is not only adjudicative, but is also representative of those standards and of the thousands of people who embody them.

A detailed analysis of the reinstatement case that was decided by the council at its January meeting is beyond the scope of this essay and the capability of this writer. As it happens, the factual predicate of the case was unusual to the point that its value as precedent is probably quite small. Even so, the fact that reinstatement cases are very rare makes the matter worth commenting upon. The lawyer in question was licensed in both North Carolina and California. He had been practicing in Greensboro for less than a year as associate in a small firm when he misappropriated legal fees amounting to about $700 from his employer. He compounded his sin by fabricating documentation to cover his tracks and subsequently lied to his boss about it. He was disbarred in 2005 by the DHC. He then decamped for California to continue pursuit of his legal career. The California State Bar took cognizance of the disciplinary action in North Carolina and, remarkably, decided that the misconduct warranted only a three-year suspension, with all but three months stayed upon certain conditions, including completion of a program designed by California's Lawyer Assistance Program to address an apparent mental health problem involving depression. Except for those 90 days of enforced professional inactivity and some down time in relocating to the West Coast, our petitioner was able to practice his profession without interruption for most of the eight years between his disbarment and the filing of his petition for reinstatement. The evidence showed that during that time he was not publicly disciplined or made the subject of any grievance filed with the professional authorities in California. He also successfully completed his contract with the California LAP. There was some evidence of civic involvement and some written statements were presented from California residents who professed familiarity with the petitioner and attested to his good character. In testimony before the DHC and then in argument before the council, the petitioner acknowledged the serious nature of his misconduct and said that he had reformed. In both proceedings, our State Bar's Office of Counsel argued strenuously that the petitioner had failed to sustain his burden of proof and that he ought not to be reinstated. After a full evidentiary hearing on the petition in August 2012, a panel of the DHC recommended reinstatement—the first such recommendation since September 1999. The council subsequently voted to reinstate, 37 to 14.

It is difficult to say what the impact of

this case will be. Although the council's decision was fact specific in regard to a set of highly unusual circumstances, it is bound to give hope to a large number of former North Carolina lawyers whose dishonesty has led them to alternative fields of endeavor, rather than to practice law in jurisdictions more tolerant of stealing. At present we think there are about 125 such individuals who are eligible to petition for reinstatement. Lawyers who often represent lawyers and former lawyers before the DHC are bound to be searching this record for clues as to how it is possible to prove reformation of character sufficient to warrant reinstatement. Obviously, most prospective petitioners will not be able to argue that they have since disbarment honorably practiced law, lest they be convicted of the crime of unauthorized practice. In truth, it has always been hard to say exactly what sort of evidence might be adequate to demonstrate clearly, cogently, and convincingly that a disbarred lawyer has reformed. Surely, it's not enough just to show that you've "done your time" and "kept your nose clean." But, what can one do to justify the conclusion that he or she is no longer a thief? And how can the readmission of a former thief not be "detrimental to the standing and integrity of the bar?" These are very hard questions to answer and yet, the very fact that we have a reinstatement procedure for disbarred lawyers confesses our belief that character can be reformed and our faith that the interests of the profession and the public will be not subverted by giving a truly rehabilitated lawyer a second chance.

Given that people strive so mightily to become members of the bar, fight so desperately to remain members of the bar, and seek, against all odds, to regain membership in the bar, it is quite surprising when someone seeks to be excommunicated. That happened at the council's January meeting. A North Carolina lawyer residing in Hawaii sought to resign from the North Carolina State Bar. He evidently wishes to regain his status as a non-lawyer in order to qualify "legally" for some appointed position in the Aloha State. He was disappointed when he initially made inquiry of the staff as to how he might accomplish his defection and was advised that there is no apparent provision in the rules for voluntary resignation. Surprisingly, I cannot recall that this issue has ever come up before. No doubt some lawyers have contemplated being "reinstated" as ordinary people at times when the profession has been besmirched—the Watergate era comes to mind—but the grim prospect of life without ready access to the Bar *Journal* has almost surely dissuaded them. Anyway, I'm not sure that it's possible to quit. It's almost unthinkable, when you think about it. After all, the statutes make no reference to resignation. They merely advise us that all members of the North Carolina State Bar are either active or inactive. The only expressed means of disassociation is disbarment. I assume that death will also sever the connection, but am doubtful that one can just pick up one's marbles and go home, as it were. Were that possible, a lawyer suspected of or being prosecuted for serious professional misconduct would be able unilaterally to divest this agency of its disciplinary jurisdiction simply by slipping the license under the door or over the transom—and then be free to seek admission in another jurisdiction, or readmission in North Carolina, on the basis of an unblemished record. And what about those unfortunate lawyers who get the random audit subpoena at an "inopportune" time? Should they have the right to walk out on Bruno?

There is, of course, some appeal to the notion that in a free society an association voluntarily joined should be just as easy to quit—sort of like the Book of the Month Club, but without the obligation to buy six books over the next two years. Perhaps the common law will be found to imply a "right to resign" from the "right to choose to try to qualify to belong." Maybe the Constitution embodies a right not to be required to associate with other lawyers or to be compelled to receive, perchance to read, the Bar *Journal*. Who knows? No one at the moment—but happily enough, the answer will soon be forthcoming. The Administrative Committee of the council has referred the question to the Office of Counsel for an opinion that should be available when the council reconvenes in April. Please stay tuned. In the meantime, don't even think about resigning.

Even if we are advised that voluntary resignation is theoretically possible, I expect that there will be some members of the Bar whose service, wherever they happen to

practicing law, is so important to the general welfare that they can never be permitted to resign, retire, or even get old. One such individual works for the State Bar. Alice Mine joined the State Bar's staff in March of 1993 and will soon be celebrating her 20th anniversary as our employee. Now that Bruno has moved on, Alice has become the most famous member of the State Bar's staff. She has been the most valuable for quite a while now. I dare say that most of the 26,000 lawyers in the state, and all 23 of those who routinely read my column, have had some beneficial and gratifying professional contact with Alice sometime during the past 20 years. Whether she's given you good ethics advice, inspired you at a CLE event, counseled you expertly in a committee, deftly facilitated your application for certification as a specialist, personally ushered you through a bureaucratic snarl, or kept you from making a colossal mistake that might have gotten you fired as the State Bar's executive director, most of you have had the pleasure of dealing with her—and you've felt better about your profession and the State Bar because of it. If it's been awhile since you thanked Alice for her service, let me invite you to take a moment to check in with her. You'll be glad you did. Her email address is amine@ncbar.gov. ■

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

## President's Message (cont.)

Hearing Commission proceedings against young lawyers. I attribute much of this increase to a lack of knowledge of what it means to be a lawyer.

I am not sure that attorneys of my generation are as generous with our time and expertise as were those who helped us find our way into the profession. How many of us will walk up to a less-experienced colleague in the courthouse, tap him on the back, and whisper how to act in front of a particular judge or how to handle a filing with the clerk? That does, of course, work both ways—how many brand-new lawyers today will take unsolicited guidance with grace and appreciation? The law is a profession, not a job, and those of us who practice it must look after and respect one another.

Mentoring for lawyers can take many forms. In Georgia, it's required—the State Bar mandates mentoring and pairs all new admittees with mentors. South Carolina is implementing a similar plan. In North Carolina, the North Carolina Bar Association and some local bar associations offer outstanding programs to match young lawyers with volunteer mentors. As I am a firm believer in avoiding regulatory dictates whenever possible, I would like to think that voluntary efforts will be enough. However, the increase in problems associated with new lawyers coming before the State Bar makes me wonder what the State Bar needs to do going forward to protect the interest of the public as well as the profession.

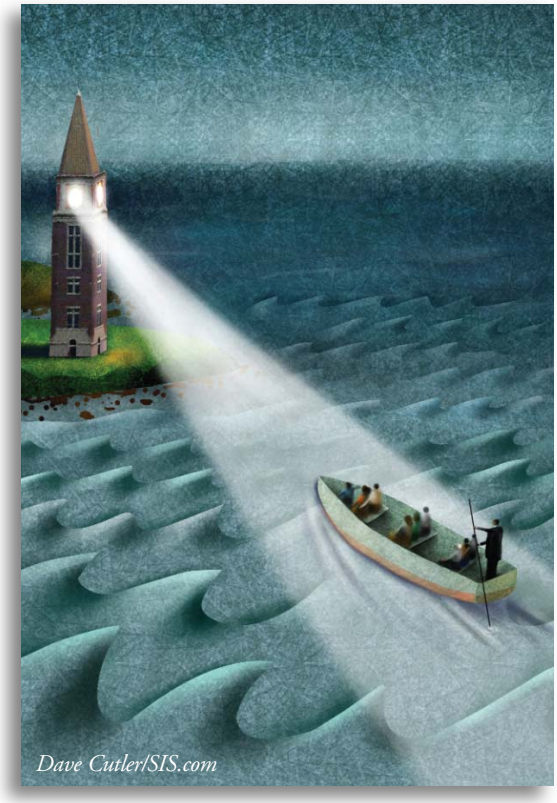
Is now the time for mandatory mentoring? ■

*M. Keith Kapp is a partner, vice-president, and vice-chair of the Board of Directors at Williams Mullen.*

# Call 4All—The Opportunity and Need for Pro Bono Service

By Debbie Hildebran-Bachofen

"Here is what is actually happening to thousands of our fellow citizens and what is going to happen during this time when privation and hardship stalk our state: Last winter more than 10,000 homes in North Carolina had no heat and almost twice that number had no indoor plumbing. At some point, 50,000 families went without food in 2011. More than 1.5 million people—over 15% of our population—have no health insurance. By 2010, 30% more North Carolina families were homeless than in 2007. North Carolina's poverty rate jumped to 17.5% in 2010—a 22% increase since the beginning of the recession in 2007—according to recent data from the US Census Bureau. Well over a third of North Carolinians are now classified as low income. The stubborn scourge of poverty is inextricably interwoven with the future of our courts, our public schools, and other public institutions, the viability of which is crucial to our future." —*NCBA Past-President Martin Brinkley*




The tremendous need for *pro bono* legal services for the poor is undisputed and has been well-publicized this year. More than 3.2 million people in NC qualify for legal services help (34% of the population). There are 19,162 clients eligible for free legal services for every legal services staff attorney. Tragically, but not surprisingly, given these numbers, Legal Aid of North Carolina (LANC) has to turn away a large majority of eligible clients simply because of a lack of resources. Who is being turned away? The

median annual household income for legal services clients served is $11,000. $24,000 is the maximum gross annual income for a family of four to be eligible for services by LANC. They may be seeking advice as to where to turn to receive the health care or education benefits to which they are entitled, or to have explained a legal notice they have received but don't understand, or perhaps to avoid finding themselves homeless or the continued victim of domestic abuse. The stakes are high; the need is great.

In order to try to address this crisis, the North Carolina Bar Association in collaboration with LANC has inaugurated a new program, Call 4ALL, that provides attorneys the chance to help a pre-screened client of LANC. In most instances, Call 4ALL attorneys will volunteer to talk with clients through approximately one-hour telephone consultations, from the attorney's office or even from the comfort of the attorney's home, and at the frequency he or she designates, providing advice or discrete services to these pre-screened Legal Aid clients. Even if the volunteer attorney doesn't practice in one of the areas needed, Legal Aid of North Carolina will offer training opportunities.

As stated in Rule 6.1, "A lawyer should aspire to render at least 50 hours of *pro bono* publico legal services per year." Call 4ALL provides a structured way for lawyers to meet this goal, within a limited scope of engagement (unless the attorney wants an expanded role), and provide essential assistance to people in need in these difficult times. A survey last spring indicated that 96% of participating Call 4All attorneys were "Satisfied" (11%), "Somewhat Satisfied (13%), or "Highly Satisfied" (72%) with their Call 4All experience. Ninety-nine percent would recommend Call 4All to their fellow attorneys.

A short video describing the program and how it helps those in need of legal advice can be viewed from the NC Bar Association's website homepage, ncbar.org. We would encourage you to take the time to watch this video. In addition, more information, the video, and answers to frequently asked questions about the program can be found at ncbar.org/public-pro-bono/call-4all.aspx.

Attorneys can volunteer to participate in the Call 4All program by visiting the NC Bar Association's website and completing an online application, or by printing out the application from the website and returning it to the Bar Association.

Returning to Past-President Brinkley's challenge:

> If we can persuade 500 volunteers to give just one hour a month, we will serve 6,000 clients each year who would otherwise go unserved. We will free up talented LANC in-house lawyers from time-consuming triage on these 6,000 cases. That, in turn, will let the LANC lawyers work 6,000 more hours on harder cases and enable them to take on more cases from the millions of North Carolinians who need their help. It will save the strength of LANC, the legal emergency room for more than two million citizens facing imminent threats of violence, risk of a family coming unglued, loss of shelter or income, or the need for medical care.

As the justice gap leaves unparalleled numbers of North Carolinians in need of legal help—with mortgage foreclosures, access to public benefits, and consumer debt

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# "[A]lmost Nothing in Ready Change"—The 19th Century Law Practice of David Swain

By Willis P. Whichard

David Lowry Swain, who would be governor of North Carolina (1832-35) and long-time president of the University of North Carolina (1835-68), left his home in the mountains of North Carolina in 1822 to study law under North Carolina Supreme Court Chief Justice John Lewis Taylor. Chief Justice Taylor's tutelage prepared him well for his chosen profession. In June 1823 he was licensed for practice in North Carolina's county courts, and in December 1824, in its superior courts. His hometown of Asheville, seat of Buncombe County, afforded a convenient locale for commencing a law practice. It was the first time a native of the county had returned there as a lawyer.[1]

*Photo courtesy of the North Carolina Collection Photographic Archives.*

Previous biographical snippets describe Swain's professional life as "very successful"[2] and "lucrative."[3] Considered in light of his lifetime financial achievements, they are almost certainly accurate. Such cannot be surmised, however, from his contemporaneous correspondence. Laments of financial woes were the common currency of his letters from the court circuits.

Lack of business was not a problem. Securing ready compensation for it was. However, he had been busily engaged in arranging his papers and researching his cases, he once told his wife Eleanor; his professional prospects were promising, but funds were so scarce that he obtained "almost nothing in ready change." Despite doing extensive business on his circuit, he received no money; indeed, he said, there was none in the county.

On one occasion he "barely received money enough to pay [his] bills"; not only was he unable to collect $100 due him from an estate, but he also had to buy in the deceased's land, worth perhaps $1200, at $300 to pre-

serve it for the family. Although he would have his full share of a docket's cases, doleful complaints such as, "I found myself poorly paid after all for my long and loud speeches" or, "I have never known so chaffy a court" were routine. Failure to secure sufficient fees to pay his bills in an eastern county made him disinclined to return there.[4]

Loneliness was the young lawyer's steady companion while traversing the circuits. The press of business somewhat diminished his brooding over the absent home fires, but he clearly and profoundly missed their warmth. Often these nomadic periods were quite prolonged. Once he had been away seven weeks; another time he wrote Eleanor in late August that he could not afford the pleasure of seeing her before Christmas.

Social life on the circuits afforded pleasant, somewhat offsetting amenities. In one week Swain attended two parties, the first given by a client, the second by Governor James Iredell. He rather heedlessly admitted to Eleanor that he had "seen many very pretty girls" at these soirees, but quickly redeemed himself by vowing that a brief embrace with her would give him more heartfelt pleasure than a month of such enjoyment.

Eleanor's deficiencies as a correspondent aggravated her husband's wayfaring solitude. In the above-mentioned seven-week absence, he had received three letters from her and was hopeful that the next mail would not disappoint him. She could not know how much he wished to see her and to avoid such long separations. Once he delayed writing because he had expected a letter from her but was disappointed. Exceedingly anxious to know everything that interested her, particularly the state of her health, he was grieved when she "complain[ed] of melancholy." "I declare this long absence is insupportable, and becomes more intolerable every day," he would say.[5]

Swain's practice, like that of most lawyers of his day, was general in nature. It appears to have been predominantly on the civil side of the dockets, but at least occasionally he handled a criminal case. He once found it his duty to defend a criminal of a character, and in circumstances he hoped never to hear of again. The defendant was a destitute, disfigured young woman, age 20, on trial for infanticide—the killing of her first-born, illegitimate child. She protested her innocence, and Swain gave her demurrer some credence, but thought convincing a jury of it would be exceedingly difficult. He must have been at his persuasive best, for the woman was acquitted "without a scuffle." Swain was not modest about his role in her release. "*I* acquitted the poor woman...," he reported, "and have generally been pretty successful" (emphasis added).[6]

On the civil side he reported numerous visitors who flattered themselves with the belief that they had important business. While somewhat deprecating their appraisals, he yielded to their importunings. "[T]alk to them I must," he said. Among them were two United States topographical engineers who were surveying the French Broad River to ascertain the practicability of uniting its headwaters with the Savannah River by means of a canal or railroad.[7]

Twice Swain represented a civil client in arguments before the North Carolina Supreme Court. The first was in an ejectment proceeding regarding a tract of land in Buncombe County. Swain represented the plaintiff's lessors; William Gaston and George Badger—preeminent lawyers of the time—appeared for the defendant. The result was a new trial for the plaintiff, indicating that Swain prevailed.

The second was a malicious prosecution case in which Swain represented the plaintiff and Badger the defendant. Plaintiff had been arrested on charges of beating and harassing defendant's cattle and driving them from their range on defendant's land. He asserted that while he was under arrest, defendant "abused him very grossly, struck him, and spit in his face." Upon examination of plaintiff, the magistrate discharged him. In the resultant malicious prosecution action, the jury found for plaintiff, and the defendant appealed.

The North Carolina Supreme Court, in an opinion by Justice Thomas Ruffin, awarded a new trial. It then said the case was affirmed "*per curiam*." The award of a new trial is inconsistent with an affirmance, so the outcome is difficult to determine. It would appear, however, that Swain lost this one.[8]

Swain's legislative capacity undoubtedly factored in his acquisition of state legal work. Governor Hutchins G. Burton appointed him a commissioner, pursuant to an act of the General Assembly, to implement a state contract with certain Cherokee Indians. Swain was to meet in Franklin, North Carolina, with Philip Brittain—another House member who was the other commissioner—to comply with the act.

Later, Governor James Iredell employed Swain as counsel to defend purchasers from the State against claims asserted by any American Indian or persons claiming under such pursuant to a reservation under treaties of 1817 and 1819. Every such case was submitted to Swain's discretion, subject to guidance from the report made to the General Assembly in 1824 by commissioners appointed to investigate these Indian titles, and to the report of the committee of both legislative houses to which this report was referred. At his convenience, Swain was to furnish the governor a list of the cases and the amount of his charges.

Iredell also appointed Swain to attend the State Bank shareholders' meeting, vote for the state in the appointment of directors, and represent the interests of the state generally.[9]

Governor John Owen, in his capacity as president of the University of North Carolina Board of Trustees, employed Swain as attorney for the trustees in Buncombe, Haywood, and Macon Counties. Swain was to collect sums due to the university, probably escheated funds primarily, in said counties; to sell and convey lands there to which the trustees held title; and to represent their interests generally.

As a lawyer Swain is said to have had no superior in complex land disputes. One such case, described as "a complicated mass of litigation, involving more land than was ever sued for under one title in our state, except...the claim of Lord Granville's heirs," went to the United States Supreme Court. George Badger represented the state of North Carolina, which deemed the case of sufficient worth and complexity that it associated the legendary Massachusetts lawyer and senator Daniel Webster. It also associated a 27-year-old David Swain, to whose careful preparation, indomitable energy, patient research, and acumen Badger attributed the state's ultimate success. When he was elected governor while the case was pending, Swain returned one-half of his retainer to the state treasury.[10]

Estate work composed a portion of Swain's law practice. He served as co-executor, with the decedent's brother David Vance, of the estate of his close friend Congressman Robert Vance, who was killed in a duel. He also served as administrator of his father's intestate estate.[11]

Throughout his life Swain was known for his remarkably retentive mind. As a lawyer, it enabled him to cite cases to the court from memory. It was said that in jury trials he could, without notes, repeat the testimony of

all witnesses regardless of the length of the trial—a feat diminished only slightly by his late-in-life admission that he could recall no instance in which a trial occupied more than a day.[12]

In his travels on the court circuits Swain met nearly every eminent lawyer in the state. Wherever he went his professional acumen and demeanor favorably impressed both his colleagues at the bar and the greater public. This gave rise to other professional opportunities. Despite "flattering" prospects in Asheville, professionally and politically, he considered both Edenton in the east and Lincolnton in the west as alternative practice sites. Asheville was not his settled locale, and at one point he saw himself continuing there at most another three years.[13]

Ultimately, however, he maintained an Asheville-based legal career until his election as a superior court judge removed him from it. His share of the legal business was then such that John Hall, son of the state Supreme Court justice of the same name, "removed to Buncombe to take charge of [it]." Over three years after he left the practice, a former client, who claimed to have paid Swain "a liberal fee," was still seeking "some prominent character who will attend [in Swain's stead] in all the counties if need be."[14]

No practitioner of the legal craft altogether escapes criticism and conflicts. Swain was no exception. He, George Badger, and others contracted to represent the state in Indian land-claims cases for $500 each. They had to inform the governor, John Owen, that this was not intended to include suits that might be brought in the federal courts. Still, the critics talked. "They are roasting the governor for the fees paid Badger, Swain & Seawell, and me...," wrote one of the lawyers, "but it cannot succeed." In another matter, the parties proposed Swain as a commissioner in a case in which he had had some previous, unspecified role. "The fact was disclosed," wrote later Chief Justice Thomas Ruffin, "but it shook not the confidence of either of the counsel."[15]

Swain was sensitive—arguably hypersensitive—to reputational concerns. His papers contain a statement by Joshua Roberts, an Asheville attorney, regarding a conversation with Swain in Rutherfordton. Swain had told Roberts he was engaged "in a business of a delicate nature about which he might be much blamed at some future period..." It related to a large tract of land in Macon County which Swain had arranged to purchase for the state. Swain was distressed that he would have no one to vindicate his conduct, which he considered perfectly correct, except those who were interested in the transaction. He was obviously prepping Roberts to be a "disinterested" witness if necessary.

