THE NORTH CAROLINA STATE BAR

JOURNAL

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"We're from the State Bar and We're Here to Help You...Really"

By M. Keith Kapp

The State Bar provides its president with very nice bond stationery. In this digital age of emails, texts, smart phones, and many more instant communications that follow us to the ends of the earth, I do not have much day-to-day need for such stationery. Shortly after I took office I looked at that stack of fine paper and, being a person who dislikes waste, I wondered how I could best use it. I decided to write personal notes to attorneys chairing committees, serving on commissions, and doing other good things around the state. I sent one to a friend in one of our westernmost counties congratulating him on a recent award. A couple of days later I got a call from him that started, "Keith, d*** you, I have been sitting here paralyzed at my desk for an hour staring at this letter from the State Bar trying to figure out what in the world I had done wrong that would cause somebody from the State Bar to write me." He was surprised—and I assume relieved—to open it and find a congratulatory letter.

After I received a few more responses in this vein, I concluded that the only mailings most North Carolina lawyers *want* to receive from the State Bar are the quarterly issues of the *Journal* and annual dues notices.

The mission of the State Bar is to protect the public, regulate the profession, and maintain the integrity of the legal profession in North Carolina. We are not here to protect the pocketbooks of lawyers. We do, however, provide direct services to lawyers, many with the goal of resolving problems before a dreaded "State Bar letter" arrives.

The State Bar staff's role in untangling ethics issues before they become grievances is one example. When you have a concern as to whether a prospective action presents an ethical issue, you can email our ethics attorneys at ethicsadvice@ncbar.gov and receive prompt, thorough guidance based on current guidelines. If you have accurately explained the situation and you follow the advice given, a grievance complaint will be resolved in your favor.

The Attorney-Client Assistance Program also helps deal with problems before they become formal grievances. The State Bar employs three public liaisons to answer calls from the public complaining about lawyers. Typically, a client calls the Attorney-Client Assistance Program at **(919) 828-4620** and then the Bar contacts the lawyer and gets everybody talking. While this might not seem at first glance to be a service for lawyers, it has in fact helped reduce the number of formal complaints by facilitating communication between clients and their lawyers

The State Bar sponsors the Lawyer Assistance Program (LAP), which provides outstanding service through confidential interventions with lawyers who are having emotional, addiction, or cognitive problems. The LAP is very ably led by Robynn Moraites, who can be reached at **(704) 892-5699**.

The new State Bar building at the corner of Edenton and Blount Streets in downtown Raleigh offers us new opportunities to serve lawyers. Thanks to a good design that allows for growth, we now have space for lawyers who are coming to Raleigh for a day or two and need a temporary office or conference room. We have rooms set up for mediations, depositions, and conferences on the first floor. At present, we are not charging for use by attorneys. You can make a reservation on a space-available basis by calling the main number at **(919) 828-4620**.

Two areas of service to attorneys that have been particularly important to me this year are the role of the State Bar in regulating—and supporting—the beginning and the ending of a legal practice.

Concerned about the number of inexperienced attorneys we are seeing in grievance proceedings, the State Bar Council has considered the issue of mandatory mentoring and has decided not to require it at this time. At least 13 states, with a noticeable concentration in the South, do have mandatory mentoring. Personally, I hope the Bar will pursue mandatory mentoring in the future. We do require the New Admittee Professional Program (NAPP)—soon to be called Professionalism for New Admittees (PNA)—which provides "nuts and bolts" and practical experience a young lawyer needs to begin practice. This is particularly important to the many young lawyers who cannot find jobs with established firms or obtain any sort of formal mentorship. This year the State Bar is in the process of targeting the program to specific practice areas. For example, we require that the program include general trust account rules. Going forward we will specify separate instruction to address large firms, small firms, and the public sector, where an individual attorney's use of the trust account may be very different.

In addressing the ending of a law practice, the State Bar is exploring several rule changes that will assist lawyers in retiring. The changes will complement programs of the voluntary bar that address retirement, particularly the Transitioning Lawyers Commission (TLC) of the North Carolina

CONTINUED ON PAGE 12


Find people worthy of the name on the door. That was my mentor's advice. But the landscape has changed over the last few years. Profits are harder earned and have to be more wisely spent. So I'm getting help to keep our practice healthy enough to attract and retain top talent. After all, it might as well be my name on the door.
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State v. Willie Grimes: Obtaining Freedom Through the Innocence Inquiry Process

By Chris Mumma and Robert Campbell

Willie Grimes spent nearly a quarter of a century in prison for a crime that he did not commit. Fingerprints on a banana discovered years later provided the proof of his innocence. His wrongful conviction was the result of careless and reckless police work, misleading hair comparison evidence, significant discovery violations, and misidentification. The discovery violations were dealt with by the court of appeals shortly after his conviction in one sentence finding "no error." It is often said that our criminal justice system is not perfect. However, the system failed entirely for Willie Grimes and took 24 years of his life. The case of *State vs. Willie Grimes* is a clear example of why judges and appellate courts must ensure fairness and compliance with discovery laws in our courts. The case also exemplifies the necessity of the Innocence Inquiry process.

Robert Campbell, Willie Grimes, and Chris Mumma

At approximately 9:00 pm on October 24, 1987, an African-American male forced his way into the Hickory, North Carolina, apartment of Mrs. Carrie Lee Elliott, a 69-year-old Caucasian woman who lived alone since her husband passed away the year before. The intruder warned Mrs. Elliott that he had a knife in his pocket and he would cut her if she did not cooperate. He then raped her on the living room sofa and dragged her to the bedroom where he raped her a second time. Ms. Elliott fought and pleaded throughout the horrific ordeal, and the perpetrator responded by beating her about the face and arms.

After the attack, Mrs. Elliott began to pray aloud and told the man to leave. The perpetrator asked the victim to make him something to eat, but then said he could not stand her praying and he went to the kitchen to find something for himself. He rifled through the fruit bowl on the kitchen table, set aside some bananas that were not to his liking, took some other bananas and an apple, and left through the back door. At 9:17 pm, Mrs. Elliott locked the doors and called her daughter-in-law, who then called the police. Law enforcement arrived at Mrs. Elliott's apartment at 9:21 pm.

At her home on the night of the rape, Mrs. Elliott was able to give police the following description of her assailant: black male, approximately six feet tall, 200–225 pounds, approximately 35 years old, very dark-skinned, bushy hair, needed to shave, very large build, smelled of alcohol, wearing dark pants and a green pullover. At the hospital hours later, her description remained consistent, but she added the additional information that the perpetrator smelled of "rock gut" alcohol and was unknown to her. Based on her description, the police showed Mrs. Elliott a traditional six-pack photo array. Mrs. Elliott did not identify any of the men in the array as her rapist. Not yet a suspect, Willie Grimes' photo was not included.

A crime scene technician processed her apartment for trace evidence, including fingerprints, hair, and semen. The technician recovered latent prints from the bananas the perpetrator had left on the kitchen table, as well as African-American hairs found on Mrs. Elliott's bed sheet.

Two days after the rape, Mrs. Elliott spoke to her neighbor, Linda McDowell, about the assault. McDowell told Mrs. Elliott she might know who raped her, but insisted she would only give the name directly to the Hickory Police Department. Mrs. Elliott called the police station and told the officers about McDowell's reluctance to reveal the name. Mrs. Elliott also told law enforcement—for the first time—that the perpetrator had a mole on his face and spoke with a lisp. In 1987, Willie Grimes had a large mole on his face and, to this day, has a speech impediment.

Later that day, McDowell went to the police department and told them that her sister's ex-boyfriend, Willie Grimes, fit the description of Mrs. Elliott's rapist. Law enforcement prepared a new photo array—this time including a photo of Willie Grimes. Mrs. Elliott picked Willie's photo out of the array, but said her rapist had longer hair and that she could not see a mole in the photograph. Based on the identification, a warrant was issued for Willie's arrest.

Upon learning of the warrant and knowing he had done nothing wrong, Willie voluntarily went to the police department to clear things up. He was charged and booked—all the while proclaiming his innocence. He tried to give police information about where he had been the night of the rape, but was encouraged by the booking officer not to talk. He also asked for a polygraph examination, but none was ever given.

The booking card for Willie, taken when he was arrested only days after the rape, indicates he was 6'2" and weighed 165 pounds—unlike the 200–225 pound man with a large build that Mrs. Elliott had originally described. Willie also had a noticeable scar on his chest, which would have been visible when the perpetrator removed his shirt during the rape, was missing two fingertips on his right hand, and had a large mole on the left side of his face that looked like a bunch of grapes. Mrs. Elliott never mentioned the scar or the missing fingertips in any of her descriptions, and she didn't mention the mole until after speaking with McDowell.

The latent prints found on the banana left at the crime scene were compared to Willie's prints, but did not match. The prints were never compared to anyone else, including Mrs. Elliott, and the fact that they did not match Willie was not revealed to the defense pre-trial.

Three weeks after the assault at Willie's probable cause hearing, Mrs. Elliott was asked to identify her perpetrator in the courtroom. Mrs. Elliott could not definitively identify Willie, saying only that he "looked like" her attacker.

Prior to trial, Willie's attorney, Mr. Eduardo de Torres, filed a motion requesting independent testing of the physical evidence because it "would be vital exculpatory evidence...[and had] a direct bearing on the issue of the innocence of the defendant." Mr. de Torres sought comparison of the hairs found at the crime to samples taken from Mrs. Elliott and Willie Grimes. The SBI lab conducted microscopic hair analysis on the hairs found at the crime scene and reported that the hair found at the crime scene "could have

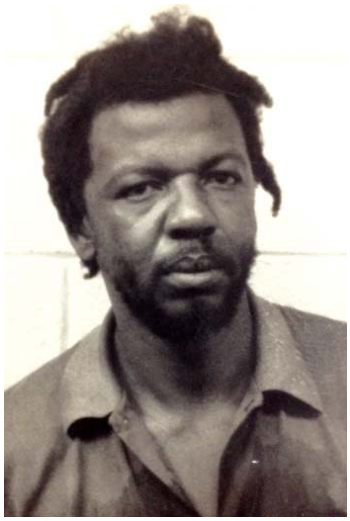
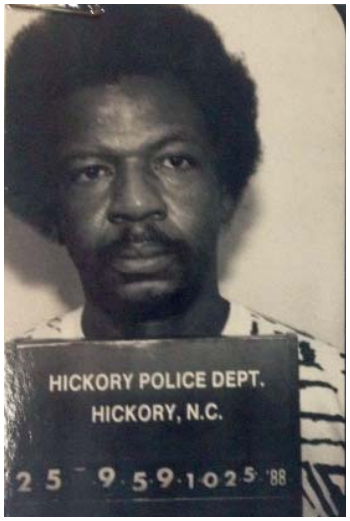
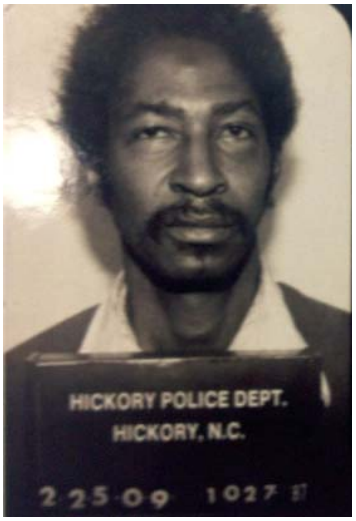


Photo of Turner, taken in 1985, that was shown to the defendant.



Albert Turner photos from 1988.



Willie Grimes photo from 1987.

originated from Willie Grimes."