Romulus M. Saunders, then the state's attorney general, recorded a related statement. "The free & voluntary communication made by Mr. Swain to me," Saunders said, "...resists all idea that he was to be benefitted in any way in the matter." Frederick Nash, later chief justice of the North Carolina Supreme Court, had been a member of the General Assembly select committee to which the matter was referred. He "considered Mr. Swain as influenced by motives firm & honorable—by a wish to save his neighbors and friends from ruin in many instances...these were the motives aroused and nothing occurred to lead me to believe them to be not the correct ones."

So far as the extant records reveal, nothing of an improper nature occurred, and nothing came of the matter. These testimonials from leaders of the bar perhaps disarmed Swain's potential critics. But he had carefully covered his tracks just in case there was a future problem.[16]

Professional standing was not the sole motivator of Swain's reputational angst. His political future weighed at least equally, probably more so, in these calculations. That, however, is another and a longer story that must await another day. ■

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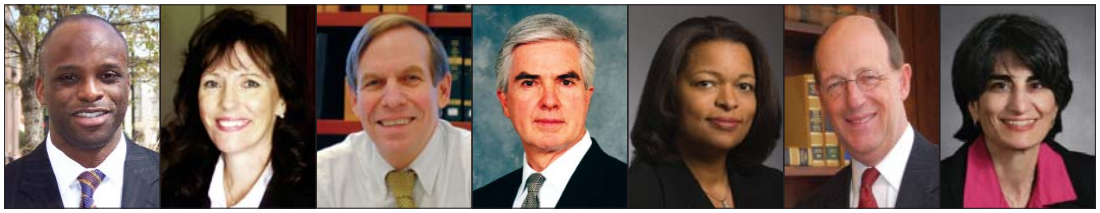

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# "So, How Much is My Case Worth?"

By Shannon B. English

You knew it was coming. You are sitting in a client meeting, explaining the procedure and the underlying issues of the case, but you can almost see the information being mentally filed away as they itch to ask you their first question…or, perhaps, in their mind, the only question. In asking this question, clients are essentially expecting lawyers to predict a future decision made by 12 other people at the end of that increasingly unlikely process we call a trial. Indeed, the odds a particular client's case will end up being decided by an actual jury are slim to none these days.


## Some History

In 1936, just before the creation of our Federal Rules of Civil Procedure, one fifth of all civil cases filed in federal court went to trial.[1] Over the next six decades that number declined at a healthy pace. In 2002, only 1.2% of all federal filings ended in a jury trial. At the state level, the proportion of cases that are resolved in a jury trial has declined to 0.6% of all state court dispositions as of 2002.[2] In his article, "The Disappearance of Civil Trial in the United States," Yale Law Professor John H. Lanbein explains that this dramatic fall in the jury trial as a means of civil case resolution is largely due to the information-gathering nature of our modern discovery process. He recounts how at common law, the trial process served to bring forth all the facts of the case at hand, as there was no formal way to obtain information from an opposing party.[3]

However, since the implementation of the Federal Rules of Civil Procedure, and their subsequently adopted state analogues, the focus of pretrial procedure has shifted from pleading to information-gathering via the discovery process. Through the mechanisms of formal and informal discovery, the facts of a case are typically uncovered and understood by all parties well in advance, thereby negating the need to "see what comes out at trial." Obviously, such advances in the ability to obtain the relevant facts have discouraged the need to go to trial, and thus increased the rate at which cases settle. As Lanbein explains, "This new procedure system has overcome the information deficit that so afflicted common law procedure, enabling almost all cases to be settled or dismissed without trial."[4]

The Federal Rules do not contemplate a turning away from the trial system. Rule 38(a) states, "The right of trial by jury as

declared by the Seventh Amendment to the Constitution—or as provided by a federal statute—is preserved to the parties inviolate."[5] Yet, due to our need today for more efficient case resolution from both the courts' caseload perspective and from our clients' perspective, settlement has become the dominant method of case resolution.

## What's Missing in the Case Valuation Process

With trial an unlikely end to a case, it is important to return to our prospective client's question posed at the outset of this article—"How much is my case worth?" We know it is now possible to uncover the case facts before, or in lieu of, trial through the discovery process. However, the one piece of information we are still missing is what a jury would award *if* the case did proceed all the way to trial. How would a jury perceive the facts of the case and what kind of monetary value they would assign to the dispute?

Over the years, lawyers have created varied ways to estimate what this award would be. The goal of these methods is to obtain an approximation of case value for when we sit down to discuss settlement with our clients and opposing counsel. An article entitled "Insightful or Wishful: Lawyers' Ability to Predict Case Outcomes," published in the journal *Psychology, Public Policy, and Law,* explored how well lawyers, on their own, were able to estimate a particular result in a pending case.[6] While the article discussed the impact of different variables such as gender and years of legal experience, the overarching finding was clear: "Overall, lawyers were overconfident in their predictions."[7] The attorneys who participated in the study were asked to make an outcome prediction regarding an actual case they had set to go to trial within 6 to 12 months. Of the 481 participants, 84% were involved in civil cases in which they were seeking a monetary award for their client.[8] The researchers found that the attorneys misjudged the award amount in nearly seven out of ten cases. Clearly, individual estimates leave a lot to be desired if the goal is to accurately predict a case value.[9]

While our individual perceptions may tend to be skewed, many alternative methods have been developed over the years to evaluate case worth or exposure. Honing in on this number is not only important in managing the increasingly-savvy client's expectations, but also in preparing for, and optimizing, settlement strategy. The problem is that some of the traditional methods provide formulas that are antiquated, not as precise as we need them to be, and, in some instances, somewhat arbitrary.

Individual clients obviously want to optimize their positions going into a negotiation or mediation scenario; however, corporate clients, especially, are becoming more interested in seeing actual calculations to understand the "method behind the madness" of case valuation. Moreover, being armed with a fair and accurate assessment of what a case is realistically worth can be an extremely valuable tool in Alternative Dispute Resolution (ADR), whether the information is used as a reality check, a bargaining chip, or a means to foster agreement. As pointed out in the "Insightful or Wishful" article, "lawyers should consider obtaining more formal external third party views on the likelihood of achieving their litigation goals on behalf of their clients. It is in the early stages of litigation that patterns and expectations for the case are established and where an intervention can have the most beneficial effects."[10]

## A Few Traditional Methods and Why They May Fall Short

**The Multiplier:** One method of damages assessment is what can be thought of as the "direct damages times x" formula. Quick and simple, even the most math-averse lawyer can understand this process of multiplying the out-of-pocket expenses by a multiplier, usually somewhere between one and three. While this has been a long-standing practice, and an easy rule of thumb to remember, there are limitations, the most obvious being the arbitrary selection of the multiplier used.

**The Decision Tree:** Decision trees or dependency diagrams are forms of risk analysis that aid in case valuation. Their primary purpose is to provide some guidance on litigation outcomes so we know where we stand in the ultimate decision of whether to settle or litigate. Assigning outcome percentages to various decisions made during a jury's damages calculation helps to understand what would happen should the case proceed to trial, and offers a frame of reference for assessing risk during any negotiation discussion. However, again, these outcome percentages are, to some extent, arbitrarily assigned based on subjective assessments or individual attorney experiences.

**Prior Jury Verdicts:** A more objective method for estimating what a case may be worth is to research prior jury verdicts in the case venue with similar facts, or to use valuation handbooks. At least in this process, we are not relying on our own estimation; however, obviously no prior case has exactly the same facts as the current one. Every client's situation is different, and it is impossible to measure the impact of all the specific variables that exist in your present case.

There are several other methods that attempt to measure a case's value before, or in lieu of, its presentation to a jury. Insurance companies create software programs that use a points system to calculate a settlement value. Some firms employ expert neutral evaluators to provide a likely damage award analysis. The common goal of all of these methods is to serve as a "best guess" of the amount that a jury would come back with if the case proceeded all the way to trial. These methods may offer a better forecast than our own personal speculations.

## A Solution

However, what all of these methods lack is a predictive *public standard* benchmark to indicate whether a fair and realistic amount is being utilized during settlement discussions. Individual estimates, rule of thumb formulas, computer programs, and even neutral third party evaluations all fall short of replicating what happens in the minds of an actual jury.

If the goal of all of these case valuation methods is to provide a "best guess" as to what a jury would award if this case were to be tried, the question begging to be posed is: Why don't we just ask the jurors themselves?

True, social science research and the industry of traditional litigation consulting have long offered ways to talk to actual potential jurors. The methodology used in the legal world has primarily been small group research—the focus group or mock trial. Indeed, a version of this kind of qualitative research exists in current ADR techniques in the form of a summary jury trial or a mini-trial, where a condensed version of the evidence and arguments are presented to a mock jury. The jury then renders a verdict and provides opinions on the issues they discussed. The information is used to help facilitate settlement before proceeding to an actual trial.

However, less familiar in the legal world is the realm of quantitative research. Quantitative research differs from small group, or qualitative research, in a few key

ways. First, more respondents are involved. So, instead of talking to 10 or 12 mock jurors, quantitative research would involve soliciting responses from hundreds. The goal is to improve the validity and reliability of the research results. By capturing more responses, the probability that they represent the input of the population being surveyed—in this case, potential jurors— is improved. Also, the more respondents interviewed, the less likely a jury's reactions will differ significantly when presented the same case as the research stimulus. With a statistically reliable sample of participants, more confidence can be assigned to the conclusions drawn from the research. This counters the inherent risk of small group research methodologies when a participant's opinion varies significantly from that of the larger venue population. Since only a small number of opinions are obtained in the focus group or mock trial, there is a risk that one "outlying" opinion is given more (or less) weight than it deserves in making a decision about the case. However, in large-sample quantitative research, this risk is mitigated, as the broader landscape of opinions is seen, and those that are "outliers" are identified.

While this type of quantitative research might be under utilized in litigation consulting, it has deep roots in the marketing world. Marketing researchers routinely employ these more robust methods in providing insights into consumer decision-making. The reason for the lag on the legal side, historically, has been cost and access. In the past, only the biggest or most complex cases warranted large-scale juror research. Meanwhile, however, marketing researchers have worked to utilize advances in technology to improve effectiveness and efficiency for their corporate clients. These advancements in research methodology have removed many of the traditional barriers that existed in the litigation world. Thus, these vigorous quantitative research techniques are more accessible to litigators than ever before.

There are now ways that we can take advantage of the benefits of large-sample research on more than only the big, complex cases that have warranted it in the past. These technological improvements allow quantitative litigation research to be not only more available, but also more routine. Why wait for only the biggest cases to gauge juror reaction, when it is now actually affordable to obtain this information on a regular basis?

One such methodology borrowed from the marketing world is a research technique that utilizes large samples of potential jurors in order to appraise case valuation. In marketing research, price sensitivity research is used to help companies determine how to price their products. In essence, this kind of research evaluates consumers' concepts of "value:" the perceived benefits of the product or service for the price paid. Since the basis for this technique is the research respondents' ability to assign a monetary value to a proposition based on the facts surrounding it, the foundational construct on which it is built has perfect application to the world of litigation research.

Specifically, in a case valuation project, this technique provides litigators with a dollar amount that jurors from the trial venue are likely to perceive as fair after exposure to the evidence and arguments. It offers that public standard benchmark that is missing from the more traditional methods of case valuation, as it measures the reactions of actual potential jurors to the specific facts and evidence in the case—not how jurors have reacted in the past to similar cases, not how one person or even 10 or 12 people perceive the case value. This technique solicits responses from a large sample of potential jurors who have been demographically screened to be representative of the trial venue, and who have been presented with the case summary.

In addition to generating an actual dollar amount that potential jurors perceive as a fair damage award, this methodology also provides sensitivities around the dollar amount, indicative of how much negotiation room exists. Participants are asked to answer a series of questions designed to elicit their perceptions of not only a fair and reasonable award amount, but also of the range of damage award amounts in which they are willing to agree.

This focus on agreement is the crux of the technique in that it recognizes that damage awards are not a dichotomous choice. It is not one number or nothing. Since the goal of a jury is to work toward consensus, there is strong incentive to avoid this false dichotomy and to compromise. The technique measures this "compromise effect" and factors it into projecting the likely award amount.

Beyond the perceived fair award amount, participants are also asked diagnostic questions that are designed to obtain each person's thought process in determining the damage award. These are rendered in response to open–ended questions about what facts the respondents considered, what they thought was important, and what questions they had, thus providing insights on how to strengthen the overall argument. For example, in one project involving a medical malpractice case, the respondents' explanations impacted not only the attorney's case assessment, but also his discovery strategy. The respondents' evaluation of how the plaintiff's injuries affected his life led the litigation team to improve their case presentation and, ultimately, to streamline their deposition plan. Finally, both demographic and psychographic questions can be included in order to profile respondents based on their tendency to award higher or lower amounts.

## Conclusion

A reliable research-based case valuation that also provides potential juror perceptions of the strengths and weaknesses of the story can finally fill the gap that exists in current evaluation methods. Whether the results are used to manage expectations, improve negotiation strategy, or encourage agreement, possessing this kind of rich information can fill that missing piece of the puzzle left open in our current case evaluation process. We no longer have to guess at how jurors will view a case. Utilizing an objective and empirically-based tool, we can feel confident in answering that all-important client question: "So, how much…" ■

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## Endnotes

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# Meet the Federal Judges—Judge Max O. Cogburn Jr.

By Michelle Rippon

*In the early 1990s what was then the State Bar* Quarterly *published a series of articles loosely held together with the theme, "Meet the Federal Judges." In the next few editions of the* Journal*, we will be updating that series.*

## Judge Max O. Cogburn Jr.

Max Sr., Max Jr., Max III, and now Max IV—here is a family of remarkable achievements. It is a closely knit family centered around the family ranch, which has been in the family since the 1790s. Since 1941 Pisgah View Ranch has been a destination for visitors—a Blue Ridge getaway that includes riding trails over "16,000 breathtaking acres."

The family of attorneys began with Chester Cogburn, who was born in 1902. Because of a lack of public education, the only school available was the Haywood Institute, a private school. Chester's mother worked as a cook at the school to pay his tuition while Chester worked at a saw mill for a dollar a day, which he gave to his mother. He worked his way through college and law school and was a judge and a state legislator.

Max Sr. graduated high school at age 16 and finished the University of North Carolina at Chapel Hill undergraduate and law school in six years. He obtained his LLM from Harvard University at the age of 24. Max Sr. was one of those attorneys that you would never forget once you had the privilege of meeting him. He was a true gentleman, a member of the North Carolina Bar for more than 50 years, and known throughout Western North Carolina as an effective advocate with a quiet, good nature. He always tried to leave those he came in contact with feeling a little better about themselves than they had before they spent time with him.

It was in Massachusetts while his father was attending Harvard that Max O. Cogburn Jr. was born. That didn't make him a "northerner," however! When he asked his dad how to respond to the suggestion that he was not a true southerner, Max Sr. replied, "Just because kittens are born in an oven doesn't make them biscuits." Although Max Sr. was offered lucrative work if he remained north, he chose to return to his home in the North Carolina mountains to practice first with his father in Canton and then, after a term as a Buncombe County Court judge, as a partner with Landon Roberts, ultimately becoming a partner in the firm Roberts, Stevens & Cogburn.

Judge Cogburn will readily admit, however, that while his father's example influenced his choice of and approach to the law as a profession, it was his mother who insisted that all of her five children study for a profession. Her second son, David, is a dermatologist, her youngest son Steve is an attorney and clerk of court in Buncombe County. Her daughter Cindy graduated from veterinary school and has recently retired as a lt. col. in the air force. A sister Chris, who is deceased, was an accountant who also ran a group of weekly newspapers.

Cogburn's daughter is a practicing attorney in Huntsville, Alabama, and his son Trip (as in third) is employed at Northwestern Mutual and is also a basketball coach. But if you ask Judge Cogburn, he will tell you that by far the most brilliant member of the Cogburn clan is his two-year-old grandson Max IV, known as Oliver.

Max Jr. attended high school at Enka High, the same high school that graduated Judge David Sentelle, now a judge with the DC Circuit Court of Appeals. He obtained his undergraduate degree from the University of North Carolina at Chapel Hill, and his law degree from Samford University's Cumberland School of Law, where his grandfather had attended.

Cogburn returned to Asheville to practice with his father at Roberts, Cogburn & Williams, where he remained until 1980 when he was appointed assistant US attorney for the western district of North Carolina, and then chief US attorney from 1986-1988. In 1992 Cogburn and Lyle Yurko formed Yurko and Cogburn, and they practiced in Asheville and Charlotte. In 1995 Cogburn

returned to the practice of law with his father and younger brother Steve, who were then practicing with the firm of Cogburn, Cogburn, Goosmann & Brazil.

Judge Cogburn was appointed magistrate judge for the western district in 1995 and remained in that position until 2004 when he returned once again to the practice of law, joining his brother Steve at the firm of Cogburn, Goosmann, Brazil & Rose. This was an opportunity to "get the barnacles off" and remember the many challenges for a practicing attorney. He loved the courtroom but disliked the billing. He also became a skilled and effective mediator. He was nominated to the federal bench in May 2010, and after senate confirmation received his commission and was sworn in as a United States district judge on March 11, 2011.

Each of these experiences prepared Cogburn for his role as an Article III federal judge. For example, Cogburn observes that coming into the position as US attorney without prosecutorial experience meant that he approached the position without any preconceived prosecutorial bent. The most difficult part of the job, he notes, is not "knowing when to strike because there are many of those opportunities, it's knowing when to forbear." He also understood how difficult it was for defense attorneys when dealing with a lack of respect from prosecutors. He believes that prosecutors need to remember that they are representatives of the people and coequal with defense attorneys in the criminal process.

Now, as a federal judge, much of his work involves sentencing. Here he sits as the ultimate arbitrator, understanding the roles of both defense attorneys and prosecutors. Because the sentencing guidelines leave room for discretion, Judge Cogburn stays attuned to how the other judges in the district are interpreting the guidelines as well as those in districts across the country. Cogburn had an opportunity to appear before two of western North Carolina's most respected judges, Woodrow W. Jones and Robert D. Potter. He learned a lot from these and other fine judges in developing his own judicial style.

From his years as a trial attorney he learned to appreciate that lawyers who appear in his courtroom have many more places to go and many more cases to handle than just the one before him, and that they are pulled in many directions, often having to deal with difficult clients. It has served to give him a "whole different perspective" when he remembers this aspect of the practice of law.

Toward the end of his term as a magistrate judge, Cogburn was trying nearly as many civil cases as then Judge Lacy Thornburg, making for a comfortable transition to the federal bench. Indeed, while each of the federal judges in the western district is unique in the way he runs the courtroom, this judge is not one to appreciate technicalities or treat the local rules with the same deference as the Federal Rules of Civil Procedure. "They are there for our convenience, not to be used as a tool to gain an advantage over an adversary. Attorneys should be given the opportunity to try their case." What causes him consternation are attorneys who submit bad law. And he's likely not to forget who they are. He is quick to point out, however, that he never rules on a case based on the conduct of the attorneys. He also runs an efficient courtroom. He took care of a large backlog of cases within the first six months on the bench.

Judge Cogburn is the first to admit that he doesn't have all the law at his fingertips, and he's willing to take a second look at a decision. He just wants "to get it right." Assisting him along the way is his career clerk, David Davis, who brings to the chambers significant experience of his own. He began as a law clerk in 1989 for Magistrate Toliver Davis, and then for Magistrate Judge Cogburn. After a short period as an assistant US attorney, David returned to clerk for Magistrate Judge Dennis Howell, and then made the move to Judge Cogburn's chambers in 2011. David is known for his willingness to help attorneys navigate the often complex issues that arise in a practice before the federal court.

As a former mediator, Judge Cogburn admits that resolving cases through mediation is certainly less expensive than a jury trial, and for many cases provides an appropriate alternative to a jury trial. However, it has created "a dearth of good trial lawyers on the civil side." He would be willing to revisit his mediation skills at the request of another judge.

On the other hand, Judge Cogburn is definitely not enamored with arbitration between individuals and large corporations, which frequently arbitrate. In *Wells Fargo Advisors v. Watts*, 2012 WL 831878, although ruling for the bank and confirming the award, Cogburn noted:

> [A]rbitration under the Federal Arbitration Act is a process that, although retaining the appearance of constitutionality by involving the courts in confirming an award, does not even attempt to retain the appearance of fairness. In the hearing before this court on the claimant bank's motion to confirm an arbitration award, counsel for the claimant bank noted that the bank handles hundreds of arbitrations a year, and that counsel herself handles 30-40 a year and that she, by the way, has never lost a single case. ("I've never lost one and I've never not gotten attorneys fees. I always win these cases.") Now there's a level playing field.

In a footnote, the judge adds, "as one author has noted, '[a]rbitration is despotic decision-making in the sense that the governing law makes arbitrator's decisions virtually unreviewable while accepting procedural and substantive results that would be considered unfair in the judicial setting.'"

Insight into his decisions as a US magistrate can be found on the walls of Judge Cogburn's new chambers where, when he returned to private practice, he was given awards and commendations from the Federal Wildlife Association, the United States Forest Service, the Blue Ridge Parkway, and the Great Smoky's National Forest, as well as from the United States Marshals, the Office of Probation and Parole, the Federal Bureau of Investigation, and the Drug Enforcement Agency.

His rise to the federal bench has not changed the way Judge Cogburn views himself, those with whom he works on a daily basis, or the attorneys who appear before him. He's easygoing and approachable. Like his father, he did not use intimidation to succeed as an attorney and does not use intimidation to control his courtroom. He loves his work and plans to continue until he's 150. He'll visit with attorneys before court and exchange stories. He's fair and he's honest. He's humble and humorous. And he smiles a lot. ■

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# Lobsters and Lawyers: Professionalism and Our Shared Capital

By Woody Connette

What does the Maine lobster fishery have to do with legal professionalism? The lobster fishermen of Maine have worked to preserve their fishery since the 19th century. They have been required by law to release egg-bearing female lobsters since 1872. If they caught female lobsters that were not bearing eggs, they could keep them. But the Maine lobstermen chose to release all of the females. More than 60 years ago they started marking egg-bearing females before releasing them by cutting a v-shaped notch in the tail flipper. If the v-notched females were caught again, they would be released, whether they were bearing eggs or not. The v-notch kept fertile lobsters in the breeding pool. They devised this system themselves and did it voluntarily. Maine did not enact legislation protecting v-notched lobsters until 2003, when the lobster fishermen themselves sought legislation protecting their lobsters from trawler operators who wanted to keep all of the lobsters swept up in their nets.[1] Today, the Maine lobster fishery is thriving, and v-notching is a required practice throughout the New England fishery.[2]

I doubt that lobster fishermen attend continuing education programs addressing professionalism and civility. I imagine them to be an independent bunch, each going out alone, tending his or her own traps with no one watching them. I imagine they can be big hearted, altruistic, ornery, individualistic, and fiercely proud of the way they make a living. I imagine them to be like many attorneys I know. The remarkable thing about these fishermen is the way they have come together to preserve their fishery. Struggling with the costs of maintaining boats and traps, worried about gas prices and feeding their families, out there in the fog where no one would ever know the difference, they have quietly returned the v-notched lobsters to the sea for over 60 years.

*A previously v-notched lobster is recaptured carrying eggs. Note the piece missing from the left side of the tail.*

* * * * *

Our legal profession is embedded in a system of justice that, in many respects, is as fragile as the lobster fishery. As attorneys, we cannot extract a living from the legal system without putting something back. Our system of justice needs the nurturing of professionalism if it is to endure. We earn our living in a legal system that requires ethical and professional conduct by attorneys to assure its survival. We serve both the courts and the broader system of justice when we act with civility in matters that are saddled with conflict. I think of this as our shared capital.

We most frequently practice civility and professionalism in our dealings with other attorneys. The way we carry out these small, daily routines gives us the greatest opportunity to nurture our legal system. If there were a chapter for litigators in *Life's Little Instruction Book*,[3] it might include these examples of model behavior for the pretrial phases of a case:

- Imagine that the opposing counsel in every case is someone you will deal with a hundred times during your career.
- Avoid scandalous or inflammatory allegations that serve only to intensify the conflict between litigants.[4]
- Use defaults, sanctions, and motions to

compel sparingly, after trying to address the underlying issues with opposing counsel.

• *Ex parte* contact with the court, as in seeking a temporary restraining order, should be done only after reasonable efforts to notify and enable opposing counsel to participate in the contact, only where warranted by the Rules of Civil Procedure, and only when you are convinced your client will otherwise suffer irreparable harm.

• Be careful in the wording of orders, particularly in state court where judges depend on the attorneys to prepare an order. While it is sometimes tempting to include unnecessary findings of fact or expand the court's ruling, it can destroy credibility with the court and opposing counsel.

• Make written discovery meaningful by focusing on the real issues. Give opposing counsel an electronic copy of your interrogatories or document production requests to save them the unnecessary labor of retyping your questions and requests.

• Work cooperatively in scheduling depositions. In cases with multiple attorneys, it sometimes is helpful to have all counsel block off deposition days as part of their initial discovery planning, with the understanding that all counsel will hold those dates for future deposition scheduling.

• Make sure you supplement your discovery responses as new information comes available. The Rules require it, and it sends the clear message that you operate with candor and expect the same behavior in return.

• Don't take advantage of another lawyer's indulgences. If you need an informal extension in responding to a discovery request, for example, give opposing counsel a reasonable deadline by which you will produce the discovery, and then stick to it. Don't make the lawyer who did you a favor have to come back to you asking for the discovery.

• Write every letter to opposing counsel knowing that it probably will be read by their client. A frank, even-handed, professional letter-writing style can help minimize the conflict between opposing parties and improve the chances of early resolution.

• You have a duty of loyalty to your client, but remember that there usually is another side to whatever your client tells you. Whenever you state your client's position in a letter or a conversation, ask for the other party's response. This gives you the advantage of informal discovery, while creating an opportunity for better understanding of the parties' respective positions.

There are sound, practical reasons for acting professionally:

• It creates a level of trust with other counsel that enables us to pursue our clients' interests as efficiently as possible.

• It reduces costs, particularly in the pretrial discovery phase of litigation, where carefully planned and targeted discovery orchestrated by opposing counsel can save substantial time and money.

• It models good behavior for the parties to litigation, which in turn helps them see and understand the strengths and weaknesses of competing claims and defenses.

• It enhances the odds of dispute resolution before trial.

• It assures that the pursuit of justice will be paramount in any trial.

• It gives us the personal and professional satisfaction of serving our clients in the best way possible.[5]

• It gives us a future stream of clients who seek us out for our knowledge, skill, and professionalism.

• It earns us membership in a community of colleagues with similar values and principles.

• It makes it easier for our clients to accept the outcome of a matter and to respect the system that produced it.

Civility and professionalism are routines that we observe with every client who comes our way. But the greater benefit of practicing in this way rests in the larger framework of our system of justice. Indeed, it creates a level of trust and respect that makes the whole system work. At any time, any one of us could cut corners in ways that might give us or a client a temporary advantage without bringing down the system, just as one fisherman in the fog might decide to hold back a v-notched lobster without destroying the fishery. For the system to endure, however, we all need to cultivate professionalism. We are the beneficiaries of this shared capital, and we are responsible for growing it for future generations. ■

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## Endnotes

1. Me. Rev. Stat. Ann. § 12-6436.
2. I first read of this practice in Linda Greenlaw's excellent little book, *The Lobster Chronicles: Life on a Very Small Island* (Hyperion Books, 2002). It is also described in *The Secret Life of Lobsters: How Fishermen and Scientists Are Unraveling the Mysteries of Our Favorite Crustacean,* Trevor Corson (HarperCollins Publishers, 2004).
3. H. Jackson Brown (Rutledge Hill Press, 1995).
4. Abraham Lincoln once said, "In law, it is good policy never to plead what you need not, lest you oblige yourself to prove what you cannot." (Abraham Lincoln, Letter to Usher F. Linder (Feb. 20, 1848) in *The Quotable Lawyer* (Shrager & Frost edits., 1986) p. 96.6, 241) quoted in *Korech v. Hornwood*, 58 Cal. App. 4th 1412, 1420 (1997).
5. Operating with civility and professionalism fits well with the many excellent principles enunciated by Steven Keeva in his remarkable book, *Transforming Practices: Finding Joy and Satisfaction in the Legal Life* (Contemporary Books, 1999).

# The Liar's Paradox

By Gary Brian Ernst Jr.

The first thought running through Ethan Bonner's mind once he had awakened was a hope that the caked blood underneath him was not his. There was a train station inside his head and his ears rang with the whistles. He struggled to raise himself off the stone floor in the squalid room. He felt sick and tried not to wretch as he braced himself against a cold wall behind him. As his eyes adjusted to the beams of light filtering in through the barred window, he focused his mind on comprehending his situation. It was obvious he was in a holding cell, a prisoner of some unknown force with uncertain intentions.

He had evidently been stripped of his possessions, though his captors had at least permitted him to keep his clothes. His face felt different and, putting a hand to it, his cheekbone exploded in blinding pain—no doubt the result of some brutish trauma. Slowly he paced the perimeter of the room, feeling his way along the walls as his squinted eyes gradually took in a dolorous scene.

His cell was a square room about the size of a restaurant bathroom. As best as he could tell, it was completely empty other than his own presence. A small drain in the middle of the floor provided a torturous dripping sound as rock condensation and God knows what else percolated down the pipe. A wrought-iron gate on the wall opposite him provided the only obvious means of access. He instinctively approached it and peered through the bars down either side of the hallway on the other side. Only more of the same—rough-hewn stone walls extending as far as the eye could see. His shouted pleadings echoed down the passage as his own voice seemed to mock him in return.

His world began to spin so he slumped himself back down on the floor. The whole room seemed to be sweating as beads of water dripped from all surfaces. It smelled as if a fishmonger's shop had been transported inside the latrine of a men's locker room. He looked up at the small window near the ceiling of the opposing wall and crawled toward it, weaving around the hideous drain. The thought passed his mind that this foul conduit must serve as his toilet and he immediately stopped thinking.

He reached the wall underneath the window and again raised himself to his feet. Stretching his arms as high as he could, he found the window to be just beyond his reach. The sky beyond was a tantalizing blue. He stood on his toes and put one ear up to the aperture and thought he could hear the surf.

Suddenly he recognized the sound of footsteps marching down the hall. He quickly moved back to the gate and scoured the passageway for the source. Down the left side of the corridor appeared the shapes of two men, both approaching his direction. It occurred to him that they might not have his best intentions in mind so he took a step back from the gate. Their paces slowed as they neared his cell.

A portly uniformed man with a swarthy complexion glared back at him through the bars. The man's gaze cased the cell to make sure there were no disturbances before returning to Ethan. The guard produced a pistol from a waistholder and ordered him, in accented English, against the far wall. He had no choice but to comply.

The guard opened the gate, keeping his pistol trained on the prisoner. The second man entered the cell and took stock of the environment. He was clean-shaven, bespectacled, and wearing an immaculate business suit. Ethan recognized him immediately as his lawyer.

"William! What the hell are you doing here? What the hell am I doing here?"

**The Results Are In!**

**This year the Publications Committee of the State Bar sponsored its Ninth Annual Fiction Writing Competition. Eighteen submissions were received and judged by the committee members. The submission that earned third prize is published in this edition of the *Journal*.**

The attorney raised his hand to plead for calm, though he himself was plainly uncomfortable under such circumstances.

"Ethan… are you hurt?"

The prisoner pointed to his own battered face. "I must've been roughed up at some point, but nothing too bad I hope. Hard to tell much of anything in this damned place."

"Before we talk further, I should tell you that our friend here speaks surprisingly good English." William motioned toward the guard, who remained an armed sentinel just inside the gate.

"No confidentiality here, I take it," quipped Ethan.

William managed a smile. "Ethan, I'm going to get right to the point. They're holding you here because they think you're a spy. They want you to sign a confession."

Ethan's head spun some more. "You cannot be serious. A spy? I came here for my vacation. We talked about it in your office just a few days ago. Didn't you tell them?"

"Of course I told them, Ethan. I told them you were an ordinary accountant who came here simply to see the ruins. Why else would anyone want to visit this place?"

The guard grunted disapprovingly.

"Look, William," replied Ethan, "I don't understand any of this. One day I'm sitting down to a pleasant dinner in the bazaar, and

the next day I wake up beaten and imprisoned. I can't remember anything in between. What the hell is going on?"

The lawyer looked back at the sentry and then to Ethan before speaking in a more hushed tone. "I believe they drugged your food. They might have slipped you some kind of truth serum as well. I don't think it had the intended effect."

"What makes you say that?"

"Because you're still here, and they still need your confession."

"I see." Ethan paused and rubbed a hand through his auburn, greasy hair. "Well, I'm obviously not a spy. So how do I get out of here? What about the consulate?"

"Unfortunately, most of the consulate's staff has already been recalled to the US. I got a call from the government to see if I could arrange some kind of agreement on your behalf. That's why I'm here."

"Unbelievable. How did you get here so fast?"

"The government chartered a jet to get me here as quickly as possible. They weren't sure how many hours they had. From what I understand, you were unconscious for quite some time."

Ethan slowly sank to the floor in disbelief. At this newfound knowledge he noticed his stomach rumbling in hunger. His throat was absolutely parched despite the overwhelming dampness of the environment. He looked back up at his friend.

"What about food?"

William sighed. "They're trying to starve you into complying with their demands. I've done my best to talk them out of it, but they're absolutely convinced you're a spy. I've repeatedly told them you are an accountant from North Carolina with no knowledge or history of such things. I asked them to produce evidence supporting their case, but naturally they refused. I'm afraid there's no arguing with them. My only purpose here is to help arrange a release."

The lawyer hunched down to set his briefcase on the floor, looked at the ubiquitous grime, and immediately rose back to his feet. He opened the case to reveal a short stack of papers and a fountain pen.

"These are your confession papers," William continued. "I've already looked through them. They contain one false allegation after another. It's an utter fraud, every bit of it. But they're quite serious about making you sign it."



"Why me?"

"Perhaps they're just using you as a political pawn. Who knows? Unfortunately, I don't think they're going to release you unless you give in to their demands."

Ethan shook his head. "So they're just going to let me go if I sign it, huh?"

"That's what they told me."

"Do you believe that?"

William's eyes darted over to the guard and back to Ethan. "That's what they told me," he repeated. He spoke the words with such lack of conviction that Ethan found little comfort in them.

"Great," Ethan replied. "Damned if I do, damned if I don't."

"I'm sorry, Ethan. You may as well take the pen and papers. If they truly are just using you for leverage, then they may have no interest in harming you once you sign the documents. In any event, you have twenty-four hours to decide."

"What happens then?"

"They'll take away the papers. I can't tell you what their plans would be afterwards. I'm doing everything I can here to help you, but unfortunately there aren't many laws within these walls."

Their conversation was abruptly broken by the guard's loud, grating tone.

"Give him the papers. You must leave now," came the order. His voice sounded like he had been smoking since infancy.

The attorney nodded in response and removed the pile of papers from his case before handing them to his client. "I'm really sorry, Ethan, but I think you should use this." He offered him the pen.

Ethan nodded and took the pen, lightly scribbling it on a blank part of the page to get the ink flowing. The slight indentations made by the instrument were devoid of any colored markings. He shook the pen and tried again. Once again, no luck.

"Something's wrong with the pen," Ethan said. His face showed muted exasperation toward this latest insult.

William looked puzzled and took back both pen and paper. He tried repeating the process, dragging the pen firmly back and forth over the top of the page. Nothing happened.

The attorney looked back at the guard and held the pen in the air. "No ink."

"Impossible," the guard replied incredulously. "It worked a few minutes ago. We both tried it."

"What do you want me to say?" the attorney shot back. "It's your pen. Try it for yourself."

The guard instinctively took a step towards them, but then thought better of it.

"Put the pen on the ground and move back to the wall. Slowly." The guard cocked his pistol and the attorney shuddered.

"Okay, take it easy," William responded. He did as ordered.

The guard took several deliberate steps towards them and then kneeled down to pick up the pen, keeping his eyes and firearm trained on the two men. He produced a small notepad from his side pocket, stepped back against the cell door and tried to make the pen work in between furtive glances back up at his audience. His face appeared angry, and William and Ethan looked nervously at each other. He seemed to be lost for words, as if his mind were searching for the proper English profanity.

"I've got a pack of new pens in my briefcase," William said calmly, as he slowly removed a clear package from his satchel. "Never been opened. I always carry them for situations like these. Well, not exactly like these, but you understand. Would you mind terribly if I offered one to my friend?"

The irritated guard cast a suspicious look upon the attorney. He had already known about the pen package, having searched the lawyer thoroughly before permitting him to enter the building. Still, he wasn't comfortable with the proposal.

"Toss them over here," he barked. "Slowly. On the ground."

The attorney nodded and slid the pack across the cell floor towards his adversary. The crackling of the wrinkled plastic bounced off the dampened walls. The guard placed the defective pen in his breast pocket and began examining the unopened parcel. It appeared to be a generic set of push-operated ballpoint pens, black in both ink color and pen shell. He carefully opened the package and withdrew a single instrument from the wrapping, placing the container back down on the floor as he set about analyzing one of its contents.

The next few moments were spent in utter silence as the guard disassembled the pen, sniffed the ink, and rubbed the components between his fingers. Putting the pen back together, he paused for a moment and seemed to mumble something to himself before depressing the button on top to propel the ballpoint from its canister. The typical click made by this action, when combined with the anxiety of the moment, made all the three men visibly tense. In a lighter moment they might have shared a laugh.

He cautiously dragged the pen back and forth over the notepad. It worked without a hitch.

"So?" asked the attorney.

"It seems fine."

"Well, can you leave it here with my client so he can sign the papers? It's going to be tough for him otherwise."

The guard glared back. He kneeled down once more and set the pen on the ground, then quickly rose to his feet. "Take your briefcase. I will keep the pens. Leave now."

The lawyer sighed and turned to Ethan, who had remained silent but vigilant. "I'll take care of things on my end, Ethan. Good luck."

The guard snatched the opened bag of pens and barked again at William, who closed his briefcase with one hand while raising the other in protested acknowledgment. He forced a halfhearted smile for his friend before exiting the cell. The guard secured the door behind him and Ethan remained still as the two men walked back down the hallway leaving only silence.

* * * * *

The light was fading quickly and Ethan knew it would soon be too dark to see much of anything. He sat on the cell floor near the spot where the guard had been standing, keeping his eye on the nascent moon as it peeked through the bars of the window. He remained silent for a while, thinking about everyone back home and whether he would see them again. He brushed back his thick, wavy hair, every now and then swatting away flies, which seemed to blow in with the twilight breeze.

After a moment Ethan nodded to himself and picked up the pen. He carried it over to the disheveled piles of papers and then moved all contents directly under the window. Using the last beams of light, he turned to a blank piece of paper, raised the pen high, clicked it, and began to write.

* * * * *

On a reconnaissance ship stationed off the coast, a communications officer listened intently as he scribbled down an incoming message. The source of the signal matched the location they had been scanning for days. It was a simple message in the simplest code transmitted by a series of familiar clicks. The officer looked down at the finished transcription.

Dot, dot, dot.
Dash, dash, dash.
Dot, dot, dot.

* * * * *

The sentry hunched over a small table in the dank surveillance room. No matter how hard he tried, he couldn't put the day's events out of his mind. Why didn't the cursed pen work? To be sure, there was nothing special or necessary about that particular item. But it had worked without a hitch in this very room at this very table minutes before it suddenly ceased to function. He had considered reporting the incident to his superiors, but what was he to tell them? That he could not be trusted to provide a simple writing instrument in working order to an important prisoner on the cusp of a valuable admission? That sort of incompetence didn't earn many promotions, and a promotion was his best chance of escaping this forsaken assignment. In any event, the insufferable attorney had been frisked and processed prior to entry, and besides, the sentry himself had thoroughly examined the substitute pen.

A large scarab scampered over the guard's boot from under the table. This minor annoyance reminded him of the wretched nature of this abominable place, and in his foul mood he raised his foot to squash the hapless creature.

With his foot in the air, a liquid dripped down from the bottom of his boot upon the diminutive beetle, forcing it back under the table for cover as the guard looked on with curiosity. He used the rear of his heel to push the chair out backwards from under him and lowered himself to the ground to investigate.

There was a small black pool of liquid several inches under the table where his foot had been resting. He dipped the tip of his left pinky in it and stood up so he could better examine it under the ceiling lights. It was cool to the touch and he gave it a tentative sniff. It had the unmistakable odor of ink.

It didn't take long to deduce what happened. The bastard attorney had drained the pen.

The guard walked briskly over to the surveillance equipment and looked at the monitors. Everything seemed normal. The external cameras showed no disturbances outside the complex. No sign of any trouble in any of the rooms or hallways. The prisoner was sitting in the corner of his cell opposite the window and appeared to be resting.

It occurred to the sentry that he should retrieve the substitute pen immediately. He grabbed his rifle from the gunshelf on the wall, opened the door, and proceeded down the hallway towards the cell.

Suddenly the whole building shook and the guard knew the offensive had commenced. He broke into a full sprint down the corridor as smoke began to fill the narrow passageway. By the time he reached the cell he already had the correct key in his hand and wasted no time opening the door.

As the smoke cleared it was painfully obvious he was too late. Where the wall with the window had been there was now only rubble and an opening just big enough for a person to squeeze through to the other side. He approached the smoldering hole and surveyed the beach looking for the prisoner. Tracer fire illuminated the night sky and he found it difficult to locate his bearings.

For a moment he thought he saw a shadow in the distance running towards the surf and he drew his rifle. He failed to fire off a single shot before suppressive fire ricocheted inches from his head, forcing him to retreat into the relative safety of the cell. He cursed under his breath and peeked up at the guard tower, hoping his fellow soldiers would do what he was unable to do. His heart sank as he spotted two bodies slumped over the railings.



He had trouble deciding whether his fate would be worse than theirs.

* * * * *

In Washington, Agent-in-Charge Ethan Bonner waited patiently in the deputy director's office as the latter poured over the dossier. Ethan had been back in the States for only a few days and was already getting anxious. He despised this part of the mission and considered personal debriefing a good thing only to the extent it meant he had survived. He coughed conspicuously to ensure his superior hadn't fallen asleep reviewing the paperwork. Finally the director tossed the folder onto the desk and stared back at the man sitting across from him.

"Looks like it was pretty hairy there for a moment, Bonner. Glad we got you out in one piece. We'd been looking for you for days, you know. The Morse code with the pen was a fine idea. Amplified it just enough with a cone of paper so that our boys could pick it up. Nice work. Ten years ago our technology wouldn't have registered any of it. Your timing is impeccable as always.

"I understand you kept the pen as a souvenir. That's government property, but I'm going to let it slide. What'd you do with the paper?"

"I left it in case I needed a distraction. I knew the guard spoke English so I left him a message."

"Explain."

"One side of the paper said, 'The statement on the other side is false.' The reverse said, 'The statement on the other side is true.'"

The director looked confused.

"It's an old Greek paradox. I thought it might buy me some time. You know, give them something to think about. He seemed like the intellectual type."

"Still not sure I follow."

"That's kind of the point, sir."

The director shrugged his shoulders. "You're an odd duck, Bonner, but I'm glad you made it back safe and sound." He half-heartedly flipped through the stack of papers on his desk. It was late and he was getting hungry.

"Anything else, Agent?"

"I believe that's all, sir."

"Alright. You know the drill. Sign on the last page and we can get you started on something else. Maybe send you to a place with air conditioning this time." The director chuckled at himself.

Bonner gave an acknowledging nod and patted his side and breast pockets. How amusing. He looked back up at the director with some embarrassment.