Mr. de Torres also interviewed and obtained affidavits from eight alibi witnesses establishing that Willie, who did not have a car or a license at the time, was over a mile away at a friend's home when Mrs. Elliott was assaulted. Mr. de Torres gave the affidavits to the District Attorney's Office, hoping to prove Willie's innocence or at least prompt further investigation of the case, but no one from the police department or the District Attorney's Office ever interviewed a single alibi witness.

At trial, the state's case centered around Mrs. Elliott's identification and the microscopic hair comparison. When asked during *voir dire* to make an in-court identification, Mrs. Elliott was still unable to identify Willie. She pointed and said, "Right down there, beside the guy with the red shirt on." Willie was actually the one wearing the red shirt, and Mr. de Torres was the person sitting next to him. Mrs. Elliott also could not recognize the photo array that resulted in her original identification. This resulted in the suppression of the array, but the trial court allowed an in-court identification during Mrs. Elliott's testimony.

Eight alibi witnesses testified that Willie was with them the night of the rape and, therefore, could not have committed the crime. Willie also testified, proclaiming his innocence as he had from the start.

The jury only deliberated for an hour before finding Willie guilty of two counts of first-degree rape and one count of first-degree kidnapping. The trial judge sentenced him to a consolidated life sentence for the rape charges, arrested judgment on the first-degree kidnapping conviction, and sentenced him to nine years for second-degree kidnapping.

Immediately following sentencing, Mr. de Torres requested access to the physical evidence and funding to pursue forensic testing, including DNA testing—an incredibly rare motion in 1988. The SBI lab was not even equipped to perform such testing at the time. He also requested that the two latent prints from the bananas be sent to the FBI to see if they matched any prints on file. The trial judge took the requests under advisement, but never ruled on the motion.

In 1991, Mr. de Torres renewed his efforts to obtain DNA testing of the physical evidence. His inquiry into the location of the evidence was met with notice that the evidence had been destroyed just months prior, despite Mr. de Torres' post-trial motion to preserve the physical evidence for forensic testing.

Willie filed appeals, postconviction motions in state and federal court, and requested clemency from the governor. All attempts for relief were denied.

In 2003 he contacted the North Carolina Center on Actual Innocence. His case stood out for several reasons: the victim's weak identification, the use of microscopic hair analysis, Willie's numerous alibi witnesses, and the fact that he refused attractive plea deals and early parole because he refused to admit guilt. In fact, Willie stayed in prison an extra ten years because he would not participate in sex offender classes necessary for early parole.

The center knew the key to Willie's case was subjecting the physical evidence to modern testing, so center staff made numerous inquiries to law enforcement agencies, the Clerk's Office, and the District Attorney's Office, all of which met with assurances that all evidence had been destroyed.

In 2006, due to national attention to North Carolina's reform work regarding the preservation of biological evidence in criminal cases and the center's firm belief in Willie's innocence, the *Denver Post* wrote an article on Willie's case in its series "Trashing the Truth." About the same time, the center also provided the case to the newly formed North Carolina Innocence Inquiry Commission to be used as a mock training case for new commission members.

After receiving federal grant support, the commission staff went back through any cases in their database where they felt an evidence search should be conducted. That led them to review Willie's case and to the discovery that the latent prints still existed in law enforcement's investigation file. The prints were apparently placed in that file when the rest of the evidence was destroyed. They remained there until the Innocence Inquiry Commission could exercise the necessary subpoena power and authority it often takes to find evidence that has previously been reported as being "lost" or "destroyed."

After locating the prints in Willie's case, the commission staff requested that they be uploaded into the statewide fingerprint databank and run against the other prints on file. A databank search resulted in a match of a latent print found on the banana inside Mrs. Elliott's apartment to a man named Albert Lindsey Turner.

Turner's prints were in the databank as a result of his lengthy criminal record, which included multiple assaults on women. Later review of police files in the personal possession of the original investigating officer revealed that Turner was also the first suspect in the case and that his photo had been included in the photo array shown to Mrs. Elliott the night of the crime. However, the photo used by the police of Albert Turner (above left) was from years earlier and was not representative

of how Turner looked at the time of the crime.

The photo in the middle is a close representation of how Albert Turner looked on the date of the crime, with longer hair than Willie Grimes. Ms. Elliot had indicated that the Grimes photo (on the right) was the suspect, but that the suspect had longer hair.

The commission staff continued their investigation by interviewing Turner's former victims. When they interviewed one assault victim, she asked if they were there to ask about Turner raping her. That alleged rape had occurred in 1973 when she was nine years old and had never been reported to police.

When the commission staff followed up with an interview of Turner, he acknowledged having sexual intercourse with the young girl, but claimed she was 12 at the time, not nine. Turner would have been in his mid-20s then.

Although Turner originally denied knowing Mrs. Elliott, after being told his fingerprints were found at the crime scene, he remembered that he knew her and would often go into her apartment with another friend, Peggy. Conveniently for Turner, Peggy is deceased and could not verify his recollections. As to why his fingerprints would have been on fruit in Mrs. Elliott's home, Turner stated that he and Peggy would bring Mrs. Elliott fruit in exchange for using the telephone.

Mrs. Elliott's family insists that she would never let any man in her apartment, regardless of whether they were accompanied by a woman. Her family and friends, to whom Mrs. Elliott was extremely close, also had never heard of Peggy or Turner.

The commission staff wrote Willie and explained that his case would be moving into "formal inquiry" and would be presented to the eight-member commission. He was also informed that he was entitled to have an attorney represent him. The day he got that letter, Willie called the center and asked Chris Mumma if she would be willing to represent him.

On April 2–4, 2012, the eight-member North Carolina Innocence Inquiry Commission considered Willie Grimes' innocence claim and unanimously found that sufficient evidence of innocence existed to merit judicial review.

The next step was a hearing before the three-judge panel, which was scheduled for October 2012. The Honorable W. David Lee, Carl R. Fox, and Sharon T. Barrett were appointed by Chief Justice Parker to hear the case. Robert Campbell was appointed as co-counsel for the defense in late August 2012. Although the center was very familiar with the case, Campbell had little over a month to get up to speed.

The defense team quickly set up meetings to go over all of the evidence in the case and lay out the hearing strategy, which included 1) showing how Willie's alibi made it impossible for him to have committed the crime; 2) presenting the fingerprint evidence and the impossibility that there was any explanation for Turner's prints to be on the fruit other than if he was the perpetrator; 3) providing evidence of the discrediting of hair microscopy evidence; 4) presenting expert testimony regarding the unreliability of Mrs. Elliott's identification of Willie; and 5) highlighting the weaknesses, and in some ways complete incompetence, of the original investigation. Although the Innocence Inquiry Commission staff had completed a very thorough investigation, meeting the burden of proving clear and convincing evidence of innocence to a three-judge panel was a high bar.

Several of Willie's original alibi witnesses testified before the three-judge panel. They all knew that it was impossible for Willie to have committed the crime because he was with them all evening. They remembered important details of that night because they had struggled for 25 years with the fact that Willie was incarcerated for something they knew he had not done.

Dr. Jennifer Dysart, an expert on eyewitness identification, also testified at the hearing. She explained to the panel how eyewitness misidentifications occur and that numerous factors in this particular case led her to question the reliability of Mrs. Elliott's identification of Willie Grimes as her rapist. Dr. Dysart explained that approximately 75% of the over 300 DNA exonerations to date had eyewitness identifications and that approximately 40% were cross-race identifications, as in Willie's case. Mrs. Elliott was likely also affected by weapon-focus, a distraction that causes the witness to draw their attention away from the perpetrator, and from the violent nature of the events. Dr. Dysart also pointed out that Mrs. Elliott was specifically asked whether she noticed any scars or tattoos when she first gave a description of the perpetrator to law enforcement. If Willie had been that perpetrator, Dr. Dysart would have expected Mrs. Elliott to mention the conspicuous mole on his face in that first interview with law enforcement. Dr. Dysart also noted that if Mrs. Elliott had really known Albert Turner, she would have expected Mrs. Elliott to point him out in the original photo array as someone she knew. Finally, Dr. Dysart explained how Linda McDowell's conversations with Mrs. Elliott could have, even unintentionally, impacted Mrs. Elliott's later descriptions of the rapist and her ultimate identification of Willie Grimes.

Although center staff had for years believed strongly in Willie's innocence, there was never a plausible alternate suspect. As all of the physical evidence was either lost or destroyed, the way to prove Willie's innocence hinged on proving someone else's guilt. The commission staff's ability to access and analyze the fingerprints from the crime scene was a critical development in the case. Not surprisingly, Mrs. Elliott's original description of her rapist was precise in comparison to Albert Turner's appearance at the time with regard to height, weight, build, and hair style. Unfortunately, the photo of Turner used in the original array showed his hair in braids.

It was also convincing that, at the time of the crime, Turner was living with his mother in an apartment that was roughly 500 feet from Mrs. Elliott's home. Additionally, on the night of the crime, law enforcement had found discarded banana peels dropped on a path outside of Mrs. Elliott's home going in the direction of Turner's home and an apple core nearby. Unfortunately, the banana peels were never collected into evidence and the apple core was inexplicably discarded at the station the night of the rape.

During the hearing before the three-judge panel, Albert Turner was called to testify by the state. At the time, Turner was in county jail on charges associated with the 1973 rape uncovered during the commission staff's investigation. On the advice of counsel, Turner asserted his Fifth Amendment right against self-incrimination. He was indicted for the rape of the nine-year-old child in May 2013 and, at the time of this article, awaits trial.

The prosecution also called to the stand the lead detective in the case, Steve Hunt, who was employed by the Hickory Police Department at the time of the crime. Hunt's testimony laid bare the incomplete, unprofes-

sional, and biased investigation. As the lead investigator, he had never interviewed a single witness, not even Mrs. Elliott. In fact, he admitted the investigation was basically completed within days of the crime.

Hunt also confirmed that Linda McDowell, who first raised Willlie's name in connection to the case, was an informant who had been paid $1,000 for her "assistance." The fact that she was a paid informant was never revealed to the defense at trial, and she was never called to testify at the original trial.

Finally, Hunt also revealed that Albert Turner was the brother of a fellow HPD officer, and that all information relating to Albert Turner's identification as the original suspect had been kept in Hunt's personal file and had never been shared with defense.

After four days of witness testimony, introducing new evidence and challenging the evidence presented at trial, closing arguments were scheduled for Thursday, October 5, 2012. District Attorney Jay Gaither spoke first and remarkably stated that he could not in clear conscience argue against Willie's innocence. He then apologized to Willie for his conviction on behalf of the State of North Carolina.

Chris Mumma spoke on Willie's behalf. As the state was no longer contesting Willie's innocence claim, the defense closing focused in part on the importance of the Innocence Inquiry process in Willie's case and others like it:

> The Innocence Inquiry process was established because sometimes the system gets it wrong, and sometimes procedural bars or the fact that our system is overloaded, underfunded, and buried in current caseloads keeps us from righting those wrongs. Despite the fact that it's the best system in the world, it's a human system and it will have human error.
>
> In every one of the of the now over 300 DNA exoneration cases, there were prosecutors, law enforcement officers, victims, and witnesses who were confident in the defendant's guilt at the time of the conviction. Our justice system has learned much about human fallibility through the advent of DNA—about the risks of misidentification, human susceptibility to bias, the overreliance on what were previously believed to be reliable areas of "science," the importance of police procedures that increase the reliability of convictions, how the personal motivations of bad actors in the system can put innocent people at risk, and the judicial value in pre-trial cooperation in discovery. We have also learned that although the jury verdict should be honored, it cannot be upheld when there is new and credible evidence of innocence that could not and was not considered by the jury.