"Excuse me… do you have a pen?" ■

## Call 4All (cont.)

matters, to name only a few high-demand fields—budget cuts have forced LANC to close offices and cut staff. Call 4All has already recruited 605 volunteers who have assisted 3,799 clients since March 2011, but this is just the beginning. Call 4All needs you to help bridge the justice gap. This program is an easy way to provide *pro bono* service and make a real difference in the lives of those in need. Thank you for your consideration of volunteering in this worthwhile and important effort. ■

*Debbie Hildebran-Bachofen is with the firm of Manning Fulton in Raleigh.*

# Profiles in Specialization—New Specialists in Juvenile Delinquency-Criminal Law

By Denise Mullen, Assistant Director of Legal Specialization

I recently had an opportunity to talk with the newest board certified specialists in juvenile delinquency - criminal law. The committee members who initiated the specialty and wrote and graded the first examination are John Cox, solo practitioner in Graham; Julie Boyer, solo practitioner in Roxboro; Mary Wilson, juvenile chief at the Wake County Public Defender's Office; and Eric Zogry, the North Carolina juvenile defender. Two new specialists—Geeta Kapur, attorney and adjunct professor at UNC-Chapel Hill & Campbell Schools of Law, and Valerie Pearce, senior staff attorney, council for Children's Rights—also provided responses. Following are some of their comments about the specialization program, and the anticipated impact specialty certification will have on their individual practices and on the practice of juvenile delinquency law in general.

**Q: Why did you, the committee members, pursue a specialty designation for juvenile delinquency?**

**Eric Zogry** – The idea actually incubated for a couple of years before we began to follow up on it. We set up an exploratory committee within the North Carolina Advocates for Justice (NCAJ) Juvenile Defense Section and completed the State Bar's application process for a new specialty area, which involved assessing support among lawyers and then gathering signatures. The perception of juvenile delinquency law is that it is a practice area a young lawyer can start out in before transitioning to something else. Developing the specialty was one way to help legitimize the practice.

**Mary Wilson** – That was important to us. We wanted to build on the knowledge that kids are important and worth the time to develop the specialty, and then worth the investment in a long-term practice.

**John Cox** – In this practice area, we all know each other, but the public doesn't know us. Having the specialty allows us to reach out to the public and give them better access to qualified representation.

**Q: Why did you apply to take the examination?**

**Valerie Pearce** – I pursued certification in order to raise the bar for representation in the juvenile court system. In order to practice well in juvenile court, you need to understand juvenile law, criminal law, federal law, child welfare, mental health, education law, benefits, and family law. I strongly advocated for recognition of this important practice area.

*Mary Wilson, Eric Zogry, and John Cox*

**Q: How did you prepare for the examination?**

**Julie Boyer** – As a committee member, I was part of the team that created the first exam. Writing the examination was certainly a group effort. Each of us developed questions for different topics, and when we met, we reviewed each other's questions to determine the level of complexity and various other criteria to ensure the fairness of the examination. The process definitely increased my knowledge of the practice area.

Pearce

**Valerie Pearce** – To prepare to take the exam I studied the *Juvenile Defender Manual*, website resources from the NC Office of Indigent Defense Services (IDS), and juvenile and criminal statutes.

**Geeta Kapur** – Using the topics that were outlined in the exam guide on the specialty website, I created a fairly in-depth study guide of my own. I reviewed criminal law and procedure as well as juvenile delinquency statutes, the entire evidence code, and reviewed recent appellate opinions on the topics outlined in the exam guide. I also reviewed trial strategies and motion practices for jury trials.

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

**Geeta Kapur** – The certification process was extremely valuable to me. Since I began practicing law, I have not had the time or opportunity to study the entire criminal law, criminal procedure, and juvenile code in its entirety. As a result of studying and taking the exam, I feel much more confident about my practice of criminal and juvenile delinquency law, and I hope to deliver the highest quality representation to my clients.

**Q: How do you envision certification being helpful to the practice of juvenile law in North Carolina?**

**Mary Wilson** – This should help legitimize that juvenile court is difficult and it is important. There are kids' futures at stake.

**John Cox** – We are on the verge of raising the age of jurisdiction, which would really increase the volume in the juvenile court system. Currently, North Carolina is the only state that automatically puts a 16 year-old

into the adult court system forever. If and when this changes, 16 and 17 year-olds would move into the juvenile courts and more qualified attorneys will be needed.

**Julie Boyer** – All juveniles brought into delinquency court are assumed to be indigent, thus they receive court appointed counsel automatically. As more juveniles are being brought into court, their parents and guardians are seeking private attorneys much like in adult court matters. Certification has helped in that regard, identifying myself as one of the few specialists in the state.

**Q: What have your clients, staff, and colleagues said about your certification?**

**Eric Zogry** – I told the IDS Commission and they were pleased. They are able to recognize the movement in this practice area over the last ten years. In some ways we are ahead of the rest of the country.

**Geeta Kapur** – My mentors were proud of me, which meant the world to me. My colleagues have offered their congratulatory remarks. I told one of my clients who was in jail at the time that I was studying for the exam. Later he asked me about the exam and when I told him I was a specialist, he was very happy for me.


Kapur

**Q: How do you think your certification will benefit your clients?**

**Mary Wilson** – Having this certification and recognition among the bar of this practice area should raise awareness and maintain increasing standards for the quality of representation.

**Eric Zogry** – Additionally, having the increased requirements for continuing legal education courses should really ensure that the lawyers who are certified have the most up-to-date knowledge, which will benefit clients tremendously.

**Q: Are there any hot topics in your specialty area right now?**

**Valerie Pearce** – The topic of raising the age of juvenile jurisdiction in North Carolina is a big one right now. Some of the underlying issues that need to be addressed include capacity, brain development, and reform of the NC mental health system.

**John Cox** – I often remind people (juveniles, parents, judges) that any 16 year-old would be diverted to teen court in any other state. The stakes are high in North Carolina, and juveniles desperately need a qualified attorney.

**Geeta Kapur** – The "school to prison pipeline" that disproportionately affects black and Latino children is an epidemic in North Carolina that must be addressed by high quality, zealous representation. Being certified as a criminal law juvenile delinquency specialist directly relates to these two issues.

**Q: How does specialization benefit the public or the profession?**


Boyer

**Julie Boyer** – In the years I have practiced, the profession in general has become very specialized. It is far more difficult to be a general practitioner nowadays. With clients expecting more and becoming more knowledgeable about their legal options, board certification is one way to tell the public that you have committed to that particular practice area. It helps the public decide what attorney they may want to contact for a certain problem. Certification also benefits the profession by recognizing those attorneys who have put in the time and effort to achieve that level of expertise in their respective practice areas.

**John Cox** – It provides a good way to let other lawyers, potential clients, and members of the public know that we exist. Lawyers are slowly but surely taking juvenile cases more seriously. We used to see new lawyers working in juvenile law for a short time and then leaving the practice. Now we are seeing more lawyers choose to stay in this practice area. They are gaining skill and a level of expertise that is critical to strong representation. We are seeing a passionate few encouraging others and raising awareness. This benefits both clients and the profession.

**Q: How do you stay current in your field?**

**Julie Boyer** – I keep up with the ever-changing court opinions differentiating juvenile and adult offenders. Juvenile delinquency matters require vast knowledge of the juvenile code as well as adult criminal law and procedure. Keeping up with changes in both areas is very important.

**Mary Wilson** – I think we all review a lot of case law, talk with the other specialists, and read the listserves, including the one hosted by the NCAJ Juvenile Defense Section.

**John Cox** – We also attend excellent continuing legal education programs including ones that the UNC School of Government and the NC Bar Association sponsor on a regular basis.

**Q: How do you see the future of board certification for lawyers?**

**Geeta Kapur** – I hope that more lawyers who focus on indigent defense will become board certified because it conveys to the poor and disadvantaged client that they also deserve to be represented by specialists of the law despite their social and political position in our society.

**Eric Zogry** – I hope to see certification grow for more specialties in indigent defense, as those who most need quality representation are often the least able to afford it.

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

**Valerie Pearce** – Certification is a public recognition of achievement and expertise in a very specialized area of the law, including juvenile delinquency law.

**John Cox** – Find an area of the law that excites you and focus on it. The practice of law as a whole is moving away from the general practice and toward specialization. It's risky to spread yourself too thin, and highly beneficial to find your passion and pursue it for a better quality of life and for the benefit of the public. ■

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

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# When "Helping" Hurts—A Guide for Law Firms and Families, Part 1

By Robynn Moraites

Most lawyers, regardless of practice area, are accustomed to solving others' problems and providing solutions. Lawyers are helpers by nature. While many of us may try to project a certain image, and despite whatever lawyer-joke-du-jour may be fashionable, most lawyers have big hearts and want to help people. It only makes sense that when a colleague or family member is struggling with alcoholism or addiction in any form, we want to help. But if we do not understand the disease of addiction (to alcohol or any other substance or process), our help can become a hindrance.

Do you remember "Opposite Day" as a child? When I was growing up, once a year all the elementary school kids and our teachers had an Opposite Day. It was great fun. The teacher would dramatically pronounce, "OK class, line up at the door," and we would settle down at our desks. When she said, "Let's settle down," we'd all run to the door and line up to go outside to play. It always made for a fun day trying to figure out the coded messages of our teachers and friends.

Alcoholism is like Opposite Day. It turns everything on its head. Helping an alcoholic by enabling an alcoholic to avoid the consequences of addiction may feel like helping, but it actually hurts him and his chance of recovery. What feels to us like hurting or betrayal, actually helps an alcoholic find recovery. Let's consider some real world examples.

When a non-alcoholic family member is in the middle of a contentious divorce (with lots of fighting at home), we may offer to have the kids stay over for a while and take them to school. When a non-alcoholic colleague has an unexpected family emergency, we may offer to cover for her and handle some work in the immediate short term. If a non-alcoholic friend suddenly became unemployed, we might be willing to lend money to cover living expenses for a few months until he got back on his feet. If a non-alcoholic lawyer recently suffered a personal family loss and is grieving, judges and opposing counsel might go to great lengths to have cases continued. None of these helping impulses is wrong or misplaced. In fact, these are the very types of interactions that build connections and strengthen community, all of which are imperative for maintaining good mental health as a lawyer.

When carrying out these very loving, helpful actions while dealing with an alcoholic or addicted lawyer, however, suddenly "helping" becomes "hurting," although it does not seem like it or feel like it to the one offering the help. Often, when family and friends try to help alcoholic or addicted lawyers, they are actually—albeit unwittingly—making it easier for the lawyer to continue in the progression of the disease. Whatever form of conventional help (as described above) we provide to someone who is engaged in the disease of addiction, that help often boomerangs and begins to hurt the addicted person (and us) because it allows him or her to avoid the consequences of the disease. The specific word for the phenomenon when help has crossed the line and starts to hurt is "enabling" because the help provided enables the disease to continue unimpeded.

The disease of addiction is progressive in nature; it builds up over time and gains momentum. Over any considerable period of time it gets worse, not better. What started out as the one-time lending of money or continuing of cases gradually turns into a pattern of behavior. Our first response is to give the lawyer the benefit of the doubt: "Joe is in a rough patch. Give him some time." But usually a precedent has been set, so if Joe is an alcoholic or addict, he knows you are willing to cover for him in whatever way you have done so in the past. So he continues to come to you—maybe more frequently now— for

help. This help in turn allows him to continue to engage in the destructive behavior of his addiction while simultaneously avoiding the consequences. The person giving help (or even the law firm that continues to look the other way) has unknowingly and unconsciously become an ally of the disease. Wikipedia describes an ally as, "...people, groups, or nations that have joined in an association for mutual benefit or to achieve some common purpose, whether or not explicit agreement has been worked out between them." Ouch. For those of us who only sincerely wanted to help, it can be a devastating blow to learn that we have been assisting the disease of addiction, not the lawyer who suffers from it. If we step out of the helper role, the alcoholic lawyer is forced to face consequences and may find recovery sooner. It can be hard to discover we have been actually hurting the alcoholic lawyer's chance for recovery.

As long as the alcoholic lawyer has enabling devices and people in place, it is easy for him to continue to deny he has a problem, because most of his problems are being solved by those around him. Only when he is forced to face the consequences of his own actions and inactions will it finally begin to sink in how deep his problem has become.

Some of these choices are not easy for the friends or families of alcoholics. For example, if the alcoholic drinks up the money that was supposed to pay the utility bill, he is not the only one who will be living in a dark, cold, or sweltering house. The rest of the family will suffer right along with him. If the alcoholic lawyer is a high-profile, high-functioning lawyer with a reputable practice, the law firm may not want to suffer a revenue loss or reputational harm. (Not to mention, it is just plain hard emotionally for all of us to talk about these things.) So the firm as a whole may ignore a known, growing problem until one day a catastrophe happens in a public forum. Often times the firm is left with no choice but to fire the lawyer. But it does not need to happen this way.[1]

## When "Hurting" Helps

So let's change the verbiage and now discuss what I will call "unconventional help," which, to be frank, will feel to the helper like nothing less than a betrayal of the alcoholic lawyer friend or colleague. Unconventional help is an action (or a refusal to act) we take in response to requests for help from the alcoholic lawyer that does not shield him or her from the consequences of the disease. In almost all cases, only when faced with consequences is an alcoholic or addicted lawyer able to begin to gain some clarity about the nature of the impairment.

The acts that truly help an alcoholic or addict are those actions (or inactions) which point the alcoholic in the direction of recovery. We may refuse to lend money, except to help pay for treatment (always give the money directly to the treatment center, not to the alcoholic or the family of the alcoholic). We may refuse to cover a case load or to have cases continued, unless it is because the lawyer goes to treatment. We may agree to represent the lawyer in a contempt hearing before a judge or a discipline matter before the State Bar on the condition that the lawyer agrees to get help and follows all directives from the EAP, LAP, or treatment center.[2] Saying "no" or setting these conditions can be very difficult for us (the helpers) emotionally, particularly because we can see so clearly what the impaired attorney cannot—the almost sure consequences coming down the pipeline. These actions can be very painful for us to carry out, and our every instinct urges us to try to prevent those consequences and pain that he or she will face as a result. But remember, we're living in Opposite Day when dealing with alcoholism or addiction. Sometimes when we cannot help an alcoholic up, we need to step out of the way as he or she falls down. It is sometimes only in that falling down that an alcoholic or addicted attorney can then begin to wake up to the situation and ask for help.

It may feel to us like we are hurting the alcoholic when we stop helping. In fact, depending upon how close we are to the addicted lawyer, he may actually accuse us of hurting him or of causing the consequences. If we are very tied to the person emotionally, while we understand intellectually we are not causing consequences, it can feel like we are because we are not preventing them from occurring. It is so important to remember that when the alcoholic lawyer is blaming us or others, it is just the disease talking. Because it is hard to remember this and not take the blaming personally, often the person who has been put into the helping role needs support of his own in order to stand his ground. The LAP offers this kind of support.

*The following short story is from one of our volunteers.*

Years ago when I lived in another state and before I enrolled in law school I began dating a man who lived downstairs from me in my quadraplex. He was a very successful computer engineer. One day he was unexpectedly fired from his job. He downplayed the incident and obtained another job of equal stature quickly. Then one day he was very late in meeting me for an event. When he arrived he seemed rushed and preoccupied. He said he had been tied up at work. I had no reason not to believe him. Soon after, he asked me for money so that he could make his car payment. I asked him why he needed it and he told me that he had some old debts he was paying off and had come up short that particular month. I was uneasy, but I lent him the money against my better judgment. Within the next few months things unraveled very quickly for him. I learned that he was a cocaine addict, but he had managed to keep it hidden for years, even from me. I sincerely cared for this man, and we had been in a relationship for a few years at that point. I began attending Al-Anon meetings and open AA meetings to learn about the disease of addiction. In the few months that followed, he had four different jobs, eventually working part-time at a fast food burger place. He parked his car several blocks away from the quadraplex in an attempt to avoid repossession of the vehicle. He had been spending all of his money on cocaine and had not paid rent for many months. An eviction notice was served on him. At this point we were broken up, but I lived right upstairs and had helped him before. He continued to ask me for money to pay for his car and rent. I started saying no and it was incredibly difficult. He began blaming me, telling me that if he was evicted or had his car repossessed it would be my fault. I leaned heavily on my friends in Al-Anon for support during this time. Then the day came that the car was repossessed. Soon after, he was evicted and asked if he could sleep on my couch. I said no. That was one of the hardest days for me, but it turned out to be the day he got sober. He had been attending AA off and on for the prior months, but that night he slept outside of an AA room, leaned up against the door. When the person came to make coffee for the 7 AM meeting, he was let in the AA room, and he spent the day there attending a bunch of meetings. He began a sincere program of recovery that day. He has not had a drink since and is now about 15 years sober. He is married with two children and is back to being a successful computer engineer. There was certainly no guarantee he would get sober if I said no to his request, but it was very clear to me he most assuredly would not have gotten sober had I said yes. I got out of the way and he was able to face his disease and recover. I do not take credit for him getting sober, I take credit for getting out of the way so that he could get sober. ■

If you know an attorney who you suspect may be an alcoholic or addicted, give the LAP a call. We can help guide and support you as you navigate what kind of help to offer. ■

*The North Carolina Lawyer Assistance Program is a confidential program of assistance for all North Carolina lawyers, judges, and law students, which helps address problems of stress, depression, alcoholism, addiction, or other problems that may lead to impairing a lawyer's ability to practice. If you would like more information, go to nclap.org or call: Cathy Killian (for Charlotte and areas west) at 704-892-5699, Towanda Garner (in the Piedmont area) at 919-719-9290, or Ed Ward (for Raleigh and down east) at 919-828-6425.*

### Endnotes

1. Please tune in next quarter when we will be interviewing a managing partner who orchestrated an intervention some years ago with a leading lawyer in the firm.
2. Requiring treatment as a condition of representation is a practice known as therapeutic jurisprudence. There is a growing body of academic research in this area with guidance for lawyers, particularly in criminal practice. *See* David Wexler's work.

# *New Look, New Logo, Same Program*

This quarter marks the first official publication use of our new logo for the NC Lawyer Assistance Program ("LAP"). We will continue to roll out the new brand, logo, and look via a new website and updated collateral and print materials. I have now been the director of the LAP for a year and a half. After getting to know the program from the inside out, meeting with our dedicated volunteers across the state, and working with the LAP Board and staff, we have determined that due to the size of our program and its increasing diversity, we need to streamline and consolidate some aspects of our program.

### LAP History at a Glance

The Positive Action for Lawyers with Substance Abuse Subcommittee ("PALS") was formed in 1979 as a purely volunteer-run organization, formed to help alcoholic lawyers. PALS has been extremely successful. Then in 1998, several lawyers committed suicide. These suicides were not related to alcoholism or substance abuse. In response, the leadership of the Bar recognized the need to broaden PALS' mission to include issues of depression, anxiety, burnout, and other mental health issues. By that time, however, the PALS "brand" was totally associated with alcoholism and substance abuse. So an altogether new program was created to address depression, anxiety, and mental health issues: the FRIENDS program. The FRIENDS program developed its own logo and its own brand. The FRIENDS program was launched in 1999-2000 to widespread acceptance and success.

### Reorganization – Same Services and Same Program

The LAP is experiencing quite a bit of brand confusion. Lawyers do not realize PALS and FRIENDS are programs of the LAP. Because of this brand confusion, current and expected trends in our client base, and the need to offer targeted programs based on the broader role we now play, the LAP Board and staff are in the process of reorganizing and rebranding the LAP as a single program with a single name to address all issues that may be impairing to lawyers. ***The LAP mission, approach, and services will remain the same.*** Moreover, our active volunteer base is and will continue to be comprised of lawyers helping other lawyers overcome whatever impairing issues and challenges they face.

### New Logo and Symbolism

The new logo is based on Adolph A. Weinman's image for the "Walking Liberty" half dollar issued by the United States Mint from 1916 to 1947. The image has been modified, however, to remove her Depression-era hat, the drape of the flag, and her flowers. Those elements have been replaced with a crown of liberty and scales of justice, creating the more-familiar and widely-accepted image of the Lady of Justice. She strides towards the sun, with her hand extended. For lawyers dealing with depression, anxiety, alcoholism, or other impairments, the journey of recovery is one from despair to hope and is often described by many lawyers as moving out of the darkness into the light. Her extended hand represents the work that the LAP and its volunteers have done for four decades: reaching out a helping hand to those who need it. And finally, she is not blindfolded. Instead, she sees those to whom she reaches while she also looks to the horizon and the path to be taken. It is a dynamic image that we hope conveys the compassion and strength that the Lawyer Assistance Program has come to be known for over its many years of assisting lawyers. ■

Have you ever called in sick for the alcoholic because he or she was too hung over to go to work or school?

Do you ever make excuses for the alcoholic's drinking or behavior?

Have you ever lied to ANYONE (friends, family, neighbors, co-workers, bosses) to cover up for the alcoholic?

Have you bailed the alcoholic out of jail or paid his or her legal fees?

Have you accepted part of the blame for the alcoholic's drinking, behavior, or consequences?

Do you avoid talking about the alcoholic's drinking with him or her out of fear of the response?

Have you paid bills that the alcoholic was supposed to have paid?

Have you loaned the alcoholic money?

Have you tried drinking with the alcoholic in hopes of strengthening the relationship?

Have you given the alcoholic "one more chance" and then another and another?

Have you threatened to leave if the alcoholic didn't stop drinking and then did not leave?

Have you finished a job or project that the alcoholic failed to complete himself?

If you answered "Yes" to any of these questions you may have enabled the alcoholic or addict to avoid the consequences of his or her own actions.

# Lawyers Receive Professional Discipline

## Disbarments

**James A. Crouch** of Raleigh surrendered his law license and was disbarred by the Wake County Superior Court. Crouch pled guilty to one felony count of altering documents, two felony counts of obstruction of justice, and one felony count of conspiracy to obstruct justice.

**Sam H. Edwards** of Shallotte surrendered his law license and was disbarred by the DHC. Edwards acknowledged that he misappropriated over $300,000 from an estate for which he was executor. He also did not file income tax returns and did not pay his tax liability for five years.

**Hugh Wolfe Johnston** of Gastonia was disbarred by the Lincoln County Superior Court. The court found that Johnston, among other things, filed frivolous lawsuits and appeals falsely accusing judges and other lawyers of committing felonies, without his ostensible clients' knowledge.

**Randolph E. Shelton Jr.** of Southern Pines surrendered his law license and was disbarred by the council at its January meeting. Shelton admitted that he misappropriated entrusted funds from an estate.

**C. Gary Triggs** of Hildebran was disbarred by the DHC. He neglected multiple clients and engaged in dishonest conduct.

## Suspensions & Stayed Suspensions

**Shannon Lovins** of Asheville was suspended by the DHC for five years. Lovins pled guilty to criminal offenses involving substance abuse. She also violated rules of trust account management, including failing to reconcile her trust account, commingling funds by leaving attorney fees in the account, and overdisbursing entrusted funds. After serving two years active suspension, Lovins may apply to have the remainder of the suspension stayed upon proof of compliance with extensive conditions.

The chair of the Grievance Committee entered an order of reciprocal discipline suspending **James I. Durodola** for two months. The Massachusetts Supreme Court suspended Durodola because he falsely certified that he was covered by professional liability insurance, which a lawyer must maintain in that state to be eligible for appointment to represent indigent criminal defendants.

## Show Cause Hearings

In 2009 the DHC suspended **Mark L. Bibbs** of Wilson for one year. Bibbs was convicted of DWI and driving while license revoked and was profane and abusive to courthouse personnel. The suspension was stayed for three years. In November 2012 the DHC concluded that Bibbs did not comply with the conditions of the stay that required him to abstain from using alcohol and to contact his monitoring program daily. The DHC lifted the stay and activated three months of the one-year suspension. After serving three months, Bibbs may apply for a stay of the remainder of the suspension upon proof of compliance with extensive conditions.

In 2010 the DHC suspended **Sharyl Mason-Watson** of Charlotte for two years. Mason-Watson did not disburse entrusted funds timely, neglected and did not communicate with clients, did not respond to the Bar, and did not maintain required trust account records. The suspension was stayed for three years. In November 2012 the DHC concluded that Mason-Watson did not comply with the conditions of the stay, lifted the stay, and activated the two-year suspension.

In 2010 the DHC suspended **Diedra Lynn Whitted** of Goldsboro for three years. Whitted allowed her disbarred father to accept checks made payable to him for legal services to be provided by her, did not supervise the activities of her father working as a paralegal in her law office, and did not act diligently and competently in representing her clients. The suspension was stayed for three years. In November 2012 the DHC concluded that Whitted did not comply with the conditions of the stay, lifted the stay, activated the suspension, and stayed the suspension for an additional three years on extensive conditions.

## Reprimands

**F. Douglas Banks** of Charlotte was reprimanded by the Grievance Committee. Banks represented an insurance company in a workers' compensation case. In the course of the representation he gave legal advice to an unrepresented party and allowed the unrepresented party to speak with third parties without first retaining counsel.

**Joe C. Jauregui** of Charlotte was reprimanded by the Grievance Committee for assisting a real estate settlement company in the unauthorized practice of law.

**Kristen H. Ruth** of Raleigh, previously a district court judge, was reprimanded by the Wake County Superior Court. Ruth, who resigned amid allegations that she signed fraudulent orders submitted by James Crouch, pled guilty to one misdemeanor count of failure to discharge her duty. The court found that Ruth did not read the orders and was unaware they were fraudulent.

## Transfers to Disability Inactive Status

**Alexander H. Veazey III** of Hendersonville was transferred to disability inactive status by the secretary.

## Reinstatements

In 2005 **Matthew A. Bromund**, formerly of Greensboro and now in California, was disbarred for misappropriating fees belonging to his law firm employer and fabricating evidence to conceal it. In 2012 the DHC entered an order recommending that the council reinstate Bromund's law license. At the January 25 meeting, the council reinstated Bromund's law license.

In 2009 **Johnny S. Gaskins** of Raleigh was convicted in federal court of seven counts of structuring financial transactions to evade federal reporting requirements. In December 2010 the DHC suspended Gaskins for the length of his supervised probation but, at minimum, two years. His supervised probation ended in September 2012. The secretary entered an order reinstating Gaskins to active practice effective January 2, 2013.

In 2012 **Michael D. Lea** of Thomasville

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# Grants Steady for 2013 Thanks to Cy Pres Funds

### Income

All IOLTA income earned in 2012 will not be received and entered until the end of January. However, we can report that the income from IOLTA accounts continues to decrease as many banks are recertifying their comparability rates at lower levels. Participant income declined by 16% in the first three quarters of the year. However, our total income will surpass last year's total (of $2.4 million) and will be over $3 million for the first time since 2008. This is due to $1.2 million received from residual funds from a class action suit in Washington state in which the court awarded funds to all IOLTA programs across the country.

We are continuing to work with the NC Equal Access to Justice Commission (EAJC) to educate lawyers and judges about the North Carolina statute that sets out a procedure for distributing class action residuals equally to the Indigent Person's Attorney Fund and to the North Carolina State Bar for the provision of civil legal services for indigents. A manual on *Cy Pres and Other Court Awards* published by the EAJC is available on the NC Equal Access to Justice website ncequalaccesstojustice.com, and the NC IOLTA website, nciolta.org.

### Grants

Beginning with the 2010 grants, we have limited our grant-making to a core group of (mainly) legal aid providers. Even with that restriction and using almost $2.4 million in reserve funds over three years, grants have dramatically decreased (by over 40%), and our reserve fund was depleted to under $450,000. Receiving the cy pres funds, however, meant that we were able to keep 2013 grants steady at the 2012 level of $2.3 million without using any additional funds from reserve. And, in fact, we should be able to replenish the reserve with close to a half million dollars to assist with grants in 2014.

### State Funds

In addition to its own funds, NC IOLTA administers the state funding for legal aid on behalf of the NC State Bar. Total state funding distributed for 2011-12 was $3.8 million, down from over $5 million administered for 2010-11. The decrease was the result of reductions to both the appropriated funds and the filing fee allocation for legal aid.

The Equal Access to Justice Commission, the NCBA, and the legal aid programs continue to work to sustain and improve the funding for legal aid. ■

# *NC IOLTA Grantee Spotlight*

### Medical-Legal Partnerships Thrive in North Carolina

In 2006, Pisgah Legal Services (PLS) in Asheville proposed to NC IOLTA the initiation of an innovative new program—a medical-legal partnership (MLP) to ensure that patients could meet basic needs that would improve their health. When patients' housing, educational, safety, and financial needs are met, medical interventions can have optimal impact, and the need for ongoing and crisis-driven medical care may be decreased. Such medical-legal collaborations were being implemented in many urban communities around the country, and PLS and Mission Hospital were eager to demonstrate the impact of this model in rural western North Carolina. Today, this partnership (the Health Education and Legal Support Project or HEALS) is thriving, and Legal Aid of NC (LANC), our statewide legal aid program, is expanding the model throughout the state.

Now endorsed by both the American Medical Association and the American Bar Association, the first such collaboration (the Family Advocacy Program at the Boston Medical Center) was founded by Barry Zuckerman, MD, chair of pediatrics at the Boston University School of Medicine. He said he founded the program after becoming frustrated with continuously having to send sick children home to apartments that were in substandard condition, often unheated and with unhealthy levels of mold. He recognized that an attorney could help patients navigate complex legal problems so patients could avoid situations that lead to medical problems, such as a lack of food or heat.

"We can treat the health problem with medication, but the point is, the cause of it frequently is a legal one, and we're going right to the root cause," said Dr. Zuckerman.

In many situations, an attorney is uniquely qualified to assist patients to:

- escape an abusive relationship;
- defend their rights with a disreputable landlord;
- preserve their housing and avoid homelessness;
- avoid predatory creditors; or
- navigate the bureaucracy to secure Medicaid or disability benefits.

### A True Collaboration

Through medical-legal partnerships, health care professionals and attorneys work together to form a safety network for their most vulnerable patients/clients. Legal experts are on site at hospitals and medical clinics to help physicians, nurses, social workers, discharge planners, and patients tackle the complex socio-economic issues that impact health. MLPs train healthcare staff to screen for potential legal issues that have a negative impact on health—such as substandard housing conditions that lead to chronic asthma—and try to intervene before a legal emergency arises. After a potential

legal problem has been identified, the healthcare provider refers the patient to the MLP lawyer just as a patient would be referred to a cardiologist for a heart problem.

Kristoffer B. Shepard, senior associate general counsel at Carolinas HealthCare System and member of the LANC Board of Directors sees this collaboration from both sides. "One of our medical providers, Dr. Daniel R. Neuspiel, has been instrumental in helping us understand the critical role that lawyers can play in improving our patients' health. Sometimes we reach the limits of what we can do clinically for someone whose health is being affected by things that are outside of the traditional role of medicine."

Health care providers are more likely to screen patients for such problems when they know that they can refer patients for services to address those concerns. Lawyers can often get better results for a client when a medical professional is on the team. By collaborating with lawyers, medical professionals are gratified to see that they can often improve the health of their shared patients/clients.

## Volunteer Lawyers Increase the Benefits

Charles R. Holton has seen the value of the MLP first-hand. A partner with Womble Carlyle Sandridge & Rice, Holton currently serves as vice-chair and chair-elect of the LANC Board of Directors. And, in October 2012, Mr. Holton was one of five North Carolina attorneys honored by the national Legal Services Corporation (LSC) Board of Directors for volunteer work with LANC.

"Legal services attorneys have overwhelming case loads. Private attorneys, particularly litigators, can play an important role in assisting legal services attorneys to bring these claims forward and litigating them in court, if necessary," says Holton. "I've had the opportunity to work with MLP attorneys on several matters that have evolved to litigation, including mold and insect infestation problems in rental housing units. Without a doubt, these cases would not have come to light without the involvement of members of the medical community who have observed the connections between their patients' health and the environmental conditions where they live."

And, those benefits can flow to the lawyers as well, acknowledges Holton. "These cases also present excellent opportunities for our newer lawyers to gain litigation skills and in-court experience, which they may not get any other way."

## Benefits to the Community Extend Beyond the Individual Clients Involved

Holton feels particularly pleased when results can benefit a larger number of people. "As it turns out, many of these cases can be satisfactorily resolved not only to help the individual client, but also to help other residents of the same dwelling units or apartment communities. This opportunity for impact work represents a terrific investment for the broader legal community."

Kris Shepard sums it up nicely, "In a time of limited resources, LANC has to make choices about how to allocate our resources. If LANC can serve someone in a way that has a ripple effect on his or her life in a way that is broader than what health care providers or lawyers can do alone, that's a bigger win." ■

**Medical-Legal Partnership Programs in NC**
**(As of January 2013)**

MLPs operate in a number of locations throughout the state as a variety of legal aid programs partner with a wide range of hospitals and clinics. Each MLP is designed to address the particular needs and capacity of the local partners. However, they all share common components including:

- Basic legal training for health care providers to help them screen and refer patients who may benefit from legal assistance;
- Regular presence of legal staff in clinic settings to conduct outreach to staff and to allow for patients to be screened for eligibility for legal assistance;
- Formal referral mechanisms between medical providers and legal partners; and,
- Direct legal assistance to patients/clients.

| Location | Medical Partner(s) | Legal Partner(s) |
|---|---|---|
| Statewide | • North Carolina's Children's Hospital | • Legal Aid of North Carolina, Inc. (Statewide)<br>• Pro Bono Program, University of North Carolina School of Law |
| Asheville, NC | • Mission Hospitals<br>• Mountain Area Health Education Center | • Pisgah Legal Services |
| Charlotte, NC | • Carolinas HealthCare System | • Legal Aid of North Carolina, Inc. (Charlotte office)<br>• Legal Services of Southern Piedmont, Inc. |
| Durham, NC | • Duke Primary Care for Children<br>• Pediatrics Department, Lincoln Community Health Center<br>• Pediatric clinics at Duke University Medical Center | • Legal Aid of North Carolina, Inc. (Durham office)<br>• Children's Law Clinic, Duke University School of Law |
| Greensboro, NC | • Triad Adult and Pediatric Medicine<br>o HealthServe Community Health Clinic<br>o Guilford Child Health | • Legal Aid of North Carolina, Inc. (Greensboro office) |
| Prospect Hill, NC | • Piedmont Health Services Prospect Hill Community Health Center | • Legal Aid of North Carolina, Inc. (Durham office) |
| Winston-Salem, NC | • Pediatrics Department, Downtown Health Plus, North Carolina Baptist Hospital | • Legal Aid of North Carolina, Inc. (Winston-Salem office) |
| Winston-Salem, NC | • Wake Forest University Baptist Medical Center and School of Medicine | • Elder Law Clinic, Wake Forest University School of Law |

# "Who You Gonna' Call?" New Admittee's FAQs

By Suzanne Lever

Welcome to the North Carolina State Bar! If you are reading this you are most likely a newly admitted North Carolina lawyer. You no doubt have (or will have) countless questions. This is especially true if you are one of the many brave new lawyers hanging out their own shingles. The good news is that the North Carolina State Bar is here to help.

The North Carolina State Bar ("Bar") is the state agency responsible for regulating the practice of law in North Carolina. The Bar's website, along with the North Carolina State Bar *Journal*, is a place to:

- learn more about the regulation of the legal profession in North Carolina;
- review proposed ethics opinions and proposed amendments to the rules and regulations of the Bar;
- research the existing rules, regulations and ethics opinions of the Bar; and
- catch up on the latest news and information from the Bar.

Not sure who to contact for the information you need? Check out our Bar Staff Contacts page: ncbar.gov/contacts/c_staff.asp.

To get you started, I have compiled a Q & A of the questions most frequently asked by new lawyers seeking advice from the Bar.

## Membership

**Q. What is the difference between the Bar (NCSB) and the North Carolina Bar Association (NCBA)?**

The Bar is the regulatory body for the legal profession in the state, and membership is mandatory. Once you are licensed by the NC Board of Law Examiners, you automatically become a member of the Bar. To be entitled to practice North Carolina law, you must be an active member of the Bar. Also, you must take the oath of office and be sworn in as a lawyer before you may begin practicing law.

The NCBA is a voluntary association serving the needs of the legal profession with member services such as continuing legal education, legislative lobbying, practice sections, public service activities, and much more. The NCBA also has a foundation, which has the primary objective of funding worthy projects or activities of the association and the foundation, as well as funding other legally related needs in the community.

**Q: What am I required to do to remain an active member of the Bar?**

Pay the annual membership fees, fulfill the CLE and IOLTA requirements, and comply with the Rules of Professional Conduct. If you are a North Carolina resident, you must also maintain membership in the local district bar where you work or reside.

**Q: How much are the mandatory annual membership fees?**

For 2013 the annual fees are $375. This includes the membership dues ($300), the Client Security Fund assessment ($25), and the Judicial Surcharge ($50).

**Q: When are the mandatory annual membership fees due?**

An invoice for the subsequent calendar year is emailed to every active member of the Bar on or before December 1 of each year, followed by additional reminders. The completed invoice and payment are due January 1, but are not considered late if received/postmarked on or before June 30.

**Q: Once I am licensed by the NC Board of Law Examiners when will I become a member of the Bar and owe membership fees for the first time?**

Your membership with the Bar is automatic upon licensure. The membership fees are waived for the calendar year in which you are admitted by exam. You will owe membership fees for the calendar year following the year of your admission to the Bar and continuously on an annual basis as long as your membership status is "active."

**Q: Am I required to be a member of a local district bar?**

Yes. Every active member of the State Bar who resides in North Carolina must be a member of the judicial district bar where he/she resides or works. The Bar automatically assigns you to a local district bar based on your address on record with the Bar unless you request a different district in a letter or email to the membership department. You can contact Beth McLamb at bmclamb@ncbar.gov or Kelly Beck at kbeck@ncbar.gov for assistance.

## CLE Hours & Requirements

**Q. How many CLE hours do I have to take each calendar year?**

An active member of the Bar who does not qualify for an exemption must take 12 hours of approved CLE during each calendar year. Of the 12 hours, at least two must be devoted to the area of professional responsibility (ethics) or professionalism. At least once every three calendar years you must complete one hour on substance abuse awareness or debilitating mental conditions.

Lawyers licensed before July 1 are subject to all CLE requirements for that calendar year. Lawyers licensed on or after July 1 of any year do not have CLE hourly requirements until the next calendar year.

The CLE rules also require every active lawyer to file an annual written report of his/her CLE activity for the preceding year. To facilitate that filing, the CLE office mails each lawyer an Annual Report Form in January. The report includes a transcript of all the CLE activity for the previous calendar year reported to the Bar by CLE sponsors. It is the lawyer's responsibility to review that transcript, make any necessary changes, verify the CLE activity, pay any outstanding attendee fees, and return the form to the Bar by the last day of February. You may contact Debra Holland at dholland@ncbar.gov for more information.

## Professionalism for New Admittees

**Q. Are there special CLE requirements for newly licensed lawyers?**

Yes. If you are admitted on or after January 1, 2011, you must complete the 12-hour Professionalism for New Admittees program. To receive credit for the program, you must also complete a written evaluation provided by the sponsor.

**Q. What is the content of the Professionalism for New Admittees program?**

The program consists of 12 hours of training in subjects designated by the NCSB, including professional responsibility, professionalism, and law office management.

**Q. Do the hours for the Professionalism for New Admittees program apply to the annual requirements?**

Yes. Credit for the program is applied to the annual mandatory 12-hour requirement.

**Q. If I am newly admitted to the North Carolina State Bar but am licensed in another state, do I have to complete the Professionalism for New Admittees program?**

A lawyer who is licensed by a United States jurisdiction other than North Carolina for five or more years prior to admission to practice in North Carolina is exempt from the Professionalism for New Admittees program requirement and must notify the board of the exemption in the first CLE annual report form filed with the Bar.

### Trust Accounts

For detailed trust accounting guidelines, you should refer to the State Bar's *Trust Account Handbook*: ncbar.com/PDFs/Trust%20Account%20Handbook.pdf.

Members of the State Bar staff are also available to answer questions about maintaining a trust account. Contact Peter Bolac, trust accounting compliance counsel (pbolac@ncbar.gov), or Tim Batchelor, staff auditor (tbatchelor@ncbar.gov), for assistance.

### IOLTA (Interest on Lawyers' Trust Accounts)

**Q: What is IOLTA?**

NC IOLTA works with lawyers and banks across the state to collect net interest income generated from lawyers' general, pooled trust accounts for the purpose of funding grants to providers of civil legal services for the indigent and to programs that further the administration of justice.

**Q: Which of my law practice accounts must be established and maintained as IOLTA accounts?**

All general client trust accounts must be established and maintained as interest-bearing IOLTA accounts, interest from which is remitted to NC IOLTA at the State Bar. General client trust accounts are those accounts that hold nominal and short-term deposits of client funds.

**Q: How do I comply with the NC State Bar rules regarding NC IOLTA?**

All active members of the North Carolina State Bar who maintain general client trust accounts in North Carolina must ensure that all of their general client trust accounts are established as interest-bearing IOLTA accounts. Lawyers must certify annually (when paying their NC State Bar dues—either on the dues notice form or electronically) that all general client trust accounts maintained by the lawyer/law firm are IOLTA accounts, or that the lawyer is exempt from the requirement as no general trust accounts are maintained by the lawyer/law firm.

Lawyers must also inform NC IOLTA when opening or closing IOLTA accounts. The NC IOLTA Status Update Form should be used for this purpose. It should also be used to report employment or address changes. A copy of this form can be found on the IOLTA website, nciolta.gov.

As of July 1, 2010, lawyers may hold IOLTA accounts only at "eligible" banks that will agree to pay IOLTA accounts the highest rate available to that bank's other customers when the IOLTA accounts meet the same minimum balance or other account qualifications. NC IOLTA maintains a list of eligible banks on its website. You may also contact iolta@ncbar.gov for more information.

### Fee Dispute Resolution

**Q: When is a lawyer required to participate in the State Bar's fee dispute resolution program?**

Rule 1.5(f) of the Rules of Professional Conduct requires a lawyer with a dispute with a client over a legal fee to notify the client of the North Carolina State Bar's program of fee dispute resolution at least 30 days prior to initiating a legal proceeding to collect the disputed fee.

**Q: When is a legal fee in "dispute?"**

A fee is in dispute if the client questions or objects to the amount billed. Also, if a client fails to pay the bill, it is assumed that the fee is disputed unless the client affirms the obligation in writing or verbally. If a client pays by a check that is subsequently returned for insufficient funds, it is assumed that the client has affirmed the obligation and the lawyer is not required to notify the client of the fee dispute resolution program.

**Q: What are the notification requirements to a client relative to the fee dispute resolution program prior to initiating suit to collect a legal fee?**

The client must be notified of the right to participate in the fee dispute resolution program at least 30 days before filing suit against the client to collect the fee. *See* Rule 1.5(f) of the Rules of Professional Conduct. A sample notice letter may be found on the forms page of the State Bar's website. You may also contact Luella Crane at lcrane@ncbar.gov for assistance.

Stay tuned. This is the first in a series of articles that will address questions frequently asked by lawyers seeking advice from the Bar. ■

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

## Disciplinary Department (cont.)

was suspended for six months. He neglected and did not communicate with his client. He also signed his client's name to an affidavit, notarized the affidavit, and submitted it to the court. The secretary entered an order reinstating Lea to active practice effective January 4, 2013.

In 2008 **Tamla T. Scott** of Washington, DC, was suspended for three years. She neglected and did not communicate with clients, did not refund unearned fees, and did not respond to the State Bar. Although Scott was eligible to obtain a stay of the suspension after one year, she did not petition for reinstatement until the entire three-year period had lapsed. The secretary entered an order reinstating Scott to active practice effective December 10, 2012.