The three-judge panel deliberated for 30 minutes before delivering their order finding that Willie Grimes had proven by clear and convincing evidence that he was innocent of the rape and kidnapping of Mrs. Carrie Elliott. The panel vacated his convictions and ordered the immediate removal of his name from the state's Sex Offender Registry.

Willie served 24 years in prison for a crime he did not commit. During those 24 years he always maintained his innocence. He never wavered even when offered attractive plea deals. He testified in his own defense. He refused to take sex offender classes where he would have to admit guilt, staying in prison an additional ten years as a result. Only an innocent man has that kind of endurance.

Since his release, Willie is adjusting to life outside of prison walls. He is fortunate to have the support of his family and friends. In prison, he became a devout Jehovah's Witness and has found a second family in the members of his Kingdom Hall. His faith gives him peace and strength.

At the conclusion of the hearing, Judge Fox commented that the Innocence Inquiry Commission "is perhaps one of the best changes in the judicial system in North Carolina in the last 100 years." He is right. The reality is that if North Carolina did not have the commission process, Willie Grimes would not have been exonerated, the latent print cards would never have been found, and Albert Turner would not be in jail. The commission process has the ability to uncover information that is otherwise seemingly lost forever. It can also right the wrongs of our criminal justice system in ways that the traditional post-conviction process cannot. The commission process is designed to get to the truth—and what can possibly be more important to the criminal justice system than the truth? ■

Chris Mumma is the executive director of the North Carolina Center on Actual Innocence in Durham, NC. The center screens over 500 innocence claims each year, coordinates the work of the Innocence Projects® at several North Carolina law schools, and has successfully exonerated four North Carolina inmates from wrongful incarceration. The center also educates policymakers, the public, the media, and the legal/law enforcement communities about systemic problems in the criminal justice system that lead to wrongful convictions, as well as the emerging solutions to those problems. Ms. Mumma has a degree in Business Adminstration and a law degree from UNC-Chapel Hill.

Robert E. Campbell has practiced law in Taylorsville since 1992. His practice areas include representing defendants charged with capital murder, civil and criminal litigation, domestic relations, and governmental representation. He has a degree in Political Science from UNC-Chapel Hill and a law degree from NC Central Law School.

President's Message (cont.)

Bar Association. We publish in this edition of the *Journal* proposed rules dealing with the following issues related to retirement:

> (1) Allowing a lawyer retiring from practice to use the title "Retired Member of the North Carolina State Bar" or a similar title that clearly indicates that the lawyer no longer practices;
>
> (2) Extending the LAP exemption from reporting Bar Rules violations of fellow lawyers to TLC interventions so that those doing interventions do not report discovered violations of the lawyer whom they are intervening to help; and
>
> (3) Revising Ethics Rule 1.17 to help senior lawyers sell or broker a law practice to a young lawyer.

Self-regulation is an important privilege granted by the NC General Assembly and the NC Supreme Court to the legal profession. This regulation must be used appropriately to protect the public and the integrity of the profession. Helping to maintain that integrity is the most important service the State Bar can provide to all of North Carolina's lawyers.

The State Bar is here to help and does help lawyers. ■

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

Win, Win, Win

"Partnerships are the foundations upon which the revitalization of a downtown can occur. By supporting the local artists who displayed art in their historic building on Fayetteville Street, the North Carolina State Bar made downtown a more vibrant, inviting, and appealing place for visitors and residents alike."

David Diaz, President and CEO
Downtown Raleigh Alliance[1]

In 1999 the State Bar renovated its building at 208 Fayetteville Street to accommodate a burgeoning staff and to rectify a number of outdated design features that made the building unsafe and limited its utility. An important part of the renovation was the removal of a false façade to expose the historic front of the former Effird's Department Store, erected in the 1920s. No self-respecting department store at that time could exist without sizable display windows on the main shopping street, Fayetteville, but exposing the windows raised a question: what to put in them? It was quickly decided that putting an employee in a "fish bowl" office would be discomforting (for employee and pedestrian on Fayetteville Street, alike). At the time, the art committee for the renovation was working with arts professional Melissa Peden to commission appropriate artwork for the renovated lobby. Ms. Peden and the art committee hit upon a novel idea: ask regional artists to display their paintings in the store front windows on a temporary, rotating basis at no charge to the State Bar. The State Bar building would be more interesting and beautiful; in exchange, the artists would get exposure and be featured in a regular article in the *Journal*. The services of Rory Parnell and Meg Rader of The Mahler Fine Art Gallery in Raleigh were quickly enlisted to identify appropriate artwork and willing artists. The artists, it turned out, were thrilled to participate.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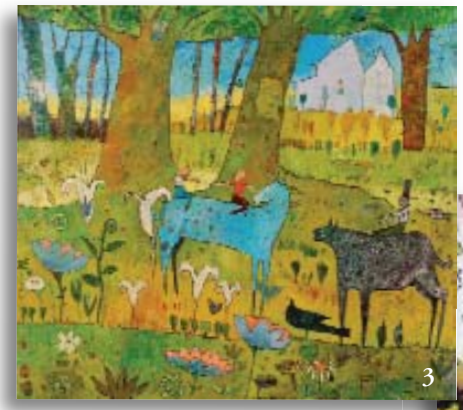
"I remember the delightful surprise of encountering the NC State Bar's artist showcase windows during my introduction to Fayetteville Street in 2009, and the building immediately became a regular destination on my frequent walks downtown. Rory and Megg have long been champions for local artists, and I think it was really smart of the State Bar to empower Clearscapes to design a handsome mini-gallery that has animated Fayetteville Street with the work of dozens of talented artists from throughout the region."

Jerry Bolas, Executive Director
Raleigh Arts Commission[2]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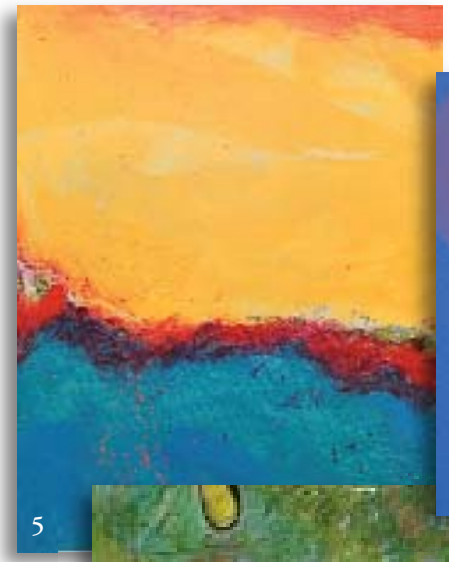
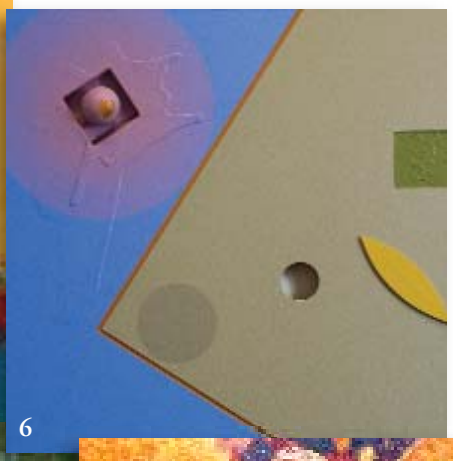
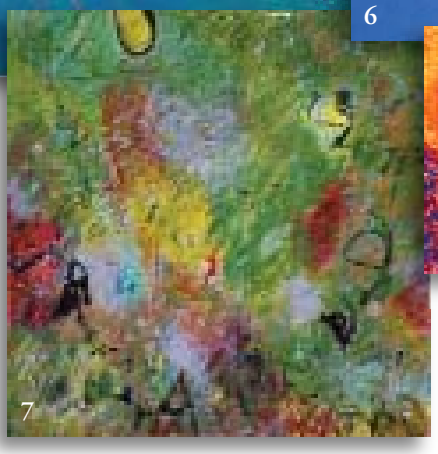
For over 12 years, the State Bar displayed paintings of regional artists in its windows. The paintings changed every three months, providing a variety of subject matter, style, perspective, materials, and points of view to be appreciated, pondered, and, on occasion, disparaged by State Bar staffers, councilors, visitors, and pedestrians. It was never dull walking past our building.

Regrettably, with the move to the new State Bar building on the corner of Edenton and Blount, the program has come to an end. There are no old storefront windows here, and there are far fewer pedestrians to entertain in this corner of downtown Raleigh. In lieu of rotating art work, a permanent art collection for the interior of the new building was acquired with private funds from the North Carolina State Bar Foundation. (The next edition of the *Journal* will feature the collection in the new building.)

Few things in life are a win for everyone involved, but this program of rotating art in the State Bar windows was a win, win, win for all: the State Bar, the artists, and downtown Raleigh. So, this article is a salute and a farewell to 12 years of a winning program and to everyone—artists, State Bar staff, Rory and the good folks at The Mahler Gallery—who worked together to make something beautiful happen on Fayetteville Street.







"When the State Bar approached me in 2001 about curating art for their windows, we did not know that we were ahead of a trend that would follow. 'Storefront Art' has become widely popular because it works on many levels. It brings validation to the artist by allowing others to see their work; it brings art to an audience that may not visit galleries or art shows; and it serves to enliven and enrich the experience of the passerby, thereby contributing to the vitality of the community.

For 12 years without interruption the State Bar has provided that opportunity to the artists and the community. The project has been a wonderful addition to Fayetteville Street and it will be missed.

I have enjoyed my partnership with the State Bar and especially Alice Neece Mine who treated the artists and their work with the utmost respect, for which I am grateful."

Rory Parnell, Director
The Mahler Fine Art

Following are quotes from artists who participated in the program, and whose work is featured in this article.

"It was a lovely experience! I enjoyed my art pieces being so visible to the public, and many people mentioned to me how nice the space was for an exhibit . The article was one of the first ones published about me as an artist. It made me feel very special and accepted as a professional in my field. I am sure this remained a wonderful space to help artist careers through the years that the exhibits were presented. Thanks again for a lovely memory!"

Rachel Nicholson (1)

"I remember coming across my work by accident one day and thinking how great a space it was for showing work. The foot traffic is the best in the city and each window gives the work displayed the perfect space to breathe and stand on its own. Plus it is a unique opportunity for artists to show their work."

Pete Sack (2)

"It has been my pleasure to display paintings in the big windows at the NC State Bar. They have given me a chance to cheer up the street and hopefully inspire the passers by."

Jane Filer (3)

"It was an honor and privilege to show two of my 'Fair View' Garden abstracts in the windows of the NC State Bar building on Fayetteville St. last year. My artwork received considerable attention and 'Fair View XIII' was purchased by one of Raleigh's premier law firms!"

Marriott P. Little (4)

"I am so honored to be in the art collection of the NC State Bar. Several years ago my work was featured in the windows and in the NC State Bar Journal. *One of those paintings was purchased by the State Bar—Perfect Silence, mixed media 48x60. This was facilitated by The Mahler's owner, Roy Parnell."*

Nancy Tuttle May (5)

"When I was first approached with the idea of having two of my paintings shown through a storefront art venue, I was a bit apprehensive. However, after giving it some thought, I soon realized that given the location and the patron involved, it was a wonderful opportunity for good exposure of my artwork. Storefront art is another form of public art and one in which art, design and marketing converge; it attracts the attention of the window shopper and passerby, while rewarding him/her with beauty and culture at no extra charge."

Lope Max Díaz (6)

"I was honored to display my art in the windows at the NC State Bar. Not only was the space lovely, it introduced my work to two new markets: the daily traffic on Fayetteville Street Mall and the lawyers across the state. For that exposure, I am very grateful."