### Notices 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 May 1, 2013 (60 days from publication).

### In the Matter of Ralph Bryant Jr.

Notice is hereby given that Ralph Bryant Jr. intends to file a petition for reinstatement before the Disciplinary Hearing Commission of the North Carolina State Bar. Bryant surrendered his license in November 2007 as a result of allegations of misappropriation of client funds held in an IOLTA account. ■

# Make the Most of Your CPE

By Kelly Farrow

Certified paralegals are required to take six hours of approved continuing paralegal education (CPE) each year to maintain certification. Of those six hours, at least one hour must be designated as a legal ethics (professionalism, mental health, substance abuse, or professional responsibility) course. I get a lot of questions about how to find approved CPE courses, especially affordable ones, so I've put together some information that may help.

## Read the Rules

The rules governing CPE can be found in the Plan for Certification of Paralegals, 27 NCAC 1G, Section .0200. First and foremost, a CPE course should relate to the law. Pursuant to the rules, a CPE course must have "significant intellectual or practical content and the primary objective of increasing the participant's professional competence and proficiency as a paralegal" (Rule .0202(a)), and must deal with "matters directly related to the practice of law, professional responsibility, professionalism, or ethical obligations of paralegals" (Rule .0202(b)). This means that courses about mass-market software products, such as Powerpoint or Excel, probably won't be approved, nor will courses related to other non-law topics, such as increasing productivity or managing office relationships.

Other aspects of CPE approval aren't quite so simple. Did you know that, pursuant to Rule .0202(c), a minimum of three certified paralegals must register to attend the presentation of a replayed prerecorded program? This means that simply ordering a DVD of a recorded live program and watching it at home by yourself will not earn you CPE credit. Additionally, note that in-house CPE courses don't qualify either (Rule .0202(h)) unless individuals from outside the law firm are invited.

## Approved Courses

Paralegals must take courses that are accredited (approved) by the NC State Bar as CPE for paralegals or continuing legal education (CLE) for lawyers. Course approval is critical if you want the course to satisfy your CPE requirements. Usually, the sponsor of a CLE or CPE program applies for accreditation of a particular course. However, not all sponsors do this automatically, particularly if the sponsor is outside of North Carolina. What if your employer wants to send you to that special conference in San Diego? No need to panic! If a course meets the requirements for approval, a certified paralegal can apply to have a course accredited specifically for herself or himself by completing and returning the "Paralegal's Request for Approval of a CPE Activity" form found on the Forms and Documents page of our website, nccertifiedparalegal.gov. If you want advanced approval of a course, try to submit the form at least 45 days before presentation of the course. This way you'll know if the course has been approved before you attend. You can apply for approval after attending the course as well, but since it can sometimes take several weeks to receive approval, applying prior to the course is the best way to go. If you want to apply after the course, make sure you do so shortly after you take the course, not the day before your annual renewal deadline!

## How to Find Approved Courses

As mentioned previously, the sponsor of a program will usually apply for CPE or CLE accreditation. Once a course is approved as CPE, it is listed on the CPE page of our website (nccertifiedparalegal.gov/cpe). Courses approved for CLE credits are listed on the CLE website, www.nccle.org. This website is a great place to start your search for continuing education courses, as it has some great searching features. You can enter a keyword, search by course type (online, live, etc.), look for courses from a particular sponsor, and even search for courses that have at least one hour of ethics.

When choosing a CPE or CLE course, always check the accredited hours! Check with the sponsor, or search for the credit information on the websites noted above. If possible, take courses that deal with the area of law in which you work. This will help you stay current on changes in the law, and learn about new policies and procedures. Perhaps you will get a few helpful tips from others who work in your field as well! If you can't find any courses related to your field of law, try to take something that interests you. It can be a great introduction to a new field, and may provide networking opportunities as well.

## Paralegal Organizations

Local and state paralegal organizations can be great places to find CPE courses, particularly less expensive ones. A lot of the local paralegal associations have monthly meetings, and most of those incorporate some CPE. Just make sure that any CPE they provide has been approved! And, of course, joining a paralegal association is a great way to meet other paralegals and get involved in your paralegal community.

Have you heard about the new webcast series offered by the North Carolina Bar Association Paralegal Division? Made possible in part by a grant from the NC State Bar Board of Paralegal Certification, these monthly, one-hour CPE webcasts are free to members of the Paralegal Division, and are only $25 for non-members. The topic varies each month, and past topics have included ethics, family law, title searching, and discovery. Other sponsors will occasionally present reduced-cost or free CPE courses, so allow time before your recertification date to do some research.

Making the most of your CPE requirements will ensure that you continue to be a great asset to your firm and the paralegal community. ■

*Kelly Farrow is the assistant director of the Paralegal Certification Program.*

# Top Tips for Trust Accounting

To honor the recently deceased author of the Dear Abby column, this quarter's Top Tips comes to you in the form of a reader mailbag. Here are some frequently asked questions and responses:

**Q: I anticipate receiving settlement funds on behalf of a client and holding them for an appreciable period, such that I am anticipating establishing a dedicated trust account. The funds held may exceed the applicable FDIC insurance limit. Is there any guidance as to whether I am required to divide the funds among multiple insured banks in order to stay within the insurance limit at each institution?**

You are not required by State Bar rules to divide the funds among multiple banks, but you are acting as a fiduciary when holding client funds and should act accordingly. It would be proper to advise the client of the current FDIC limits (currently $250,000 per client, per bank). Remember, with written consent of the client, a dedicated trust account may be maintained at a bank that does not have offices in NC or at a financial institution other than a bank in or outside of NC.

*Note: On December 31, 2012, unlimited FDIC coverage of both non-interest bearing and IOLTA accounts ended. FDIC coverage of IOLTA accounts, therefore, goes back to the type of FDIC coverage that was previously in place, i.e., the funds of each client in an IOLTA account will be covered to the FDIC limit, which is currently $250,000 (assuming no other client funds in the bank and the lawyer is correctly handling the account as a fiduciary account).*

**Q: Do I have to use business-size checks for my trust account, or are personal-size okay?**

You must use business-size checks, which are greater than six inches long. They typically come in book form. The checks must also be labeled as trust account checks.

**Q: What does this mean: "Auxiliary On-Us field in the MICR line is needed"?**

On your trust account checks, there must be a number to the left of the routing and account numbers in the MICR line that corresponds with the check number on the top right of the check. This "Auxiliary On-Us" number keeps the check from being converted to an ACH (automated clearinghouse) transaction.

**Q: Does the Bar still require paper receipts of all transactions, or are photo images from online banking statements enough?**

You must either have paper copies of all required records or have access to the required records for a period of seven years. If you are randomly audited, you will be asked to show you have access to these records, and will be required to print at least one year's worth of the records for review. There are advantages to having paper copies, however, especially when reviewing cancelled checks.

**Q: After earning funds held in trust, I write a check out of my trust account to my operating account in the amount of the earned fee. My bank offers a website feature that allows me to simply transfer funds between accounts. Am I permitted to electronically transfer funds from the IOLTA account to the operating account, instead of writing a check?**

You are permitted to use online banking to transfer funds from one account to another provided that you can properly identify the funds to the particular client in the record of the transfer. Most banks have a "memo box" or text box that allows you to write a memo to describe the transfer. If your bank has that box, you should type in the name of the client ledger from which you are taking the earned fee. If the bank does not have this option, you cannot use the online transfer because there is no way of showing from which client's funds you are taking the earned fees. *See* 2011 FEO 7.

**Q: I recently joined a new firm and am in the process of closing my practice. A few of my old clients are coming with me to the new firm. Those clients signed letters of intent, new contracts, etc. and now we need to move their money from my old firm's trust account to the trust account at my new firm. It is my understanding that I need to write a check for the amount the client currently has in trust to my new firm's trust account. Is this the correct procedure?**

When you transfer client funds from one trust account to another you must attribute the funds for each client on the transfer. For instance, if you transferred the funds of three clients totaling $1,000, you may write one check for $1,000, but you must attribute the amount transferred for each client in the memo line (Smith - $250, Jones - $300, Adams - $450). The attribution must be on the bank record.

**Q: Would it be permissible for me to open a second trust account for only my contingent fee cases, and leave all my hourly billing funds in the first, existing account?**

As long as you register your new trust account with the State Bar/IOLTA, file the NSF directive with your bank, and follow all of the trust accounting rules, there is no prohibition against having more than one general trust account. The necessary forms can be found at ncbar.gov/resources/forms.asp.

**Q: Is there a maximum amount of time that client funds may be held in trust? If so, what's the time limit?**

There is no "maximum" time that funds may be held in a trust account. However, there are certain situations that require that funds be taken out of a trust account:

1) If you are no longer performing a legal service for a client, the funds should be returned to the client. If you can no longer reach the client, or if the client has abandoned the funds, they must be escheated to the state after five years.

2) If you are holding funds for a significant period of time, they may need to be placed in a dedicated trust account so the interest income will benefit the client. Comment [3] to Rule 1.15-3 explains the factors to consider when making that determination.

Remember that at least every 12 months you must provide an accounting to a client that discloses the amount of money currently held in your trust account on the client's behalf. ■

**NOTE: Judicial Districts randomly selected for audit for the first quarter of 2013 are District 17A (Rockingham County) and District 21 (Forsyth County).**

# Committee Grapples with Two Ethical Dilemmas in Criminal Law Practice

## Council Actions

At its meeting on January 25, 2013, the State Bar Council adopted the ethics opinions summarized below:

**2012 Formal Ethics Opinion 2**

***Lawyer-Mediator's Preparation of Contract for* Pro Se *Parties to Mediation***

Opinion rules that a lawyer-mediator may not draft a business contract for *pro se* parties to mediation.

**2012 Formal Ethics Opinion 4**

***Screening Lateral Hire Who Formerly Represented Adverse Organization***

Opinion rules that a lawyer who represented an organization while employed with another firm must be screened from participation in any matter, or any matter substantially related thereto, in which she previously represented the organization, and from any matter against the organization if she acquired confidential information of the organization that is relevant to the matter but has not become generally known.

**2012 Formal Ethics Opinion 9**

***Identifying the Roles and Responsibilities of a Lawyer Appointed to Represent a Child or the Child's Best Interests in a Contested Custody or Visitation Case***

Opinion holds that a lawyer asked to represent a child in a contested custody or visitation case should decline the appointment unless the order of appointment identifies the lawyer's role and specifies the responsibilities of the lawyer.

**2012 Formal Ethics Opinion 10**

***Participation as a "Network" Lawyer for Company Providing Litigation or Administrative Support Services***

Opinion rules a lawyer may not participate as a network lawyer for a company providing litigation or administrative support services for clients with a particular legal/business problem unless certain conditions are satisfied.

**2012 Formal Ethics Opinion 12**

***Agreement for Division of Fees Entered Upon Lawyer's Departure from Firm***

Opinion rules that a provision in an agreement for a departing lawyer to pay his former firm a percentage of any legal fee subsequently recovered from the continued representation of a contingent fee client by the departing lawyer does not violate Rule 5.6 if the agreement was negotiated by the departing lawyer and the firm after the departing lawyer announced his departure from the firm and the specific percentage is a reasonable, efficient resolution of the dispute over the division of future fees.

**2012 Formal Ethics Opinion 14**

***Advertising Content on Gift or Promotional Items***

Opinion rules that the advertising content displayed on certain gifts or promotional items does not have to include an office address.

**2012 Formal Ethics Opinion 15**

***Lawyer as Witness***

Opinion rules the issue of whether a lawyer is a "necessary witness" and thereby disqualified from acting as a client's advocate at a trial is an issue left up to the discretion of the tribunal.

## Ethics Committee Actions

At its meeting on January 24, 2013, the Ethics Committee voted to send the following proposed opinions to subcommittees for further (or continued) study: Proposed 2011 FEO 11, *Communication with Represented Party by Lawyer Who is the Opposing Party*, and Proposed 2012 FEO 11, *Use of Nonlawyer Field Representatives to Obtain Representation Contracts*. Proposed 2012 FEO 13, *Duty to Safekeep Client Files upon Suspension, Disbarment, Disappearance, or Death of Firm Lawyers*, was returned to staff for revision. The Ethics Committee also voted to publish the following revised proposed opinion and three new proposed opinions. The comments of readers are welcomed.

## Proposed 2012 Formal Ethics Opinion 7
## Copying Represented Persons on Email Communications
## January 24, 2013

*Proposed opinion rules that Rule 4.2 requires a lawyer to have the express consent of a represented person's lawyer prior to sending the represented person a copy of an email communication.*

### Inquiry #1:

When Lawyer A sends an email communication to opposing counsel, Lawyer B, may Lawyer A "copy" Lawyer B's client on the email?

### Opinion #1:

No, unless Lawyer B has consented to the communication. Rule 4.2(a), often called the "no contact rule," provides that, during 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." Copying the opposing party on a communication—whether email or conventional mail—to opposing counsel is a communication under Rule 4.2(a) and prohibited unless there is consent.

### Inquiry #2:

Would the answer change if Lawyer A is replying to an email message from Lawyer B in which Lawyer B copied her own client? Does the fact that Lawyer B copied her own client on the email constitute implied consent to a "reply to all" responsive email from Lawyer A?

### Opinion #2:

No. Rule 4.2 requires the express consent of opposing counsel.

The purposes behind Rule 4.2 are set out in comment [1] to the rule. Rule 4.2 con-

tributes to the proper functioning of the legal system by "protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship, and the uncounselled disclosure of information relating to the representation."

To effectuate it purposes, Rule 4.2 must be interpreted broadly and strictly. For this reason, the protections accorded by Rule 4.2 may not be waived by the client. Comment [8] to Rule 4.2 provides that the rule "applies even though the represented person initiates or consents to the communication." Given the obvious strictness of the rule, a lawyer may not rely on what he assumes to be the "implied" consent of the opposing counsel.

This issue was recently addressed by the Association of the Bar of the City of New York Committee on Professional and Judicial Ethics ("New York Committee") and the California Standing Committee on Professional Responsibility & Conduct ("California Committee"). Both the New York Committee and the California Committee concluded that consent to "reply to all" communications may sometimes be inferred from the facts and circumstances presented. Ass'n of the Bar of the City of NY Comm. on Prof'l and Judicial Ethics, Formal Op. 2009-1; CA. Standing Comm. on Prof'l Responsibility & Conduct, Formal Op. 2011-181.

Although concluding that consent under Rule 4.2 may be implied, both opinions caution lawyers against relying upon implied consent. The New York Committee's opinion states that a lawyer who relies on implied consent "runs the risk that the represented person's lawyer has not consented to the direct communication" and that "[t]o avoid any possibility of running afoul of the no-contact rule, the prudent course is to secure express consent." The California opinion states that the consent requirement of Rule 4.2 should not be taken lightly and that it is not appropriate for lawyers to "stretch improperly to find implied consent." The California Committee further states that "even where consent may be implied, it is good practice to expressly confirm the existence of the other attorney's consent, and to do so in writing."

The potential harm that can occur by allowing opposing counsel to infer implied consent to communicate with a represented party is too great in comparison to the ease with which express consent can be obtained at the beginning of a transaction or matter. As noted above, the potential harm is not limited to the represented party. The Ethics Committee is persuaded by the cautionary words offered by the New York and California Committees. Because of the risks associated with inferring implied consent, we conclude that Rule 4.2 requires the express consent of opposing counsel.

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## Proposed 2013 Formal Ethics Opinion 1
## Release/Dismissal Agreement Offered by Prosecutor to Convict
## January 24, 2013

*Proposed opinion rules that a state prosecutor may not condition initiation of or cooperation in a proceeding to dismiss a conviction upon the convicted person's release of civil claims against the prosecutor, law enforcement authorities, or other public officials or entities.*

### Inquiry:

Defendant was convicted of rape in a North Carolina state court and sentenced to life in the North Carolina prison system. After Defendant served ten years, the alleged victim recanted. In the absence of the victim's testimony, there was no longer evidence sufficient to support the conviction. Prosecutor presented an agreement to Defendant, while in prison, offering to initiate proceedings to dismiss the conviction (and to recommend Defendant's release from prison) upon the condition that Defendant execute a release purporting to waive any civil claims for wrongful arrest, prosecution, and imprisonment against the prosecutor, law enforcement authorities, or other public officials or entities. After the agreement was signed, Prosecutor initiated a proceeding to vacate the conviction, the conviction was vacated, and Defendant was released from prison.

When a state prosecutor is made aware of new evidence that justifies the granting of a motion for appropriate relief, may the prosecutor prepare, offer, or execute an agreement (a "release/dismissal agreement") that conditions the prosecutor's initiation of a proceeding to dismiss the conviction, or the prosecutor's agreement not to object or contest such a proceeding initiated by the convicted person, upon the convicted person's agreement to release civil claims against public officials or entities arising from the convicted person's arrest, prosecution, or imprisonment?

### Opinion:

No.

This opinion is limited to state court prosecutions in which the state did not also assert civil claims against the defendant arising from the same alleged criminal conduct.

The special responsibilities of a prosecutor are set for in Rule 3.8. As explained in the comment to the rule, "[a] prosecutor has the responsibility of a minister of justice and not simply that of an advocate; the prosecutor's duty is to seek justice, not merely to convict. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evi-

## *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.

## *Citation*

To foster consistency in citation to the North Carolina Rules of Professional Conduct and the formal ethics opinions adopted by the North Carolina State Bar Council, the following formats are recommended:

· To cite a North Carolina Rule of Professional Conduct: N.C. Rules of Prof'l Conduct Rule 1.1 (2003)

· To cite a North Carolina formal ethics opinion: N.C. State Bar Formal Op. 1 (2011)

Note that the current, informal method of citation used within the formal ethics opinions themselves and in this *Journal* article will continue for a transitional period.

## *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 March 31, 2013.

## *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.

dence." Rule 3.8, cmt. [1]. Rule 3.8(a) specifically prohibits a prosecutor from prosecuting a charge that the prosecutor knows is not supported by probable cause. When new evidence clearly demonstrates that a convicted person should be released from prison, the duty to "seek justice" requires a state prosecutor to initiate a proceeding to have the conviction vacated if not already initiated by the convicted person. Therefore, conditioning the initiation of that proceeding, or cooperation with a proceeding initiated by the convicted person, upon the convicted person's agreement to release civil claims against the authorities arising from the convicted person's arrest, prosecution, or imprisonment violates the most basic tenets of a prosecutor's responsibilities as set forth in Rule 3.8. To imply that a prosecutor may withhold or contest the dismissal unless a release is executed by the convicted person also violates Rule 8.4(d), which prohibits conduct that is contrary to the administration of justice.

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### Proposed 2013 Formal Ethics Opinion 2
### Providing Defendant with Discovery During Representation
### January 24, 2013

*Proposed opinion rules that a lawyer is not required to provide a defendant with copies of discovery from the client's file so long as a summary of the discovery materials is sufficient to satisfy the requirements of Rule 1.4.*

#### Inquiry #1:

Lawyer is appointed to represent Defendant in a non-capital murder case. The state has provided Lawyer with discovery as PDF files. The state has also provided Lawyer DVDs containing copies of the video recordings of interrogations of Defendant and a codefendant, surveillance videotapes, and audio recordings of calls made by Defendant and the codefendant from the jail.

Lawyer reviewed the discovery and provided Defendant with a summary of the evidence. Defendant demands that he be provided a copy of the entire 1200 pages of discovery and be allowed to view/listen to the 17 hours of video and audio recordings.

Does Lawyer have to comply with the client's demand?

#### Opinion #1:

Comment [2] to Rule 1.2 (Scope of Representation and Allocation of Authority between Client and Lawyer) provides that clients "normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal, and tactical matters." A criminal defense lawyer's decision whether to provide his client with copies of discovery materials is a matter of trial strategy and judgment that ultimately lies within the lawyer's discretion.

Rule 1.4 requires a lawyer to "keep a client reasonably informed about the status of a matter" and "promptly comply with reasonable requests for information." As stated in comment [5] to Rule 1.4, a client should have "sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued... The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation."

Providing a client with a summary of the discovery will, in most instances, fulfill the duty to keep the client "reasonably informed."

#### Inquiry #2:

If the answer to Inquiry #1 is "yes," does Lawyer have a duty to redact confidential or private material, such as the address of a witness or pictures of an alleged rape victim?

#### Opinion #2:

If Lawyer provides Defendant with a copy of discovery materials, Lawyer may redact or otherwise remove information that the lawyer determines, in his professional discretion, should not be disclosed to the client at this time, including information that would endanger the safety and welfare of the client or others, violate a court rule or order, or is subject to any protective order or nondisclosure agreement. *See* Rule 1.4, cmt (7).

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### Proposed 2013 Formal Ethics Opinion 3
### Safekeeping Funds Collected from Client to Pay Expenses
### January 24, 2013

*Proposed opinion examines a lawyer's responsibilities when charging and collecting from a client for the expenses of representation.*

#### Inquiry #1:

Attorney hires a court reporter to take a deposition in Client's case. The court reporter transcribes the deposition and delivers the transcript and an invoice to Attorney. Attorney bills Client for the court reporter's services in the amount shown on the invoice. Client gives Attorney the funds to pay the court reporter's invoice. Attorney has not previously paid the court reporter.

May Attorney deposit the funds from Client into Attorney's operating account and write a check on the operating account to pay the court reporter?

#### Opinion #1:

No. The funds collected from Client

were collected for the purpose of paying a third party in connection with the performance of legal services and are, therefore, "entrusted funds." Entrusted funds are funds belonging to someone other than the lawyer which are in the lawyer's possession or control in connection with the performance of legal services or professional fiduciary services. Rule 1.15-1(d). Entrusted funds must be maintained separately from the property of Attorney and deposited in Attorney's trust account in accordance with Rule 1.15-2(b).

Attorney may direct Client to write a check for the court reporter's fee payable directly to the court reporter. Attorney would then forward the check to the court reporter without depositing the check in Attorney's trust account. Rule 1.15 does not prohibit a lawyer who receives a check belonging wholly to a third party from delivering the check to the appropriate recipient without first depositing the check in the lawyer's trust account. Rule 1.15, cmt. [5].

### Inquiry #2:

Would the answer to Inquiry #1 change if Attorney considers payment of a court reporter to be the lawyer's obligation?

### Opinion #2:

No. It does not matter who has the obligation to pay the court reporter. If a lawyer receives funds from a client for the purpose of paying a third party, the funds are entrusted funds and must be maintained separately from the property of the lawyer in a trust account.

### Inquiry #3:

Would the answer to Inquiry #1 change if Attorney is contractually obligated to pay the court reporter's fee regardless of whether Client pays Attorney for this expense?

### Opinion #3:

No. Attorney's contractual obligations do not change the fact that Attorney is receiving entrusted funds from a client for the specific purpose of paying a third party.

### Inquiry #4:

Would the answer to Inquiry #1 change if Attorney has already paid the court reporter from either his operating account or personal funds prior to receipt of Client's funds?

### Opinion #4:

Yes. Attorney has advanced the funds to pay the expenses of representation and Attorney is entitled to reimbursement from the client. Rule 1.8, cmt. [10]. The money paid by Client is not entrusted to Attorney but is owed to him. To avoid commingling client funds with the lawyer's funds as required by Rule 1.15-2(f), Attorney must deposit Client's payment into his operating or personal account.

### Inquiry #5:

In the field of patent law, the services of patent lawyers or agents in foreign countries ("foreign agents") are sometimes required in the course of applying for international patents for US clients. On behalf of Client, Patent Attorney arranges for foreign agent services. The foreign agent performs the required services and sends an invoice to Patent Attorney. Patent Attorney bills Client for the foreign agent's services in the amount shown on the invoice. Client sends Patent Attorney the funds to pay the foreign agent's invoice. Patent Attorney has not previously paid the foreign agent.

Do the answers to Inquiries #1-4 change if the funds at issue are funds received from the client to pay for the services of a foreign agent?

### Opinion #5:

No.

### Inquiry #6

Patent Attorney and a foreign agent routinely provide services to clients of the other lawyer upon request. The foreign agent and Patent Attorney invoice each other per client matter. The foreign agent and Patent Attorney also have a practice of arranging offsets, such that the total amount due to the foreign agent is reduced by the amount due to Patent Attorney.

When Patent Attorney receives an invoice from the foreign agent for services performed by the foreign agent for one of Patent Attorney's clients, Patent Attorney invoices the client for the amount due for the foreign agent's fee and collects the funds from the client.

Do these additional facts change the answer to Inquiry #5?

### Opinion #6:

No.

### Inquiry #7:

Under the facts in Inquiry #6, Patent Attorney collects the funds from the client for the foreign agent's fee but does not use that money to pay the foreign agent's fee. Instead Attorney settles the obligation to the foreign agent through offsets or, if no offset agreement can be reached, by payment from Patent Attorney.

Is this permissible?

### Opinion #7:

No. If a lawyer collects money from a client for a specific purpose, the lawyer must either (1) use the money received from the client to make the payment for which the money was collected, (2) return the funds to the client, or (3) obtain the client's consent to hold the funds in trust until earned by provision of legal services or used to pay other expenses. Rule 1.15-2.

### Inquiry #8:

Under the facts in Inquiry #6, is it permissible for Patent Attorney to offset a client expense with a fee due to Patent Attorney in an unrelated matter?

### Opinion #8:

Yes, provided Attorney provides Client with a full accounting and explanation of the cost of the foreign agent's services, the offsets applied to the foreign agent's invoice, and the amount still owed to the foreign agent or owed to Attorney by Client. If a lawyer invoices a client for a specific amount to pay a designated expense, the lawyer must use the money received from the client to pay that expense, return the funds to the client, or obtain the client's consent to deposit the funds in the trust account. *See* Opinion #7. If an expense was already paid by the lawyer through offsets or the advancing of the lawyer's funds, the lawyer may use the money received from the client to reimburse the lawyer. *See* Opinion #4. However, offset agreements may never be used by a lawyer to earn a profit on the expenses of representation. *See* Rule 1.5(a)(prohibiting the charging or collecting of an excess amount for expenses).

### Inquiry #9

Would the answers to Inquiries #6-8 change if Patent Attorney considers the

CONTINUED ON PAGE 48

# Amendments Pending Approval of the Supreme Court

At its meetings on October 26, 2012, and January 25, 2013, 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 Fall 2012 and Winter 2012 editions of the *Journal* or visit the State Bar website):

### Proposed Amendments to the Discipline and Disability Rules

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

In addition to rearranging the provisions of the existing disability rule to improve clarity, the proposed amendments eliminate ambiguity, add a new provision allowing the Office of Counsel to initiate a disability proceeding while a disciplinary proceeding is pending, and explain the procedure to be followed when a Disciplinary Hearing Commission panel finds probable cause to believe a defendant in a disciplinary proceeding is disabled.

### Proposed Amendments to the Lawyer Assistance Program Rules

27 N.C.A.C. 1D, Section .0600, Rules Governing the Lawyer Assistance Program

The proposed amendments eliminate consensual suspension by court order in favor of consensual transfer to inactive status by court order. The lawyer may only return to active status pursuant to a court order.

### Proposed Amendments to the Procedures for Reinstatement from Inactive or Suspended Administrative Status

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

The proposed amendments to the rule on reinstatement from inactive and suspended status will cap the CLE requirement for reinstatement of lawyers who have been inactive or suspended for seven or more years and who have been practicing in another state or serving in the military. The proposed rule amendments also clarify that CLE taken in another state may be used to offset the CLE requirement for reinstatement even if the CLE was taken more than two years prior to the petition.

### Proposed Amendments to The Plan for Legal Specialization

27 N.C.A.C. 1D, Section .2500, Certification Standards for the Criminal Law Specialty, and Section .3100, Certification Standards for the Trademark Law Specialty

The proposed amendments to the standards for the criminal law specialty provide that jury trial experience is a component of the substantial involvement standard for certification in the criminal law specialty.

A new section of the Plan for Legal Specialization establishes standards for a new specialty in trademark law.

### Proposed Amendments to The Plan for Certification of Paralegals

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

The proposed rule amendments limit to 30 days the time for appeal to the State Bar Council from an unfavorable decision on certification or continued certification rendered by a hearing panel of the Board of Paralegal Certification. The proposed amendments to the rules on continuing paralegal education clarify that law school courses are approved activities for the purpose of satisfying the continuing paralegal education requirements.

# Proposed Amendments

At its meeting on January 25, 2013, the council voted to publish the following proposed rule amendments for comment from the members of the Bar:

### Proposed Amendments to the Rules on Election of Councilors

27 N.C.A.C. 1A, Section .0800, Election and Appointment of State Bar Councilors

The proposed amendments, including a proposed new rule, permit judicial district bars to adopt procedures for early voting in district bar elections for State Bar Councilor as long as there is appropriate notice and reasonable access to early voting locations for all active members in the judicial district.

**.0802 Election - When Held; Notice; Nominations**

(a) Every judicial district bar, in any calendar year at the end of which the term of one or more of its councilors will expire, shall fill said vacancy or vacancies at an election to be held during that year.

…

(e) The notice shall state the date, time, and place of the election, give the number of vacancies to be filled, identify how and to whom nominations may be made before the election, and advise that all elections must be by a majority of the votes cast. If the election will be held at a meeting of the bar, the notice will also advise that additional nominations may be made from the floor at the meeting itself.

In judicial districts that permit elections by mail **or early voting**, the notice to members shall advise that nominations may be made in writing directed to the president of the district bar and received prior to a date set out in the notice. Sufficient notice shall be provided to permit nominations received

## *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.

from district bar members to be included on the printed ballots.

**.0806 Procedures Governing Early Voting**

**(a) Judicial district bars may adopt bylaws permitting early voting for up to 10 business days prior to a councilor election, in accordance with procedures approved by the NC State Bar Council and as set out in this subchapter.**

**(b) Only active members of the judicial district bar may participate in early voting.**

**(c) In districts that permit early voting, the notice sent to members referred to in Rule .0802(e) of this subchapter shall advise that early voting will be permitted, and shall identify the locations, dates, and hours for early voting. The notice shall also advise that nominations may be made in writing directed to the president of the district bar and received prior to a date set out in the notice. Sufficient notice shall be provided to permit nominations received from district bar members to be included on the printed ballots.**

**(d) The notice sent to members referred to in Rule .0802(e) of this subchapter shall be placed in the United States Mail, postage prepaid, at least 30 days prior to the first day of the early voting period.**

**(e) Write-in candidates shall be permitted during the early voting period and at the election, and the instructions shall so state.**

**(f) Early voting locations and hours must be reasonably accessible to all active members of the judicial district.**

**~~.0806~~ .0807 Vacancies**

[Rule is unchanged.]

[Re-numbering remaining rules in this section.]

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### Proposed Amendments to the Rules on Reinstatement from Administrative Suspension

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

The proposed amendments extend to one year the time period during which an administratively suspended member may be reinstated by order of the secretary of the State Bar. The rule currently allows reinstatement by the secretary during the time between the effective date of the suspension order and the next meeting of the Administrative Committee. Thereafter, reinstatement must be granted by order of the council entered at one of the council's quarterly meetings. Extending the time for reinstatement by the secretary will allow more lawyers to be reinstated promptly, thereby avoiding the harms to clients and law practices that result when a forced wind-down occurs following suspension.

**.0904 Reinstatement from Suspension**

(a) Compliance Within 30 Days of Service of Suspension Order.

…

(f) Reinstatement by Secretary of State Bar. At any time **during the year** after the effective date of a suspension order ~~and prior to the next meeting of the Administrative Committee~~, a suspended member may petition for reinstatement pursuant to paragraphs (b) and (c) of this rule and may be reinstated by the secretary of the State Bar upon a finding that the suspended member has complied with or fulfilled the obligations of membership set forth in the order; there are no issues relating to the suspended member's character or fitness; and the suspended member has paid the costs of the suspension and reinstatement procedure including the costs of service and the reinstatement fee. Reinstatement by the secretary is discretionary. If the secretary declines to reinstate a member, the member's petition shall be submitted to the Administrative Committee at its next meeting and the procedure for review of the reinstatement petition shall be as set forth in Rule .0902(c)-(f).

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### Proposed Amendments to the Standards for Certification of Specialists

27 N.C.A.C. 1D, Section .1700, The Plan of Legal Specialization

The proposed amendments specify that a satisfactory disciplinary history is required to qualify for initial and continued certification as a specialist.

**.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) The applicant must be licensed in a jurisdiction of the United States for at least five years immediately preceding his or her application and must be licensed in North Carolina for at least three years immediately preceding his or her application. The applicant must be currently in good standing to practice law in this state **and the applicant's disciplinary record with the courts, the North Carolina State Bar, and any other government licensing agency must support qualification in the specialty.**

(2) …

(b) …

**.1721 Minimum Standards for Continued Certification of Specialists**

(a) The period of certification as a specialist shall be five years. During such period the board or appropriate specialty committee may require evidence from the specialist of his or her continued qualification for certification as a specialist, and the specialist must consent to inquiry by the board, or appropriate specialty committee of lawyers and judges, the appropriate disciplinary body, or others in the community regarding the specialist's continued competence and qualification to be certified as a specialist. Application

for and approval of continued certification as a specialist shall be required prior to the end of each five-year period. 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's disciplinary record with the courts, the North Carolina State Bar, and any other government licensing agency supports qualification in the specialty.**

~~(1)~~ (2) …

[Re-numbering remaining paragraphs.]

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## Proposed Amendments to The Plan for Certification of Paralegals

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

The proposed amendments to Rule .0122 provide that an individual whose certification has lapsed for failure to complete the requirements for renewal within the prescribed time limit may request reinstatement by the Board of Paralegal Certification. The proposed amendments specify the procedure for doing so. Other proposed amendments to Rule .0122 include re-labeling of the subparagraphs to improve clarity. The proposed amendments to the rules on continuing paralegal education (CPE) require a CPE sponsor to apply for CPE accreditation for a program if more than five paralegals apply for individual accreditation of the program.

**.0122 Right to Review and Appeal to Council**

**(a) Lapsed Certification. An individual whose certification has lapsed pursuant to Rule .0120(c) of this subchapter for failure to complete all of the requirements for renewal within the prescribed time limit shall have the right to request reinstatement for good cause shown. A request for reinstatement shall be in writing, must state the personal circumstances prohibiting or substantially impeding satisfaction of the requirements for renewal within the prescribed time limit, and must be made within 90 days of the date notice of lapse is mailed to the individual. The request for reinstatement shall be reviewed on the written record and ruled upon by the board. There shall be no other right to review by the board or appeal to the council under this rule.**

(b) ~~(a)~~ **Denial of Certification or Continued Certification**. An individual who is denied certification or continued certification as a paralegal or whose certification is suspended or revoked shall have the right to a review before the board pursuant to the procedures set forth below and, thereafter, the right to appeal the board's ruling thereon to the council under such rules and regulations as the council may prescribe.

(1) ~~(b)~~ Notification of the Decision of the Board.

…

(2) ~~(c)~~ Request for Review by the Board.

…

(3) ~~(d)~~ Review by the Board.

…

(A) ~~(1)~~ Review on the Record.

…

(B) ~~(2)~~ Review Hearing.

…

(C) ~~(3)~~ Decision of the Panel.

…

(c) ~~(e)~~ Failure of Written Examination.

…

(1) ~~(f)~~ Request for Review by the Board.

…

**.0203 General Course Approval**

(a) Approval - Continuing education activities, not otherwise approved or accredited by the North Carolina State Bar Board of Continuing Legal Education, may be approved upon the written application of a sponsor, or of a certified paralegal on an individual program basis. An application for continuing paralegal education (CPE) approval shall meet the following requirements:

(1) If advance approval is requested by a sponsor, the application and supporting documentation (i.e., the agenda with timeline, speaker information, and a description of the written materials) shall be submitted at least 45 days prior to the date on which the course or program is scheduled. If advance approval is requested by a certified paralegal, the application need not include a complete set of supporting documentation.

(2) **If more than five certified paralegals request approval of a particular program, either in advance of the date on which the course or program is scheduled or subsequent to that date, the program will not be accredited unless the sponsor applies for approval of the program and pays the accreditation fee set forth in Rule .0204.**

(3) ~~(2)~~

[Re-numbering remaining paragraphs.]

… ■

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# Proposed Opinions (cont.)

obligation to pay a foreign agent to be the lawyer's obligation?

### Opinion #9:

No.

### Inquiry #10:

Would the answers to Inquiries #6-8 change if Patent Attorney is contractually obligated to pay for the services of the foreign agent regardless of whether Client pays Patent Attorney for those services?

### Opinion #10:

No.

### Inquiry #11:

Client pays Patent Attorney for the foreign agent's fee after the foreign agent has performed services and invoiced Patent Attorney. Client terminates Patent Attorney's representation and retains Patent Attorney #2. At the time of termination, Patent Attorney has not paid the foreign agent or used offsets to satisfy the obligation to the foreign agent. The foreign agent invoices Patent Attorney #2 for the services provided in Client's matter. Do these additional facts or the potential for this to occur change the answers to Inquiries #5-12?

### Opinion #11:

No. Patent Attorney must maintain Client's entrusted funds in Patent Attorney's trust account until returned to Client or until receipt of instructions for disposition from Client or Client's new lawyer. If Client or Patent Attorney #2 instructs Patent Attorney to pay the foreign agent, Patent Attorney must do so promptly. *See* Rule 1.5-2(m). Similarly, if instructed to do so, Patent Attorney must transfer Client's funds to Patent Attorney #2 for deposit in Patent Attorney #2's trust account where they will be available to pay the foreign agent. ■

# Client Security Fund Reimburses Victims

At its January 24, 2013, meeting, the North Carolina State Bar Client Security Fund Board of Trustees approved payments of $134,236.31 to 16 applicants who suffered financial losses due to the misconduct of North Carolina lawyers.

The new payments authorized were:

1. An award of $14,068.64 to a former client of Willis Harper Jr. of Whiteville. The board found that Harper misappropriated the client's $13, 978.64 workers' comp settlement and $90 he had received from the client to be used to issue subpoenas in the client's equitable distribution ("ED") case that were never issued. Harper was disbarred on February 26, 2012. The board previously reimbursed two other Harper clients a total of $4,735.

2. An award of $5,870 to another applicant who suffered a loss due to Harper's conduct. The board found that Harper settled several personal injury cases for clients for whom the applicant had provided medical services. Harper held funds in a fiduciary capacity for the applicant from those settlements. Harper failed to disburse the funds to the applicant. Due to misappropriation, Harper's trust account balance is insufficient to pay all of his clients' obligations.

3. An award of $25,000 to a former client of Jimmy H. Joyner Jr. of Graham. The board found that Joyner was retained to handle a client's personal injury matter. Joyner settled the matter and retained funds from the settlement to resolve potential subrogation claims. There were no subrogation claims and Joyner never disbursed the retained funds. Due to misappropriation, Joyner's trust account balance is insufficient to pay all of his clients' obligations. Joyner was transferred to disability inactive status on October 10, 2011.

4. An award of $235 to a former client of Jimmy H. Joyner Jr. The board found that Joyner was retained to handle a client's traffic ticket. Joyner provided no valuable legal services for the fee paid.

5. An award of $2,000 to a former client of Alan Roughton of Greenville. The board found that Roughton was retained to handle a civil dispute. Roughton provided no valuable legal services for the fee paid. Roughton abandoned his practice.

6. An award of $146 to a former client of Robert Morgan Smith of Goldsboro. The board found that Smith was retained to handle a client's traffic ticket. Smith failed to pay the client's court costs and fine. Smith was disbarred on October 14, 2011. The board previously reimbursed four other Smith clients a total of $13,900.

7. An award of $1,640 to a former client of Robert Morgan Smith. The board found that Smith was retained to represent a client on criminal charges. Smith provided no valuable legal services for the fee paid.

8. An award of $670 to a former client of Robert Morgan Smith. The board found that Smith was retained to represent a client on criminal charges. Smith provided no valuable legal services for the fee paid.

9. An award of $1,000 to a former client of Robert Morgan Smith. The board found that Smith was retained to represent a client on a motion for appropriate relief relating to criminal charges. Smith provided no valuable legal services for the fee paid.

10. An award of $350 to a former client of Robert Morgan Smith. The board found that Smith was retained to handle a client's speeding ticket. Smith provided no valuable legal services for the fee paid.

11. An award of $176 to a former client of Robert Morgan Smith. The board found that Smith was retained to handle a client's speeding ticket. Smith failed to pay the client's court costs and fine from the funds the client had provided for that purpose.

12. An award of $1,750 to a former client of Robert Morgan Smith. The board found that Smith was retained to represent a client on criminal charges. Smith provided no valuable legal services for the fee paid.

13. An award of $5,000 to a former client of Creighton W. Sossomon of Highlands. The board found that Sossomon represented a seller in a real estate transaction. Funds were escrowed by the closing lawyer from the seller's proceeds until a potential lien could be resolved. When the lien resolved, the escrowed funds were disbursed to Sossomon to be held in trust. Due to misappropriation, Sossomon's trust account balance is insufficient to pay all of his clients' obligations. Sossomon was disbarred on October 17, 2012.

14. An award of $30,275.08 to a former client of W. Darrell Whitley of Lexington. The board found that Whitley was retained to handle a client's personal injury matter. Whitley settled the matter, took his attorney fee, disbursed funds to the client, and retained funds to pay medical providers. Whitley failed to pay all the medical providers prior to his death. Due to misappropriation, Whitley's trust account balance is insufficient to pay all of his clients' obligations. The reimbursement will be paid to the client's new lawyer who will be responsible for resolving the liens. Whitley died on December 6, 2011. The board previously reimbursed 11 other Whitley clients a total of $305,464.58.

15. An award of $43,709 to a former client of W. Darrell Whitley. The board found that Whitley was retained to handle a client's workers' compensation claim. Whitley settled the matter and later received funds from Medicare for the client's future medical expenses. Whitley failed to disburse the Medicare funds to the client prior to his death. Due to misappropriation, Whitley's trust account balance is insufficient to pay all of his clients' obligations.

16. An award of $2,346.59 to a former client of W. Darrell Whitley. The board found that Whitley was retained to handle a client's personal injury matter. Whitley settled the matter and retained funds to settle a Medicare lien. Whitley failed to settle the Medicare lien or disburse the funds to the client prior to his death. Due to misappropriation, Whitley's trust account balance is insufficient to pay all of his clients' obligations. Counsel was directed to resolve the Medicare lien prior to any distribution being made to the client. ■

# 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

***Military Law Student Association Prepares Nearly 1,000 Christmas Cards for Soldiers***—Campbell Law's Military Law Student Association (MiLSA) recently held its annual Christmas Cards for Soldiers event, resulting in an all-time high 992 Christmas cards. The cards were sent to soldiers in the Third Infantry Division in Kandahar, Afghanistan.

***Professor Essary Receives 2012 Women of Justice Award***—Campbell Law professor and former dean Melissa Essary recently received a 2012 Women of Justice Award from *North Carolina Lawyers Weekly*. The Women of Justice Award annually recognizes women across the state of North Carolina who have demonstrated leadership, integrity, service, sacrifice, and accomplishment in improving the quality of justice and exemplifying the highest ideals of the legal profession. In addition to Essary, Campbell Law alumnae Shelby Benton (L '85) and Kimberly Miller (L '07) also collected 2012 Women of Justice Awards.

***Student Trio Awarded ACC Scholarships***—Three Campbell Law students have been tapped to receive $1,000 scholarships from the Association of Corporate Counsel's (ACC) Research Triangle Area Chapter (RTAC). Third-year student Frank Milner and second-year students Benjamin Buskirk and Sarah Murray will each collect the honor for the 2012-13 academic year. For the second consecutive year, Campbell Law students received three of the five available ACC-RTAC scholarships.