Lisa Stroud (7)

"A display on Fayetteville Street in downtown Raleigh? An artist couldn't ask for a better place to share his artistic talents."

Eric McRay (8)

"High praise to the North Carolina State Bar for their patronage and promotion of North Carolina artists! Through a long standing partnership with the Mahler Fine Art Gallery, the State Bar has consistently sought to showcase our state's rich talent with a commitment both to presenting quality work in their spaces, as well as profiling artists in their publica-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tion. As a beneficiary of this exposure I wish to express my appreciation to the State Bar for their professional encouragement and congratulate them on the new building!"

Linda Ruth Dickinson (9)

"North Carolina has few venues for works to be on public view. We who create work, while we appreciate sales, want even more for it to be seen. To walk down Fayetteville and to see what thousands have viewed creates a sense of belonging. While sculpture in the role of public art is seen by the many, painters are seldom afforded the same opportunity. The North Carolina State Bar window exhibition is a welcome and unique experience for the citizens to view our work. And for the artist...an appreciated experience."

Marvin Saltzman (10)

"I very much appreciated the opportunity to display work at the NC State Bar. A non traditional venue like the State Bar certainly has the potential to provide artists with new channels for connecting with members of the public who might not regularly visit galleries. Still, I was surprised by the amount of positive feedback I received from showing there. It's an excellent service to artists."

Henry Link (11)

"I was truly excited to learn that the NC State Bar displayed my woodcuts on loan from The Mahler Fine Art in their windows. This was a great opportunity for more exposure for my large format woodcuts in downtown Raleigh. I would welcome the opportunity to do so again."

Ann Conner (12)

"Displaying my work in the windows of the NC State Bar was a wonderful experience for me. It was a welcome challenge to create a piece to suit the unique windows and interesting to see the work installed in such a dramatic space. I made two 24" x 48" diptychs, which allowed me to make a work big enough in scale and play with breaking up imagery on the narrow canvas fields. I was also impressed with the number of people who saw the work. I received many phone calls and emails from friends and colleagues who wanted to let me know they noticed."

Sarah Powers (13)

"Every time I've walked by the State Bar building on Fayetteville Street I've paid attention to the artwork hanging there in that unique and very visible space. The space has been a terrific spot to show work, and I was happy to have my work there for a time. It's not often that a painter like myself gets to display work that's so open to the public on a main thoroughfare."

Richard Garrison (14)

"My experience showing my work at the State Bar was a very positive one. I had people visiting my studio and even calling me, commenting on my landscapes and how nice they looked in the context in which they were being shown. For me as an artist, I thought it was a wonderful venue because the paintings had a different feeling for the people who walked by depending on the time of day, the weather, the temperature, and so on. Normally we think of viewing paintings while indoors, but this was a way people could enjoy being outdoors in a downtown setting and look at my paintings—which were landscapes—and be taken outside of the city they are in. I really enjoyed being a part of it."

Tim Postell (15)

"I am thankful to have been one of the artists to showcase my paintings through this great collaboration with the North Carolina State Bar and The Mahler Fine Art Gallery. I believe society is greatly enhanced when art is on display for all to see. In our fast-paced, high-tech, 24/7 social media frenzy we oftentimes do not take the time to replenish our minds. Placing dynamic art in large, oversized windows is a giant step in helping visitors to refocus and reflect. As an artist, this was a rewarding experience from my standpoint."

Willie Green-Aldridge (16)


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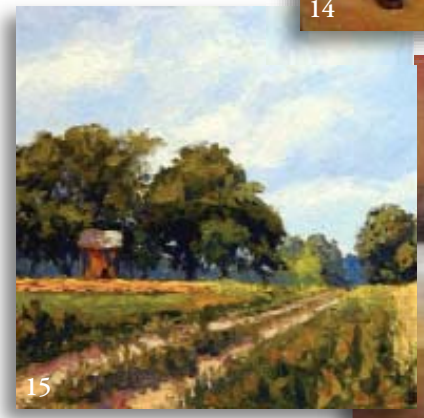
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Endnotes

1. The Downtown Raleigh Alliance is the official nonprofit organization designated to manage and promote downtown Raleigh as a regional center of commerce, tourism, and livability.
2. The City of Raleigh Arts Commission serves as the leading force to champion the arts with Raleigh citizens and their representatives. Serving as the official advisory body and advocate for the arts to the city council, the commission is dedicated to the ongoing goal of connecting people to the arts and building a vital and ever-expanding creative community for Capital City residents and visitors.

Working with a *Pro Se* Claimant—Never Easy, but Completely Manageable

By Nancy Black Norelli

No one ever said practicing law, presiding in court, or mediating cases was going to be easy. If it was, then just about anyone could do it, and that's emphatically not the case. However, the complexity involved doesn't stop everyone from taking on the legal system *pro se* with no training or skills and expecting justice to be best served.


Dave Cutler/SIS.com

The *pro se*, or self-representing claimant, certainly has a place in our democratic legal system. Some people cannot afford an attorney, some people don't trust attorneys, and at the end of the day everyone has the choice to exercise his or her legal rights as they see fit. That said, on those days when you—a trained attorney, judge, or mediator—face a *pro se* party, you have to acknowledge that your job just got a little bit trickier.

In my longtime career as a lawyer, judge, and mediator, I have encountered a variety of *pro se* parties that I now am able to separate into several general types. First, there is what I call the "classic *pro se*" claimant. This person feels beaten up by the system and is both bitter and pessimistic about the outcome, regardless of any assurances or additional consideration offered on your part.

You will also come across what I call the "delusional *pro se*" claimant. This person has watched enough reality TV shows and legal courtroom dramas to feel like he or she is embodying the spirit of Clarence Darrow himself. This *pro se* feels equipped to win with style and ease and is largely unconscious to the reality and challenges that face the unrepresented in the court system.

Lastly, there is what I call the "Eddie Haskell *pro se*" claimant. This person is determined to muck-up the wheels of justice while grinning sheepishly and milking the attorneys, judges, and clerks for legal advice and special favors with his or her "aw shucks" antics. This is perhaps the most difficult of all of the *pro se* types because they tend to be more clever than anyone suspects and can position themselves to take advantage of the system, whether they deserve it or not.

While each of the above types of *pro se* clients presents their own unique challenges, there are some tips I have compiled through the years that are applicable to each and every one. It's up to you—the trained attorney or mediator—to prevent time-consuming, on-the-record confrontations with the *pro se* claimant. As a judge, only you can keep your courtroom from turning into a three-ring circus between a *pro se* client and a trained attorney, and it is up to you to prevent the *pro se* from wasting your most valuable judicial resource—time. The theme of my advice is simple: start on your right foot and avoid reaching the end of your rope.

First, let me assure you that I know of what I speak by telling a true story. During my

tenure as an emergency district court judge, I was called upon to handle a difficult custody case involving a father appearing *pro se* and a distinguished attorney who represented the mother. The veteran attorney undoubtedly thought I was naïve as I explained rules for the case and remained patient as the *pro se* asked questions. Whenever possible, I unscrambled statements to clarify for the record what the *pro se* was attempting to say. Three weeks after the conclusion of an eight-day trial, I returned to present a detailed custody order including psychological counseling for the father, schedules for the children, rules for attending school events, availability of email addresses, and a host of other details including the *pro se* claimant's obligation to pay attorney's fees. I knew I had done my best to ensure that the rights of both parties were being equally addressed and that the *pro se* father wasn't on unequal footing simply because he was unrepresented by counsel.

I carefully presented the order to the parties and their adolescent children myself in a pleasant conference room. My purpose in investing this time was to avoid spin from either party about my ruling and how it was presented. My effort to start on the right foot was well received, and general euphoria prevailed with hugs and handshakes all around. Unfortunately, the *pro se* father failed to meet any portion of his monetary obligations and disregarded terms of the order relating to care of his children. I was called back to the county for a contempt hearing two months later.

Could it be that the *pro se* father disregarded much of what was said? Did he remember nothing of the trial? Had the courtesies extended and my patient good humor for eight days gone for naught? While I had made a concerted effort to start on the right foot in dealing with the *pro se* claimant, I was incensed by his inability to follow my directions, or to appreciate the time and efforts exerted on his behalf. Instead of stopping and taking a deep breath, I slid quickly to the end of my rope, and with a heavy hand ordered a psychological evaluation of the defendant by a certain psychologist.

Unfortunately, this decision came back to haunt me. The clever *pro se*, perhaps empowered by "getting my goat," appealed both sets of orders and a multitude of other issues to the court of appeals. The result? A 26-page opinion affirming the conduct of the trial and custody order, but remanding to let the appellant have an opportunity to be heard with respect to the evaluating psychologist. Clearly, the system was hurt by my end-of-rope decision, and all of the effort I spent starting on the right foot was diminished. Don't let this story come true for you.

Below are some additional tips I have learned along the way in dealing with a host of *pro se* claimants. I hope you find them helpful and useful.

Tips for Judges

1. Find your right foot and start on it.

2. Explain your rules for the case, which must be observed by both the lawyer and the *pro se* party.

3. Let everyone know the *pro se* party is on his/her own. Repeat this frequently so everyone remembers that you are not providing legal assistance to the *pro se*.

4. Give the *pro se* some fundamental ground rules for courtroom etiquette. Explain that the person addressing the court must stand and wait to be recognized; the person who is standing "has the floor" and no one else may address the court except for objections, at which time the *pro se* or attorney may stand and say only the word: "Objection."

5. Require reasons for each objection and make sure each is stated clearly in simple English by both the *pro se* and opposing counsel.

6. Ask questions to the heart of the matter and restate a scrambled response from the *pro se* to clarify, for the record, the interpretation that you, the judge, are relying upon.

7. Make the judge's door off-limits to the attorney and anyone from his or her office. The appearance of an associate sashaying through the door and straight to the attorney's table is unsettling for the *pro se* and provides fodder for confronting the judge.

8. Tolerate only calm presentations and announce recess as necessary.

9. Do not tolerate rudeness, finger pointing, other gestures, loud voices, and repetition. Use summary contempt powers as necessary.

10. Consider delivering your judgment and orders in open court so everyone hears simultaneously – helpful to have older children in court to hear the decision so that neither party can put a "spin" on your order.

11. Stay calm, carry on, and avoid reaching the end of your rope.

Tips for Opposing Lawyers

1. Start on the right foot.

2. Carefully consider the judge's rules, or suggest some if none are given, and request modification at the outset if you have unique knowledge of the propensities of the *pro se* party.

3. Rise to the challenge and try to get the case successfully litigated. Your client depends on you to get the matter tried to a final judgment that will withstand challenge.

4. Alert your office that you have a *pro se* trial and ask them to be thoughtful if entering the courtroom. For example, delivering papers to the attorney by walking merrily through the judge's door creates an appearance that rattles and annoys *pro se* litigants.

5. Object if it is important and explain reason in simple terms.

6. If the judge is losing control, ask for a recess.

7. Alert your client that you will be treating the opposing party with extreme respect to avoid increasing tensions in the courtroom, which in this context is part of your zealous representation.

8. Offer to draft orders, and generously provide possible language.

9. Help the judge!

10. When selecting a mediator, avoid advocating for the mediator you customarily use. If possible, accept the choice made by the *pro se*. Even encourage the *pro se* to go to the Dispute Resolution Commission website to make an independent selection.

11. Take a deep breath and do everything possible to avoid reaching the end of your rope.

Tips for Mediators

1. Start on the right foot.

2. Consider declining a designation if you frequently mediate for the attorney and believe you may have trouble gaining the *pro se* claimant's respect.