***Campbell Law Call for Judges***—Campbell Law has been selected to serve as the host institution for the 38th National Trial Regional Competition for Region V, February 8–10, 2013, at the Wake County courthouse. The National Trial Competition is one of the most prestigious law school trial competitions in the country. Region V includes law schools from North Carolina, South Carolina, and Georgia. You can volunteer to be a judge for our regional competition by registering online at http://law.campbell.edu/ntc. If you have any questions in the meantime, please contact Megan West at 919.865.5875 or by email at westm@law.campbell.edu.

## Charlotte School of Law

***Paralegal Certificate Program Recognized by NC State Bar***—Charlotte School of Law's newly created Paralegal Certificate Program has been designated as a qualified paralegal studies program by the North Carolina State Bar. The first paralegal certificate session began January 7. The 24-week curriculum includes a fundamentals class, core legal areas, an elective, and/or an internship opportunity, providing students with essential hands-on experience and networking opportunities.

***December Recognition and Hooding Ceremony***—Seventy-three members of the Charlotte School of Law December class of 2012 were recognized for their outstanding achievements at a special Recognition and Hooding Ceremony held on Friday, December 14, in the Halton Theater at Central Piedmont Community. Judge Brenda Branch, chief district court judge, Halifax County, gave the keynote address.

***Dean Spriggs Named to List of Nation's Most Influential Black Attorneys***—Dean Denise Spriggs has made the top 100 list of the nation's most influential black attorneys. On Being A Black Lawyer released the names of those chosen for the 2nd Annual Power 100 list, a comprehensive catalog of the nation's most influential black attorneys working in government, academics, and both the public and private sectors.

***Presidential Management Fellows Semi-Finalists***—Charlotte School of Law students Jason Hardy, Chelsea Dalziel, Jamie Vandel, and Randall Faircloth were named as semi-finalists to the Presidential Management Fellows class of 2013.

***Student Attends Clinton Global Initiative Annual Summit***—For the past five years, Sally Santiago, currently a 1L at Charlotte School of Law, has worked as team captain in logistics for the Clinton Foundation at their Annual Summit in NYC and for CGI America in Chicago every summer.

***Legends and Leaders in the Law***—Honorable Judge Mark Hayes II spoke to Charlotte School of Law students about ethics in the law and Brigadier General Mark Martins spoke about reformed military commissions and their place in the legal system. Both men were also recognized as Legends and Leaders in the Law.

## Duke Law School

***Duke Launches Capital Campaign***—Duke Law School has launched an $85 million fundraising campaign in conjunction with Duke University's "*Duke Forward: Partnering for the Future*" campaign. Campaign funding priorities are scholarships and fellowships for students; professorships and research funds for faculty; support for innovation in the curriculum and clinical programs; funds for research centers and programs; and expanded support for current-use operating funds such as the Duke Law Annual Fund.

***New dual degree in law and entrepreneurship***—Duke Law will offer a new dual-degree program in law and entrepreneurship beginning in the 2013-14 academic year. The "JD/LLMLE," which includes coursework over a portion of two summers, combines a rigorous JD curriculum with business and entrepreneurship courses as well as participation in the Start-Up Ventures Clinic, through which students provide legal counsel to start-ups; an entrepreneurship "boot camp" that models the experience of launching a new company; and an integrated externship in a start-up venture. The multifaceted curriculum is designed to prepare lawyers for careers as advisers to and leaders of entrepreneurial

businesses and innovative ventures.

***DC Summer Institute on Law and Policy***—Duke has launched the DC Summer Institute on Law and Policy, designed for undergraduates and professionals interested in studying the legal and constitutional framework that undergirds the development of policy, regulation, and legislation. The program offers theoretical and practical insights into how the law affects every aspect of US policymaking. One course will highlight constitutional law, both its structure and the rights it guarantees, while others will focus on timely subjects such as health care law and the impact of the Affordable Care Act; environmental law and climate change; national security law and foreign policy; business law and financial regulation; statutory interpretation; and Congress and its functions. Courses will be offered during evenings in two two-week sessions. Contact Amanda.lacoff@law.duke.edu.

## Elon University School of Law

***Third Annual Billings, Exum, & Frye National Moot Court Competition, April 4-6***—Thirty-six teams, representing 24 law schools, are registered to participate. Volunteer judges are crucial to the event's success. If you can judge, please contact Prof. Alan Woodlief, director of the Moot Court Program, at awoodlief@elon.edu.

***Law Faculty and Students Engage Law and Policy Overseas***

Elon Law Professor Enrique Armijo travelled to Myanmar (Burma) in December as part of a State Department-funded team of experts working with the Myanmar government and civil society there to draft a new press law and other communications-related legislation. The work supports a number of pro-democracy reforms currently taking place in Myanmar and is undertaken pursuant to the US's diplomatic reengagement with the country as well as President Obama's visit there in 2012.

Elon Law Professor David Levine recently presented in The Hague, Netherlands, and in Auckland, New Zealand, speaking about the importance of transparency in international trade negotiations. At the 15th round of Trans-Pacific Partnership (TPP) negotiations, held December 3-12 in Auckland, Levine delivered a stakeholder presentation focused on the need to make the negotiations and the negotiating positions of the nations involved in formulating the agreement more transparent. Levine also delivered stakeholder presentations at the previous two rounds of TPP negotiations.

In January, several law students travelled to Vietnam and Singapore with Elon MBA students in a collaborative international business course. Students analyzed US-based businesses operating in both locations before the trip, and then visited those businesses, as well as law firms, during the trip to see their operations and speak with executives first-hand about the challenges and opportunities of doing business internationally. This is the fourth time Elon's law school and MBA program have collaborated in this joint winter term course.

## North Carolina Central University School of Law

***NCCU School of Law Will Launch a Foreclosure Clinic***—With a grant of $800,000 from the North Carolina Housing Finance Agency, North Carolina Central University School of Law will transform its Foreclosure Prevention Project into a new Foreclosure Clinic.

Since the beginning of the housing crisis in 2008, NCCU's Foreclosure Prevention Project has provided training to volunteers—law students and private attorneys—in the identification of predatory lending practices. These volunteers counseled potential homebuyers and assisted those trapped in predatory contracts with the process of mortgage adjustment to prevent foreclosure.

Demand quickly outpaced the capacity of a volunteer force, particularly with the expansion of the law school's outreach efforts through TALIAS—NCCU's telepresence classroom linked to 27 high-definition videoconferencing locations across the state.

"We had to suspend our foreclosure project," said Atty. Pamela Glean, assistant dean for clinical programs. "Our volunteer attorney was simply overwhelmed."

Glean appealed to the North Carolina Department of Justice (DOJ) for funding to support a full-time director and financial counselor, as well as contract attorneys to represent homeowners in trials and appeals in their local jurisdictions.

The funds flowing from the DOJ through the Housing Finance Agency represent a portion of the multistate settlement with five major banks that engaged in fraudulent foreclosures and unethical practices in their mortgage lending. Legal Aid of North Carolina and the UNC School of Law also received funding. NCCU School of Law intends to collaborate with these partners to ensure that all necessary services are provided efficiently and effectively to our residents.

NCCU Law School Dean Phyllis Craig-Taylor said, "NCCU Law recently ranked fourth in the nation in the provision of clinical opportunities to our students. We're proud of our unfaltering commitment to work on pressing social justice issues that face our communities, including the loss of property."

## University of North Carolina School of Law

***$1 Million Gift***—The William R. Kenan Charitable Trust announced a gift of $1 million to support student scholarships at UNC School of Law in memory of alumnus William C. "Bill" Friday '48, who died October 12.

***Pro Bono Winter Break Trip***—Twenty-one students from UNC School of Law collaborated with Legal Aid of NC over winter break to run a free legal clinic for residents of the Cherokee Reservation in Cherokee, NC. Students live-blogged about their trip at http://blogs.law.unc.edu/probono/.

***Conference on "US v. Jones: Defining a Search in the 21st Century"***—*The North Carolina Journal of International Law and Technology* (JOLT) and the UNC Center for Media Law and Policy co-hosted a conference on the issues of privacy, law enforcement and new digital technology on January 25. For more information: http://ncjolt.org/symposia.

***Frank Porter Graham Award***—UNC School of Law faculty member Deborah M. Weissman, Reef C. Ivey II Distinguished Professor of Law, received the Frank Porter Graham Award from the NC ACLU on February 16 for her work "with various individuals and organizations across the state to promote a vision of North Carolina that respects individual rights, human dignity, and due process."

***CLE Programs***—Recent and upcoming CLE programs include the Festival of Legal Learning, Chapel Hill, February 8-9; Banking Institute, Charlotte, March 21; the J. Nelson Young Tax Institute, Chapel Hill, May 2-3. Visit www.law.unc.edu/cle.

## Wake Forest University School of Law

***Dean Blake D. Morant Ranks 13th***

***among Most Influential People in Legal Education***—*The National Jurist* has announced that Dean Blake D. Morant ranks 13th among 24 legal educators and one legal education public policy advocate on its 2012 list of the most influential people in legal education. The magazine, which made the announcement in the cover story of its January issue, requested nominations from every law school in the nation, and received more than 85. Its editorial team narrowed the list down to 50 and then asked 350 people in legal education, including every law school dean, to rate each nominee based on how much they influenced them in the past 12 months. Dean Morant is one of the nation's best known and respected legal educators and scholars. He has served in numerous leadership positions in the American Association of Law Schools and the American Bar Association, and he regularly speaks across the country and abroad on legal education and diversity, as well as topics relating to his scholarly interests.

***Inaugural Wake in Washington Summer Judicial Externship Program to be Offered in 2013***—In an effort to create more hands-on learning opportunities for students, the Wake Forest University School of Law will begin offering a "Wake in Washington Summer Judicial Externship Program" this year. Professor Abby Perdue will teach the course that is part of the law school's Applied Legal Theory – "Law in Action" program. Through the program, students can obtain externships with the United States Court of Appeals or the Federal Circuit, the United States Court of Federal Claims, and the Office of the Special Masters of the Courts of Federal Claims. The program is unique because it includes an externship component and customized instructional component, according to Perdue. "It also effectuates Dean Morant's goals of expanding our metro externship presence, and developing innovative ways to assist our students in securing employment and judicial clerkships." ■

# John B. McMillan Distinguished Service Award

**J. Allen Adams** is a recipient of the John B. McMillan Distinguished Service Award. Mr. Adams received his bachelor's degree in 1952 and his JD in 1954 from the University of North Carolina. He began his law practice in Raleigh and became an early partner in the law firm of Sanford, Cannon, Adams & McCullough in 1967. He remained as a partner of that firm and its successors until his retirement from Parker Poe Adams & Bernstein in 2003. In addition to his legal career, Mr. Adams served five terms in the NC House of Representatives and was an active duty officer in the US Navy and naval reserves, retiring as a captain in the Judge Advocate General's Corp. A long-time advocate for diversity, Mr. Adams led the efforts to integrate the Wake County Bar Association in the 1960s. Mr. Adams embraced the obligation of *pro bono* representation throughout his career and was a zealous advocate for the underprivileged. A lifelong volunteer, he has served on countless boards throughout North Carolina and has been a consistent advocate for his alma mater, the University North Carolina. In 2007 Mr. Adams was awarded the Chief Justice Branch Professionalism Award, the highest honor given by the Wake County Bar Association, in recognition of his long and honorable career of public service to the bar and to the citizens of North Carolina.

**H. Grady Barnhill Jr.** is a recipient of the John B. McMillan Distinguished Service Award. Mr. Barnhill graduated first in his class from Wake Forest University School of Law and began his career trying cases in 1958. He is considered the dean of the Womble Carlyle Sandridge & Rice litigation practice and a dean of the Forsyth County Bar. Throughout his over 50 years of litigation practice, Mr. Barnhill has advocated for hundreds of clients, both big and small, in both federal and state courts and before both trial courts and appellate panels. Mr. Barnhill's skill in the courtroom has earned him such honors as fellow in the American College of Trial Lawyers and advocate in the American Board of Trial Advocates as well as listings in The Best Lawyers in America and in North Carolina Business Legal Elite. He has had a long standing and continuous support for the judiciary, having served on the US Magistrate Selection Committee, the Middle District Local Rules Committee, the Commission on the Future of the Business Court, and as a permanent member of the Fourth Circuit Judicial Conference. He has a passion for supporting young lawyers, and is a founding director and master of the bench for the Chief Justice Joseph Branch Inns of Court. Mr. Barnhill served as a 1st lieutenant in the air force and was later promoted to captain in the air force reserve. With accolades and accomplishments too numerous to mention, Mr. Barnhill's life and career have greatly enhanced both the Forsyth County Bar and the entire legal profession of North Carolina.

**Senator Daniel T. Blue Jr.** is a recipient of the John B. McMillan Distinguished Service Award. Senator Blue received his bachelor's degree from NC Central in 1970 and his JD from Duke University in 1973. He began his law career at what is now Parker, Poe, Adams and Bernstein and became one of the first African-American attorneys to integrate one of the state's major law firms. In 1980 Senator Blue was elected to the NC House of Representatives, where he served 11 terms, including an election as Speaker of the House of Representatives in 1991. After leaving the House in 2002, Mr. Blue returned in 2006 and was selected to serve as a senator in 2009. Throughout his career in the NC Legislature, Senator Blue has used his talents, energy, time, and efforts to improve the legal system as well as the community. He has served on the boards at Duke University, Duke Health System, and the Center on Ethics in Government in Denver, Colorado. He has been a visiting instructor at Duke University, and also a faculty member of the National Institute for Trial Advocacy. Senator Blue has been recognized as one of America's outstanding political leaders, earning numerous awards throughout the state and country. He has provided a lifetime of distinguished service to both the legal profession and the people of the 10th Judicial District.

**Kenneth S. Broun** is a recipient of the John B. McMillan Distinguished Service Award. Mr. Broun earned his JD with hon-

ors from the University of Illinois School of Law in 1963 and became licensed in North Carolina in 1976. He is the Henry Brandis Professor of Law at the UNC Law School. Mr. Broun has an international reputation for aiding the legal profession by seeking to improve the administration of justice and the quality of services rendered by professionals in South Africa. Mr. Broun has cultivated knowledge of the law, helped reform the law, and worked to strengthen legal education. He has served on the Federal Rules Advisory Committee since 1993 and on the board of the National Institute for Trial Advocacy since 1976. He is nationally recognized for his scholarship as the general editor of *McCormick on Evidence*. Mr. Broun has trained many North Carolina lawyers to treat opposing counsel with courtesy and respect, and has provided advice and mentoring to countless young lawyers. Additionally, Mr. Broun has devoted his time in civic leadership, having served as the mayor of Chapel Hill from 1991-1995. Known across the state as "Dean Broun" and to the citizens of Chapel Hill as "Mayor Broun," Ken Broun has demonstrated exemplary service to the legal profession.

**William K. Davis** is a recipient of the John B. McMillan Distinguished Service Award. Mr. Davis attended high school in Winston-Salem, went to Davidson College, earned an MBA at UNC-Chapel Hill, and served in the army in 101st Airborne stationed in Germany. He then attended Wake Forest Law School where he was the editor-in-chief of the Wake Forest *Law Review*. In 1980 he helped establish the firm of Bell, Davis & Pitt where he continues to practice today. Mr. Davis has served in a wide variety of professional and public service capacities. He has been president of the North Carolina State Bar, chair of the Board of Law Examiners, chairman of the Board of Continuing Legal Education, and president of the North Carolina Association of Defense Attorneys. He is also a founding member of the Chief Joseph Branch Inns of Court at Wake Forest and has been a member of the NCBA Board of Governors. Mr. Davis has earned numerous professional honors including being listed in Best Lawyers in America and North Carolina Super Lawyers (as one of NC's top ten lawyers). Mr. Davis has always been a role model and mentor for younger lawyers, has set an example of professionalism and civility for other lawyers, and has been a strong supporter of organizations that provide legal services to persons of limited means. He has given a lifetime of service to his clients, his alma mater, the Forsyth County Bar, and the state of North Carolina.

**Richard S. Jones Jr.** is a recipient of the John B. McMillan Distinguished Service Award. Mr. Jones was born in Asheville and attended Davidson College. He received his JD from the University of North Carolina School of Law and was licensed in 1961. In addition to his litigation practice, Jones served as the county attorney for Macon County from 1969 to 2005. Mr. Jones also served as counsel to Macon Bank from 1972 to 2004. During his 61 years of law practice, Mr. Jones served on many professional organizations including 12 years on the North Carolina Board of Law Examiners. In addition to his service in professional organizations, Mr. Jones has volunteered his time to numerous civic organizations including the local chamber of commerce, Rotary Club, and Jaycees. In 1999 Mr. Jones was inducted into the North Carolina Bar Association's General Practice Hall of Fame. Generations of lawyers in the 30th Judicial District have benefited from Mr. Jones' knowledge, skill, wisdom, and comforting presence. He is known as "President for Life" of the Macon County Bar, and he continues to make himself available to any attorney—beginning or experienced—as a mentor, counselor, and advisor. Richard S. Jones Jr. has provided a lifetime of distinguished service to both the legal profession and the people of 30th Judicial District.

**Maria M. Lynch** is a recipient of the John B. McMillan Distinguished Service Award. Ms. Lynch graduated with honors from the University of North Carolina School of Law in 1979. After clerking for the Hon. J. Dickson Phillips Jr., she entered private practice where she has established a reputation as one of the preeminent tax and estate planning lawyers in North Carolina. She has been included in Best Lawyers in America since 1991, and included in Super Lawyers in 2006. In 2011 she was named to the Legal Elite Hall of Fame for Tax and Estate Planning. Throughout her career Ms. Lynch has consistently represented clients in a *pro bono* capacity. Ms. Lynch served as a State Bar Councilor for the 10th Judicial District from 1993 until 2001, and currently serves on the Wake County Bar Association Board of Directors. She was an original member of the 10th Judicial District Grievance Committee and was the first chair of the Wake County Bar Association Professionalism Committee. In addition to her service to the legal profession, Ms. Lynch has taught as an adjunct professor at UNC Law School, as a lecturing fellow at Duke Law School, and at countless CLE programs. Maria Lynch has established a standard of excellence in her legal field and in her service to the community.

**Norwood Robinson** is a recipient of the John B. McMillan Distinguished Service Award. Mr. Robinson grew up in Sampson County and attended the United States Military Academy, from which he graduated in three years. Following his service as a 2nd lieutenant and company tank commander in the Army Tank Corps, he attended Duke Law School, where he was a co-editor of the Duke *Law Review* and graduated as a member of the Order of the Coif. Mr. Robinson has been practicing complex litigation for over 50 years and was a co-managing parter of Petree, Stockton, Robinson, Vaughn, Glaze & and Maready. He continues to practice full-time at Robinson & Lawing. Among numerous professional honors, Mr. Robinson has been inducted into the American College of Trial Lawyers and named one of the Best Lawyers in America. He has served in many professional endeavors, including the American Bar Foundation, the NCBA Board of Governors, the Forsyth County Bar Association, and as a member of the Board of Visitors for both Duke Law School and Wake Forest Law School. He has given his time to civic service as an admissions counselor for West Point, as a co-founder of the Winston-Salem Housing Foundation, as chairperson of the Forsyth County United Way, and as a Sunday school teacher for over 50 years. He evidences all the qualities and qualifications set out in the preamble to the Rules of Professional Conduct and is a role model for members of the Forsyth County Bar.

**James T. (Jim) Williams** is a recipient of the John B. McMillan Distinguished Service Award. Mr. Williams received his bachelor's degree (1962) and his law degree (*cum laude*, 1966) from Wake Forest University, where he was a founding member of the *Law Review*. Upon graduation from law school, Mr. Williams joined what is now known as Brooks, Pierce, McLendon, Humphrey &

Leonard, LLP and is currently a partner in the firm. Mr. Williams has been recognized by his peers as one of the best business litigators in North Carolina and was recently named as one of the top ten Super Lawyers in North Carolina. In addition to his legal practice, Mr. Williams has served the bar and his community with distinction. He has served as chair of the North Carolina State Committee of the American College of Trial Lawyers, chair of the Board of Trustees of Wake Forest University, and chair of the Community Foundation of Greater Greensboro. He has also served on the Greensboro Development Corporation and the Board of Education of the Greensboro Public Schools. Mr. Williams has shared his legal expertise as an educator, having served as an adjunct instructor at Elon, Campbell, and Wake Forest Law Schools. Young lawyers in Guilford County would be well served to use Jim Williams's commitment to the law and to his community as a model for their careers. ■

# *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. ■

## In Memoriam

**Lyn Bond Jr.**
Charlotte, NC

**William Frazier Briley**
Raleigh, NC

**William James Chandler Jr.**
Charlotte, NC

**James William Clontz**
High Point, NC

**Gene Porter Cole**
Charlotte, NC

**Robert Davis Darden Jr.**
Raleigh, NC

**Ralph Patterson Dodds**
Raleigh, NC

**Alonzo Hill Gainey Jr.**
Oak Island, NC

**John C. Gardner**
Mount Airy, NC

**Laurence Starr Graham**
Greenville, NC

**Stephen Paul Halstead**
Winston-Salem, NC

**Garland Edison Hill**
Asheville, NC

**James Baxter Hinson**
Charlotte, NC

**Edward Brandt Hipp**
Raleigh, NC

**James D. Howell**
Matthews, NC

**John Randolph Ingram**
Myrtle Beach, SC

**William A. Johnson**
Lillington, NC

**Brian Francis David Lavelle**
Asheville, NC

**Hugh A. Lee**
Rockingham, NC

**Hector MacLean**
Lumberton, NC

**Duncan Brown McFadyen III**
Raeford, NC

**Erle E. Peacock Jr.**
Chapel Hill, NC

**Larry William Pitts**
Newton, NC

**Eric Alton Saunders**
Winston-Salem, NC

**James Dale Shepherd**
Greensboro, NC

**Arnold Monty Stone**
Morehead City, NC

**James Richard Vosburgh**
Washington, NC

**Donald Hurst Wilson III**
Raleigh, NC

**Deborah Williamson Witt**
Midland, NC

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