3. Explain in the opening conference, and re-state each time you enter a room, that you cannot be the lawyer for the *pro se* party.

4. Allow a *pro se* to bring an advisor to the mediation, but only for assistance in the private conference and not the joint session.

5. Encourage the *pro se* to phone a friend for help to evaluate an offer.

6. Provide calculator and assistance with math.

7. Maintain conversation and negotiation.

8. Address the cost of litigation in dollars, lost work hours, lost recreation time, and emotional stress.

9. Help the *pro se* articulate what would be a satisfying result. Suggest alternatives such as non-disparagement provisions, avoiding certain venues, and payment schedules.

10. Reiterate the importance of closure.

11. Ask questions to help the *pro se* assess an offer. Give offers a chance to be understood, even if rejected at first.

12. Step out of the room and give the *pro se* space to think.

13. Take a deep breath, do not give up too soon, and avoid the end of your rope.

The more time and effort you invest during the action involving a *pro se* claimant, the better your rewards will be as you march toward an outcome. It is possible to manage the challenges presented by the *pro se* claimant and the value of patience should never be underestimated. Everyone in the action will appreciate your consideration and it will go far in solidifying your reputation as competent counsel, judge, or mediator. ■

Nancy Black Norelli is a Charlotte lawyer, a mediator, and a former district court judge.

Do No Harm: *The Importance of Safeguarding the Confidentiality of HIV-Positive Clients*

By Michael Benson, Hannah Demeritt, and Allison Rice

A lawyer is advocating on behalf of her client and the hearing is not going as the lawyer had hoped. As a last ditch effort, she discloses in open court that her client has HIV, hoping to garner sympathy and to explain why he would have difficulty following the judge's order. Her client never authorized her to reveal his HIV diagnosis.

The client had never disclosed his HIV to any family or friends in the small community in which he lives. Word gets out about his HIV. His neighbors avoid shaking his hand or going into his apartment. He sometimes catches people mumbling something that sounds like "faggot." He loses his job. His tires are slashed.

At Duke Legal Project, we represent many clients with HIV. We all too often hear stories like the one described above. In our experience, lawyers who improperly disclose the HIV status of their clients are often unaware of the stigma their clients face, may be misinformed or uneducated about the basics facts about HIV, and have not adequately considered the relevant ethical rules. Through this article, we hope to help lawyers more effectively handle cases involving HIV. A lawyer who understands the stigma surrounding HIV and the requirements of Rule 1.6 should never disclose a client's HIV status in a situation like the one outlined above.

I. HIV Basics

The HIV virus is generally found in relatively low concentrations in fluids like blood, semen, or saliva. The virus does not survive long outside the body. Ninety to 99% of the virus dies within a few hours of leaving the body.[1] By comparison, more robust viruses like influenza can last for up to 48 hours outside of the human body.[2]

The fragility of HIV makes the risk of transmission through casual contact extraordinarily low or non-existent. The CDC has found no documented cases of HIV being transmitted from ordinary workplace contact, shaking hands, hugging, sharing glasses, sports, mosquito bites, or eating food prepared by someone infected with HIV. The primary activities that do create a risk of HIV infection are unprotected anal and vaginal sex and intravenous drug use.[3] This means that a lawyer has no reason to fear infection from her client, or to fear infection of third parties who do not have sexual contact or share needles with her client.

Modern HIV medications are very effective at controlling HIV. Most people who adhere to their medications will not have detectable virus in blood tests. An undetectable amount of HIV in the blood does not mean that HIV has been eliminated from the body, but simply that the infection is controlled enough so that it is present only in quantities that are beyond the sensitivity of the test. HIV medications are expensive, but treatment is available for uninsured clients

through government and pharmaceutical assistance programs.[4]

II. HIV Stigma

"Stigma" is defined as "a mark of disgrace or infamy; a stain or reproach, as on one's reputation."[5] Research indicates that stigmatizing attitudes about HIV/AIDS correlate with misunderstanding and misinformation about the modes of HIV transmission, or the risk of infection through normal social behavior.[6] About one in four Americans either believes HIV can be transmitted from sharing a drinking glass or is unsure whether or not that is possible. One in six Americans feels the same way about toilet seats and 12% worry that transmission may be possible from swimming pools.[7] Given these statistics, it is hardly surprising that HIV-infected clients are likely to be stigmatized.[8] Who would eat food prepared by someone with HIV if they were uncertain whether doing so would infect them?

Added to this ignorance about HIV transmission is a tendency to morally condemn people infected with HIV. A recent Kaiser Family Foundation survey asked participants to agree or disagree with this statement: "In general, it's people's own fault if they get AIDS."[9] The number of people who agree with that statement has *increased* since the 90s. It is likely that this moral condemnation is exacerbated by the social marginalization of groups that are at increased risk of HIV infection. Stigma about HIV tends to travel with prejudices against homosexuals, prostitutes, or intravenous drug users.

Despite years of education and research regarding HIV, the stigma for people diagnosed with HIV remains high. Discrimination and ostracism are common. We have had clients who have been denied medical or dental care, fired from their jobs, discriminated against in their communities, and even physically threatened and verbally harassed because of their HIV. One client in a rural community had repeated verbal altercations with her neighbors that escalated into having rocks thrown through her windows. Clients have been fired from jobs ranging from health care to food preparation to retail. A surprising number of health care providers are ignorant about HIV, its risks, and their legal responsibilities. Some refuse to treat HIV-infected patients claiming that they need special equipment to do so safely. Some clients become isolated from their own family members who voice groundless concerns about the risk of HIV infection, or make negative judgments about the client's lifestyle because of his or her HIV.

Given these kinds of consequences, it is not surprising that many clients carefully guard information about their HIV, declining to share this secret with even close friends and family. Sadly, even trusted people such as healthcare workers, employers, family members, law enforcement personnel, and, unfortunately, even attorneys have been the source of a disclosure. The damage of an unintended or ill-advised disclosure can be impossible to undo, especially in small communities.

III. Relevant Legal and Ethical Rules

A client's HIV status is protected in North Carolina by statute[10] and by the familiar ethical obligations of confidentiality.

The requirement of confidentiality is familiar to all practicing attorneys. Rule 1.6 requires lawyers not to disclose "information acquired during" the lawyer-client relationship without "informed consent." The duty of confidentiality covers "all information related to the representation, whatever its source."[11] Although there are exceptions to the rule, best practices in this context call for careful and narrow construction and application of the exceptions.

1. Adequately Safeguarding Confidential Information

Because of the importance of confidentiality to the lawyer/client relationship, the Rules of Professional Conduct require that attorneys act "competently" to safeguard confidential client information.[12] Information about a client's HIV status is especially sensitive and thus requires special care. Compliance with the ethical rules when representing HIV positive clients calls for attorneys to be hyper-vigilant about possible disclosure of their client's HIV status.

a. Protecting HIV Confidentiality in the Office

Papers referencing a client's HIV status should be carefully protected from accidental view by office visitors, cleaning staff, and the public. North Carolina ethics opinions do not require shredding of waste paper, but recognize the special care that should be taken with medical records.[13] We recommend attorneys consider the following practices when representing HIV positive clients:

- **Never assume that an HIV positive client's friends or family know about the diagnosis.** Sometimes a client will bring friends or family to a meeting. It is easy to assume that these companions are aware of the client's HIV status. Often, they are not. Do not discuss HIV in front of these third parties unless you have the client's permission.
- **Be careful with any paper in your office that refers to HIV status.**
- **Be careful about referring to HIV status in correspondence with the client or others.** Many people with HIV are uncomfortable having any paper in their possession that mentions HIV, even a general health brochure. They worry that others in their household might learn of their diagnosis by finding papers referencing HIV.
- **Properly dispose of medical records and other papers referencing HIV.**
- **Be discreet in discussing HIV and other sensitive information in your office or elsewhere.**
- **Train your staff well.** If you have clients with HIV, office staff need to understand the sensitivity of information about HIV.

b. Protecting HIV Status in the Court System

Attorneys should also know how to protect a client's HIV status within the court system. There are several means to do this:

- File a motion *in limine* to have the client's HIV status excluded where its relevancy is questionable.
- Consider proceeding anonymously in civil cases where HIV status is relevant (such as in a suit regarding HIV discrimination or breach of confidentiality).
- Be familiar with North Carolina Rule of Civil Procedure 26(c) for issuing protective orders.

Attorneys should also be familiar with Section 130A-143 of the General Statutes, which specifically protects the confidentiality of records, whether publicly or privately maintained, that identify a person with HIV.[14] This statute provides for *in camera* review of records released pursuant to subpoena or court order, which identify someone as HIV positive, "upon request of the person identified in the record."[15] The statute also provides that the judge "may, during the taking of testimony concerning such information, exclude from the courtroom all persons except the officers of the court, the parties, and those engaged in the trial of the case."[16]

2. Exceptions to Confidentiality

a. Implied Authorization

Rule 1.6 states that a lawyer may reveal

confidential information if it is "impliedly authorized to carry out the representation." Unfortunately, Rule 1.6 does not provide much guidance regarding the scope of implied authorization. Comment 5 states only that "in some situations" a lawyer may be authorized "to admit a fact that cannot properly be disputed" or "to make a disclosure that facilitates a satisfactory conclusion to a matter."

Generally, the implied authorization to reveal confidential information arises out of the decision to have an attorney handle the matter itself. Clients almost certainly expect that their attorneys will at times have to admit facts "that cannot properly be disputed" and make some disclosures that "facilitate a satisfactory conclusion..." They thus can be assumed to have authorized certain kinds of disclosure just by asking an attorney to handle a matter. But because the source of the authority to disclose *ultimately comes from the client*, an important consideration must always be how likely it is that it would be apparent to the client that he had authorized such a disclosure.[17]

An easy case is when the client hires an attorney to represent him in a social security disability claim *arising out of his HIV*. The client can certainly be deemed to have implied authority to disclose his HIV status to the Social Security Administration, as the case cannot proceed without it. But consider the hypothetical presented at the beginning of this article—a lawyer disclosing her client's HIV status to garner sympathy from a judge. This lawyer might assert that she disclosed her client's HIV status pursuant to Rule 1.6(a) because it "facilitate[d] a satisfactory conclusion to the matter." But it is unlikely that such a disclosure would have been within the contemplation of the client. Given the stigma and secrecy surrounding HIV diagnoses, one cannot conclude that simply by hiring an attorney the client consented to the disclosure of his HIV status for sympathy or a creative argument.[18]

To find implied authority whenever a disclosure might "facilitate a satisfactory conclusion to the matter" creates too broad an exception. The text of the rule states that disclosure is impliedly authorized "in order to carry out the representation." This language suggests that disclosure is impliedly authorized only when it is *necessary*—i.e, that the representation could not be effectively carried out absent the disclosure. The annotation to the ABA Model Rule supports this reading.[19] It provides that "[t]he exception is generally limited to disclosures that are *clearly necessary* to advance the representation of a client" (emphasis added). The annotation cites to an ABA ethics opinion, which limits implied authority to "when the lawyer reasonably perceives that disclosure is necessary ...and *no client may be presumed impliedly to have authorized*...harmful disclosures."[20] The annotation also notes that "impliedly authorized" depends upon the circumstances of each case and cites ethics opinions from a number of jurisdictions, but none of the cited opinions involved disclosure that would merely benefit a client.

Moreover, the concept of "implied authorization" must be read in the context of Rules 1.2 and 1.4, which require that the attorney consult with the client about the means taken to achieve the client's objectives. If the attorney might have reason to believe that the client would object the "means" of disclosing his HIV to obtain a more favorable result, the client should be consulted. Given the potential for harm to the client from disclosure, and the care with which clients protect the information, it should be clear that an attorney should not disclose this information without client consultation, and arguably permission. Even in the courtroom, it would not be too much to expect that a lawyer would take a moment to consult with the client about such a serious matter.[21]

Thus the exception to Rule 1.6 for implied authorization should not be fairly read to give an attorney carte blanche to disclose HIV status any time the attorney thinks it might help the client.

b. Disclosures to Prevent a Crime or Bodily Harm

Under limited circumstances, the exceptions to Rule 1.6 allowing disclosure to prevent a crime or bodily harm might lead an attorney to consider revealing her client's HIV status. For instance, she might learn that an HIV positive client is having unsafe sex or failing to disclose his HIV to partners. How should she handle this situation? First, it should be remembered that an attorney is never *required* to make a disclosure to protect a third party, and should only do so as a last resort after counseling the client.[22]

Preventing a Crime: North Carolina law requires HIV-infected persons to abide by "control measures" and provides criminal penalties for those who do not comply.[23] These control measures include notifying sex partners of one's HIV status. Rule 1.6(b)(2) permits a lawyer to disclose information "to prevent the commission of a crime." Thus, Rule 1.6(b)(2) may *permit*, but does not require, an attorney to disclose a client's HIV status to prevent a crime. Given that Rule 1.6(b)(2) gives discretion, not a mandate, a cautious attorney should probably not disclose for minor criminal violations. The attorney's discretion to disclose should be exercised with great care, and only as a last resort.

Bodily Harm: Rule 1.6(b)(3) permits a lawyer to disclose confidential information "to the extent the lawyer reasonably believes necessary...to prevent reasonably certain death or bodily harm." While HIV is no longer "reasonably certain" to cause death, many would conclude that infection with HIV would constitute "bodily harm." The analysis turns on whether the client's action is "reasonably certain" to cause such harm.

Just how "reasonably certain" is it that a client's sex partner would be infected if the client fails to disclose his HIV or engages in unprotected sex? It is a common misconception that HIV is easily transmitted. In fact, the risk of transmission varies widely depending on a number of facts, including the amount of virus in the HIV-positive person's bloodstream, the particular acts, and whether either party has other sexually transmitted infections.[24] Numerous studies have found that people whose viral load is undetectable are much less infectious than those with high levels of virus.[25] This includes a very recent study from UNC of couples in which one partner was HIV positive and the other negative. The study found that when the infected partner's viral load was undetectable due to treatment with HIV medications, there was a 96% reduction in HIV transmission.[26] Thus the risk of transmission of HIV, especially in a person who is taking HIV medications, is relatively low. So it is by no means clear that harm under Rule 1.6(b)(3) is "reasonably certain."

Exercising Discretion: In both the exception to prevent a crime and that to prevent bodily harm, disclosure is never required and should be a last resort. As suggested in the comments, "[w]here practicable, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure."[27] The attorney could help the client problem solve and might enlist the help of other professionals, including the client's doctor. If the lawyer does opt to disclose, she should reveal no more "than the lawyer rea-

sonably believes necessary to accomplish the purpose."[28] The lawyer could attempt to lessen damage to the client by giving the client advance warning, and if disclosing directly to the partner, urging the partner to keep the information confidential.

Conclusion

An attorney should jealously guard the HIV status of her client in the office and in court. The potentially devastating consequences of HIV disclosure should encourage attorneys to take steps to avoid inadvertent or needless disclosure. An attorney should respect and inquire about the wishes of her client and not presume that disclosure is impliedly authorized merely because she thinks it might help resolve a matter. If a situation arises in which there is a concern for a third party, an attorney should be mindful of the science about HIV transmission, and consider disclosing in only a few extreme cases. As more attorneys understand the facts surrounding HIV and the ethical rules about disclosure, we hope to counsel fewer clients whose lives have been damaged by their attorney's decision to disclose their HIV status. ■

Michael Benson is a third year student at Duke Law School who has represented clients with HIV in the Duke Legal Project, a clinical course focusing on the legal concerns of people living with HIV/AIDS. Hannah Demeritt and Allison Rice are supervising attorneys in the clinic.

Endnotes

1. Centers for Disease Control, *HIV Transmission*, cdc.gov/hiv/resources/qa/transmission.htm.
2. The Mayo Clinic, *Flu germs: How long can they live outside the body?*, February 8 2012, mayoclinic. com/health/infectious-disease/AN01238.
3. *HIV Transmission, supra* note 1.
4. If you are advising a client who cannot afford HIV medications, refer the client to the North Carolina AIDS Drug Assistance Program (ADAP). *See* Fact Sheet, epi.publichealth.nc.gov/cd/hiv/docs/ADAPFactSheet.pdf (February 1, 2013).
5. "Stigma." Dictionary.com Unabridged. Random House, Inc., 11 Jul. 2011.
6. Richard Parker, Peter Aggleton, *HIV and AIDS-related stigma and discrimination: a conceptual framework and implications for action*, 57 Social Science & Medicine, 13, 14 (2003).
7. Kaiser Family Foundation, *Public Opinion Spotlight, Attitudes about Stigma and Discrimination Related to HIV/AIDS*, August 2006, at 8. kff.org/spotlight/ hivstigma/upload/SPotlight_Aug06_Stigma-pdf [hereinafter "Kaiser, *POS - Attitudes about Stigma*"].
8. *See*, Kaiser, *POS - Attitudes about Stigma* at 8 ("People who harbor misconceptions about how HIV is transmitted are much more likely to express discomfort about working with someone who has HIV or AIDS than those who know that HIV cannot be transmitted in these ways.")
9. Kaiser, *POS - Attitudes about Stigma*, *supra* note 7, at 8.
10. NC Gen. Stat. 130A-143.
11. NC Rules of Prof'l Conduct 1.6, cmt. 3.
12. NC Rules of Prof'l Conduct 1.6, cmt. 17.
13. *See* 2006 Formal Ethics Opinion 10, *Safeguarding Confidential Health Information of Clients and Third Parties*, July 21, 2006, which discussed RPC 133, *Recycling Office Waste Paper*, July 17, 1992. RPC 133 notes that some waste paper will be "so sensitive that the attorney's professional obligations...can only be satisfied by the paper's retention or its destruction." 2006 FEO 10 notes that "the public policy of providing substantial protection for the privacy of such information, which is expressed in [HIPAA], should inform the actions of lawyers and law firms, particularly with regard to the disposal of such records."
14. NC Gen. Stat. §130A-143.
15. NC Gen. Stat. §130A-143(6).
16. *Id.*
17. *See* NC Rules of Prof'l Conduct 1.2(a) ("a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued.")

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The Rules of Self-Defense in Light of the Castle Doctrine, "Stand Your Ground" Laws, and the Death of Trayvon Martin

By Timothy J. Peterkin

Before February 26, 2012, most people had not heard of "Stand Your Ground" (SYG) laws, nor would they have understood any reference to the Castle Doctrine. Further, it may not have been of great significance that North Carolina's self-defense statute was updated on December 1, 2011.[1] However, on this same day in February 2012, Trayvon Martin was shot by George Zimmerman. Notwithstanding the legal questions that were to be raised, this was simply a tragedy that would devastate two families. The legal issues developed when a possible self-defense argument was raised, and there was much media speculation about a law in Florida that would allow a defendant to initiate communication to a person, and when the person responded, the defendant could shoot the person but argue self-defense and have no civil or criminal penalties.


Kino Brod/SIS.com

Ideological preferences may have played a role in how different groups reacted to the tragedy. Some thought that Mr. Martin was the victim of racial profiling because he was a black male and was wearing a hooded sweatshirt.[2] Others thought George Zimmerman was a good example of how we can use our second amendment rights to defend ourselves and our neighborhoods.[3] Even after Mr. Zimmerman was found not

guilty in state court, the questions regarding the law and its applicability to this case still remain. At least one juror in the case acknowledged that she thought the jury somewhat relied on the Stand Your Ground law or the common law notion of self-defense in reaching the not-guilty verdict.[4] There was subsequent debate regarding whether that juror's opinion was representative of the six-member jury. Further, there have been immediate calls by the US Attorney General to re-consider Stand Your Ground laws across the country.[5]

The legal questions are still puzzling. What exactly does it mean to SYG? What may a person do who is attacked in an effort to defend himself/herself? This article will attempt to address these very difficult questions by looking at North Carolina cases in light of our recent passage of what is referred to as the Castle Doctrine. It will then lead to a comparison of North Carolina vs. Florida laws.

When discussing limits on the ability to carry and use weapons and implementing new self-defense laws, the overriding and unfounded fear has been that we will lose our right to defend ourselves and our right to bear arms. We know that Florida has a SYG law, and this body of law has been described as broad and expansive in scope. If you live in a state like North Carolina, the logical question to ask is what are our rights and protections since our state does not have such a law? In Florida:

> [a] person who is not engaged in an unlawful activity and who is attacked in any other place where he or she has a right to be has no duty to retreat and has the *right to stand his or her ground* and meet force with force, including deadly force if he or she reasonably believes it is necessary to do so to prevent death or great bodily harm to himself or herself or another or to prevent the commission of a forcible felony (emphasis added).[6]

The idea behind creating a SYG law was simplicity. You, as a potential victim, would know that if you were attacked, you could defend yourself. You would not have to really consider your location and then weigh and balance how much force you could use in your own defense. If you were lawfully in a place and you were attacked, you could defend yourself. There are two problems with this premise: 1) common law already recognizes the right to defend yourself against an attack; and 2) the right to use deadly force is still not absolute,. This leaves some citizens with a misunderstanding of what their rights actually are. A layperson's summary of his rights under SYG are often too aggressive. You can't kill another human being in self-defense unless you reasonably believe that doing so is the only alternative to losing your own life. This is also true in a SYG state, like Florida.

It is important to understand what a SYG law actually changes from the common law. First, even without the SYG law, a person who is attacked can still argue self-defense.[7] Self-defense was originated in common law. Statutory law has only been applied to explain and bolster the common law rule. The victim could meet force with force, assuming no other issues are present. Thus, if a person was attacked by another with a knife, that person could use a knife to defend himself. In Florida, prior to 2005 citizens still had a right of self-defense, but there would have been times when citizens would have been obligated to retreat before they could assert their right to self-defense. See a pre-SYG case, *Weland v. State*.[8] The Florida court held:

> Person may use deadly force in self-defense if she reasonably believes that deadly force is necessary to prevent imminent death or great bodily harm; however, even under those circumstances, a person may not resort to deadly force without first using every reasonable means within her power to avoid the danger, including retreat.[9]

The big issue that SYG laws attempt to address is the duty to retreat. Without SYG, there are times when the law would require you, as the victim, to seek to retreat from the attack before you could subsequently resort to using force to defend yourself. With SYG, you are no longer under a duty to retreat. As long as you are lawfully in the place where you are attacked, you would have no duty to retreat. You may simply meet force with force, even if there is a reasonable means to escape.

In another pre-SYG case, *State v. Bryant*, the court noted:

> [t]here is a distinction made by the text writers in criminal law, which seems to be reasonable and supported by authority, between assaults *with felonious intent* and assaults *without felonious intent*. In the latter the person assaulted may not stand his ground and kill his adversary if there is any way of escape open to him, though he is allowed to repel force with force and give blow for blow. In the former class, where the attack is made with murderous intent, the person attacked is under no obligation to flee, but may stand his ground and kill his adversary, if need be (emphasis added).[10]

Without a pure SYG law, a person who is attacked, (Alex), must make an assessment of whether the person attacking him (Jon) is doing so with or without felonious intent. Generally, an attack without felonious intent would be an attack where the person does not intend to or appear to be capable of inflicting serious bodily injury.[11] If Alex has determined that Jon does not have felonious intent, Alex would have to determine if he can safely retreat from Jon. If Alex can retreat from the conflict with Jon, Alex must do so. If Alex could have retreated from Jon and Jon did not have felonious intent, but Alex and Jon enter into a physical altercation, Alex cannot use self-defense if he used deadly force against Jon. While this may sound odd, note that Jon did not have felonious intent. In other words, Jon was going to attack Alex, but he was not going to use deadly force. When Alex responded to Jon's attack, note that Alex could have avoided the conflict altogether by retreating. There would have been a safe exit strategy for Alex to avoid a confrontation, but Alex would have declined to take the safe exit and Alex would have used deadly force when Jon was not using deadly force.

If you thought the preceding discussion was confusing, you are correct. Imagine a layperson in a confrontational situation having to follow this analysis. The results of an incorrect analysis would be that the victim could become the defendant and have no self-defense protections.

If the state has a pure SYG law, one simply has no duty to retreat if he/she is "attacked in any place where he or she has a right to be."[12] There is no need to distinguish felonious from non-felonious intent. There is no need to survey your surroundings and determine if there is a safe method of escape.

The SYG law goes even further in simplifying the analysis. There is a presumption that Alex (the victim) was in "reasonable fear of imminent peril of death or great bodily harm to himself or herself or another

when using defensive force" that can cause death when: a) the deceased was in the process of unlawfully and forcibly entering the dwelling, residence, or occupied vehicle, or is attempting to remove someone from the same; and b) the defendant knew or had reason to believe that aforementioned entry had or was occurring.[13] This helps Alex because there is a lesser burden on him to prove that he was in fear for his life. When Jon seeks to attack Alex, this presumption works in Alex's favor as Alex no longer has the burden to convince the jury that his fear of death or serious bodily harm was reasonable.

North Carolina's Law

North Carolina's Castle Doctrine (CD) has some similarities, as well as very key distinctions. The key to understanding the CD is to start with the name. A person's home is commonly referred to as his "castle." This doctrine surrounds the idea that a person should be under no duty to retreat when he/she is in his/her home. A person in NC has no obligation to retreat, and has the same benefits of the presumption of reasonable fear as the Florida citizen has in his/her state if certain criteria are met.[14]

In NC the person must be the "lawful occupant of a home, motor vehicle, or workplace" to have the SYG concept apply.[15] The courts are very liberal in their findings that a person was in one of these protected places. The statutory definitions are broad, leading to the broad case holdings. A home is defined as "[a] building or conveyance of any kind, to include its curtilage, whether the building or conveyance is temporary or permanent, mobile, or immobile, which has a roof over it, including a tent, and is designed as a temporary or permanent residence."[16] This very expansive definition allows for a person to assert that he/she is defending a home under many circumstances. The NC courts have even taken a fairly broad definition of the lawful occupant requirement. In order for a person to claim protections under this law, the person must actually live in the home.

Oddly, one can also stand his ground when he is at home and the assailant or aggressor is another lawful occupant of the home. In *State v. Browning*[17] the defendant shot his brother while they were at their mother's home—a home they both lawfully occupied. The evidence showed that the defendant's brother was approaching the defendant in an aggressive manner. They were outside of the home, but in the yard, at the time.[18] [19] The defendant was convicted, but appealed and argued that he was entitled to a jury instruction that explained the defendant was under no duty to retreat. The instruction had not been given at trial. It appears there was hesitancy to offer a SYG defense against a defendant who shot his brother, another lawful resident of the home.[20] However, the court of appeals held that failure to offer the jury instruction regarding the defendant's right to stand his ground, even against another lawful occupant of the home, was reversible error and the case was remanded.[21] This case clarifies that a lawful occupant of a home has the right to stand his ground against intruders and other lawful residents of the home as long as the other statutory provisions of the SYG law are satisfied.

Once an assailant is in your home (or curtilage or porch), you have the right to defend yourself, including the use of deadly force. This right is not changed or limited if the assailant is found to ultimately have been unarmed. In *State v. Johnson*[22] the defendant was in her home. The assailant (or victim) had previously assaulted the defendant and the defendant had told him not to return to her home.[23] On the night of the last incident, the assailant entered the defendant's home and he was asked to leave. Even though the assailant did not have a weapon, the defendant obtained a knife and fatally stabbed him. The NC Supreme Court held that:

> [s]he had the right to stand her ground, protect her person, prevent the invasion of her home, and remove him from the premises. She was not required to engage him with her bare hands or wait until he seized her before taking action. Under the circumstances she did not, as a matter of law, use excessive force, but acted in the proper defense of her person and habitation.

The Court was likely persuaded by the history of violence the assailant had exerted against the defendant. There had even been an incident where the assailant had previously attacked the defendant with an ax.[24] It would have been imprudent and unsafe for this defendant to attempt to meet her assailant in a force-for-force manner.[25]

In another domestic dispute at a residence of a defendant, the Court made a ruling that was quite different than that in *State v. Johnson*. In *State v. Rawley* the defendant was in her home and she was being attacked by her paramour.[26] The defendant testified that she picked up a knife and stabbed the assailant/victim. The defendant's testimony was as follows:

> Q. Why did you say you picked up the knife?
>
> A. I picked it up in order to try to keep him off of me again, just as I was trying to keep him from hitting me again.
>
> Q. Did you use it in any way to keep him off of you? You mean you wanted to use it to keep him off you, or what?
>
> A. Just use it as it might would keep him from hitting me again, or doing anything.[27]

The defendant and the victim had a three-year history of domestic violence in which they both exchanged threats towards one another. However, the evidence did tend to show that on the night in question the assailant had been the aggressor.[28] Unfortunately, the defendant's testimony seemed to vary between theories of self-defense and accidental stabbing. The defendant further testified as follows:

> Q. In other words, you did not consider yourself in that great danger that you felt it necessary to cut him yourself, is that right?
>
> A. I didn't intend to cut him. I only wanted to protect myself. I didn't think I was in great enough danger so it was necessary for me to cut him. It was an accident.
>
> Q. You don't claim you cut him in self-defense or anything of that kind?
>
> A. I didn't strike at him with the knife.
>
> Q. You did not cut him in self-defense?
>
> A. No, sir.
>
> Q. You claim then that it was an accident?
>
> A. Yes * * *. He got down far enough so that he just fell on the knife.[29]

This defendant's conviction was upheld. It appears that the damage to her case was her assertion that the stabbing was an accident and she was not in great danger. Even with their sordid history, it appeared that the defendant did not believe the victim was actually going to kill her, so her intent in taking out the knife was to stop the attack and when she killed him, it was not intentional. Based on the previous case of *State v. Johnson*, it seems clear that if the defendant had not

alleged this stabbing was an accident and that she was seeking to defend herself, she would not have been found guilty of any offense.

While the ruling in *State v. Rawley* may surprise some, it is clear and accepted that there must be limits to a defendant's ability to claim a right of self-defense. Basically, the courts will look for subjective and objective reasonableness of the fear that one's life is in danger. The defendant must personally believe that he needed to use the amount of force used to prevent the harm, and the fear that the defendant had must be objectively reasonable to the ordinary person viewing the situation.

In *State v. Williams* the defendant shot a victim who he thought was armed with a weapon.[30] The defendant's brother had been shot by the victim or those associated with the victim and defendant had encountered the victim previously and saw a weapon. On the day of the shooting, the defendant testified that he shot his gun in the air in an effort to thwart the victim from advancing towards him.[31] The defendant testified that he had no intent to shoot the victim and he wanted to argue self-defense.[32] The Court found the defendant's self-defense argument to be unsupported by the facts.

> The defendant is not entitled to an instruction on self-defense while still insisting that he did not fire the pistol at anyone, that he did not intend to shoot anyone, and that he did not know anyone had been shot. Clearly, a reasonable person believing that the use of deadly force was necessary to save his or her life would have pointed the pistol at the perceived threat and fired at the perceived threat. The defendant's own testimony, therefore, disproves the first element of self-defense.[33]

Interestingly, if the defendant had intentionally shot the victim, he would have had a very strong likelihood of successfully arguing self-defense.

Marissa Alexander and George Zimmerman both attempted to use the SYG defense in Florida, but with polar opposite results. Following the analysis in the two cases mentioned earlier, these frustrating outcomes are clear. While a peaceful society would prefer that a defendant fire warning shots to stop an attack, the reality is that it seems unlikely that a person who is in imminent fear for his life would fire warning shots. Killing the other person would effectively stop the imminent harm. Let us note with candor that the cases above show that NC courts would and have reached the same conclusion.

Ultimately, the questions surrounding when one has a right to defend himself or herself remain complicated, with or without a SYG law. While it does seem completely impractical for a person facing possible harm to determine whether the assailant has felonious or non-felonious intent, there also remains the overzealous person who will unreasonably attack anyone first and then ask questions later. Society does not want to embolden laypeople so they feel comfortable being vigilantes, but there is also a natural desire to want to protect our person, our home, and our property. North Carolina's approach appears to be a reasonable middle-ground approach. North Carolina citizens should not have to retreat when they are attacked in a home, place of business, or vehicle. However, they should be more prudent when engaging in acts of self-defense when they are in other places that they do have a right to be. They must insure their behavior meets objective and subjective reasonableness, and if there is a safe way to avoid a confrontation, they should do so. Lives will be saved through this approach, and that is the real saving grace of this law.[34] ■

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Endnotes

1. NC Gen. Stat. §14-51 et. seq. (2012).
2. *See Democrat invokes Trayvon Martin in anti-racial profiling bill*, washingtontimes.com/news/2013/feb/27/democrat-invokes-trayvon-martin-anti-racial-profil/, last visited Mar. 15, 2013.
3. *See* gzlegalcase.com, last visited Mar. 15, 2013. "As of January 2, 2013, the George Zimmerman Defense Fund has received $314,099.17."
4. Florida Statute § 776.013 (3) (2012). This statute was enacted in 2005.
5. *See* AC360 interview on CNN originally aired July 16, 2013.
6. Attorney General Eric Holder at annual NAACP convention in Orlando, Florida. July 16, 2013. AG Holder did indicate that his comments about the law were separate and apart from any inquiry regarding Mr. Zimmerman.
7. *Weland v. State*, 732 So. 2d 1044 (Fl. 1999).
8. *Id.*
9. *Id.* at 1045.
10. *State v. Bryant*, 213 NC 752, 760 (1938) (internal cites omitted).
11. *Id.* at 754. In this case, the deceased attacked the defendant and the evidence showed that the defendant had not responded to the attack until the defendant was on the ground on his back. Error was found in the jury instructions that left the question regarding the reasonable apprehension of death up to the defendant's perception. The jury must view the evidence from defendant's vantage point and then determine if the defendant's apprehension of death or serious injury was reasonable under those circumstances.
12. Florida Statute §776.013 (3) (2012).
13. Florida Statute §776.013 (1)(a)-(b) (2012).
14. NC Gen. Stat. §14-51.2 (2012).
15. NC Gen. Stat. §14-51.2 (b) (2012).
16. NC Gen. Stat. §14-51.2 (a) (2012).
17. *State v. Browning*, 26 NC App. 376 (1976).
18. *Id.* at 378. This case also reiterates that the cartilage of the home is protected under the stand your ground law, including the yard, barns, and outbuildings.
19. *See also, State v. Blue*, 356 NC 79 (2002). The NC Supreme Court overturned a court of appeals decision and held that the porch was to be considered part of the home for purposes of analyzing a lawful occupant's right to stand his ground. In this case, the defendant shot a man on the porch of his home after the victim had engaged in aggression towards the defendant.
20. *Id.*
21. *Id.* at 380.
22. *State v. Johnson*, 261 N.C. 727 (1964).
23. *Id.*
24. *Id.* at 730.
25. Similarly, the Court will consider the "great disparity in strength between defendant and assailant or where defendant is attacked by more than one assailant and defendant may be justified in employing deadly force to repel such an attack." *See*, *State v. Pearson*, 288 NC 34 (1975). Defendant was attacked at a country club by three men who did not have deadly weapons. Defendant used a deadly weapon to defend himself. Jury had to be instructed that Defendant must have believed his life was in danger or he was not justified in using deadly force. Even without the presence of deadly force from the assailants, it could have been reasonable that the defendant felt reasonably justified in using deadly force to defend himself.
26. *State v. Rawley*, 237 NC 233 (1953).
27. *Id.* at 235.
28. *Id.*
29. *Id.* at 236.
30. *State v. Williams*, 342 NC 869 (1996).
31. *Id.* at 870.
32. *Id.*
33. *Id.* at 871.
34. There is research that indicates an 8% increase in the number of reported murders and non-negligent manslaughters when a state enacts SYG laws: *Does Strengthening Self-Defense Law Deter Crime or Escalate Violence? Evidence from Expansions to Castle Doctrine,* Cheng Cheng and Mark Hoesktra, available at econweb.tamu.edu/mhoekstra/castle_doctrine.pdf.

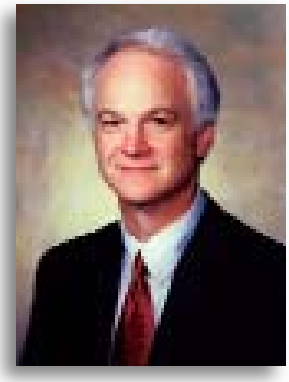
Pictures of Professionalism

By Evelyn Pursley

Lawyers have written their expectations for a professional into the Preamble to the Rules of Professional Conduct: "The legal profession is a group of people united in a learned calling for the public good. At their best, lawyers assure the availability of legal services to all, regardless of ability to pay, and as leaders of their communities, states, and nation, lawyers use their education and experience to improve society." NC Rules of Prof'l Conduct, Preamble (2003). This article highlights two individuals who have taken different paths to meet those expectations and who have worked to instill those ideals in the next generations of our profession.

Charles Holton

Charles Holton's law firm profile shows that he is a member in the Research Triangle Park office of Womble Carlyle, where he concentrates his practice in handling sophisticated healthcare litigation matters. He is also experienced in handling complex construction litigation and arbitration matters, as well as construction contracting. But George Hausen, director of Legal Aid of NC (LANC), knows him as "a single-handed, *pro bono* force of nature."



The profession has memorialized our expectation for *pro bono* service in Rule 6.1: "Every lawyer has a professional responsibility to provide legal services to those unable to pay. A lawyer should aspire to render at least (50) hours of *pro bono* public legal services per year." NC Rules of Prof'l Conduct, Rule 6.1 (2003). Tripp Greason, Womble Carlyle's full-time *pro bono* director, reports that, "Year after year, Charles has substantially exceeded the expectations of Rule 6.1. In the past decade, for example, Charles has recorded more than 2,500 hours of *pro bono* time, 388 hours in 2012 alone. Charles works with *pro bono* clients on a personal basis and regularly represents needy clients in fair housing, health care payment, and domestic abuse cases. Fluent in Spanish, Charles also sponsors an annual clinic to provide legal assistance to the Latino community in the Triangle area."

Hausen notes that, as *pro bono* lead counsel in the last two years, Holton has contributed several hundred *pro bono* hours as co-counsel on the seminal housing cases—involving dangerous and hazardous housing conditions—that validated the working model of the Medical-Legal Partnership (MLP) program. "These cases have resulted in benefits for low-income tenants in Durham extending far beyond the individual clients involved," Holton says. (For more information on the MLP program, see the IOLTA Grantee Spotlight in the spring 2013 issue of the *Journal*, also accessible on the NC IOTLA website.) And, LANC staff attorneys who have worked with him as they got their first taste of complex, high-impact litigation describe him as "an incredibly generous mentor." Madlyn Morreale, supervising attorney of the MLP program, notes that, "Charles has been very generous with his time to serve as co-counsel on 'high impact' cases, and I have personally benefitted from his willingness to serve as a mentor."

Holton also works to establish collaborative programs, such as the partnering with lawyers from Womble Carlyle, GlaxoSmithKline, and LANC's Durham office to handle fair housing cases. And, in late 2012 Holton initiated an effort to have lawyers and NC Central Law students work with residents of the Durham Rescue Mission to provide legal assistance to resolve issues that might hinder their successful re-entry into their communities as contributing members after they leave the program.

In recognition, Holton received the William Thorp Award for *pro bono* service from the NC Bar Association in 2013 and was one of six North Carolina attorneys honored with a *pro bono* award by the national Legal Services Corporation (LSC) in the fall of 2012. LSC President Jim Sandman notes that, "Mr. Holton's work exemplifies the qualities LSC seeks in conferring *pro bono* awards."

Holton also lends his energy and expertise in a leadership role with legal aid. Having served on the Legal Aid of NC Board since 2012, he begins a two-year term as chair of the board in 2013. He previously served for ten years on the Legal Aid of North Central North Carolina Board, a predecessor organization to LANC serving needy citizens in the Triangle.

Evelyn Pursley, director of IOLTA, spends a great deal of time with the legal aid grantees, including attending board meetings. As nonprofits, these organizations are governed by their boards, and it is important to see the engagement of board members. "I am always amazed by the time spent by members of our profession in serving these organizations in this way. Sitting in a stuffy room trying to figure out how to keep a roof over the heads of legal aid staff may not provide the same adrenalin rush as taking a court case, or the heartwarming immediacy of assisting an individual client with a life problem, but it is crucial for the operation of these programs and for connecting them with their local legal community."

As George Hausen says, "Charles embodies the highest ideals of our profession."

Larry Nestler

Larry Nestler has devoted his life's work of 35 years and counting to provide legal services to those who could not otherwise obtain a legal aid attorney. In doing so, he has positively affected the lives of clients, co-workers, interns, the legal system, legal aid programs, and others.

In recognition, Larry is the 2013 recipient of the Deborah Greenblatt Outstanding Legal Services Attorney Award presented to a legal services attorney who has made an exemplary contribution to the provision of legal assistance to help meet the needs of the poverty population in North Carolina.

Larry has worked as a legal aid lawyer for his entire career—and even before. While a law student at NC Central in the mid to late 1970s, Larry volunteered at the Durham Legal Aid office. There he learned about the tremendous need for low-income legal assistance. Despite the difficulties of working where requests for assistance greatly exceeded the available resources, he found that he liked the work so much he wanted to be a legal aid lawyer.

He began his career in 1978 serving the Eastern Cherokee Legal Services Organization, which later became the Sylva office of Legal Aid of NC. He helped expand the coverage area of the Sylva office into the seven counties it now serves, where he ably serves as managing attorney. Initially this office was located on the Eastern Cherokee Reservation. Larry was at the forefront of developing the legal system for the then newly formed Cherokee Court. He helped prepare the written rules and procedures for attorneys and the court to follow. As Gerald R. Collins Jr., Murphy attorney and current State Bar councilor for the 30th Judicial District notes, "In my opinion, his work greatly advanced the development of the Cherokee Tribal Court and provided credibility for that new court among members of the bar and the public at large. Larry's work also greatly assisted members of the bar who represented individuals appearing before the Cherokee Tribal Court in both civil and criminal cases." Nestler currently manages the Eastern Cherokee Native American Legal Services grant and participates in the national Indian legal services group.

Larry has a dedicated commitment to serving domestic violence victims, both through his work and through community service. He currently serves as the board president of the 30th Judicial District Domestic Violence-Sexual Assault Alliance, a regional non-profit agency responsible for capacity building and creating a strong coordinated community response to victims of domestic violence, sexual assault, stalking and dating violence, and elder abuse. His involvement with the alliance has been critical in not only ensuring legal services to victims, but also in serving as a catalyst to coordinate a community response to provide services to these vulnerable clients. As the alliance's director, Sue Fowler says, "Mr. Nestler is more than an attorney for Legal Aid. He is a leader in his field intent on helping others in a quiet, focused manner through his passion for creating positive change. He works not just for victims, but for community and service providers, supporting collaborative partnerships among the victim service agencies."

Larry has also been active and recognized at the state level for his domestic violence advocacy. He was appointed to serve on an Administrative Office of the Courts Domestic Violence Advisory Committee, which is composed of judges, attorneys, victim advocacy organizations, magistrates, clerks of superior courts, and educators. In 2010 this committee produced the *NC Domestic Violence Best Practices Guide for District Court Judges* to serve as the statewide standard for civil and criminal domestic violence cases and to provide guidance to both experienced and newer district court judges handling these cases.

As with so many of our finest professionals, Larry has found the time to serve as a mentor throughout his career. As Mark Melrose of Melrose, Seago & Lay remembers, "Larry's door was always open and his time was always unrushed when I would pester him with questions about conflicts of interest, ethical quandaries, and often just what the 'right' way to practice law as a professional was. Larry helped instill in me and in others the desire to not just treat the practice of law as a job, but as a tool to help others in meaningful ways."

Most recently Larry supervised a successful UNC Law *Pro Bono* clinic at the Cherokee Court serving 28 clients. Assistant Dean for Public Service Programs Sylvia Novinsky remembers, "During the week we spent with him in Cherokee, NC, Larry shared his time and his experience and helped to inspire another generation of soon-to-be lawyers. We are so grateful for his willingness to supervise and mentor our students." (For more information and pictures, access the blog kept during the trip: blogs.law.unc.edu/probono/category/winter-break-trip-2013/.) Despite the anxieties felt by the students, meeting Larry and his staff let them know they "were in very capable, welcoming hands," reports law student Brandy G. Barrett. "I have heard many people say that they want to become lawyers in order to 'help people.'" she continues. "I have usually avoided this expression for fear

CONTINUED ON PAGE 33

Moving Judicial Voting from the Bottom of the Ballot to the Top

By Nancy Black Norelli

The men and women serving as judges for the North Carolina Superior and District Courts make critical decisions every day that affect the very foundation of our democratic society.

Judges set precedent on issues as vast and far reaching as the home life of the citizens of this state, protecting civil liberties, and adjudicating criminal offenses. So why don't more voters make researching and electing the right candidates for these critical jobs more of a priority? Even though the judicial elections are listed at the bottom of the ballot, they should be at the top of people's voting agendas.

Supreme Court Justice Sandra Day O'Connor put it best when she said, "There are few matters more important in our democracy than ensuring that we have a system in place that results in the best possible men and women serving on the bench."

In this spirit, the North Carolina Bar Association is preparing to launch its bi-annual Judicial Performance Evaluation (JPE) survey in October 2013. Moving forward, the survey will be conducted in odd years along with a companion survey of non-incumbent challengers that will run in March of even years. The information will be made widely available to members of the public and the media for use in the 2014 general election and spring primary.

Judges are graded on characteristics such as integrity and impartiality; legal ability or the demonstration of knowledge of the law, procedure, and evidence; professionalism; communication skills; administrative skills such as running a punctual courtroom; and finally they are given a rating for overall performance.

The JPE Committee aims to make information regarding judicial candidates more accessible to members of the public by taking educated and confidential feedback from licensed North Carolina attorneys about the efficacy and impact of trial judges and presenting it to the public through a range of outlets from print media, the Internet, and even social media outlets such as YouTube.

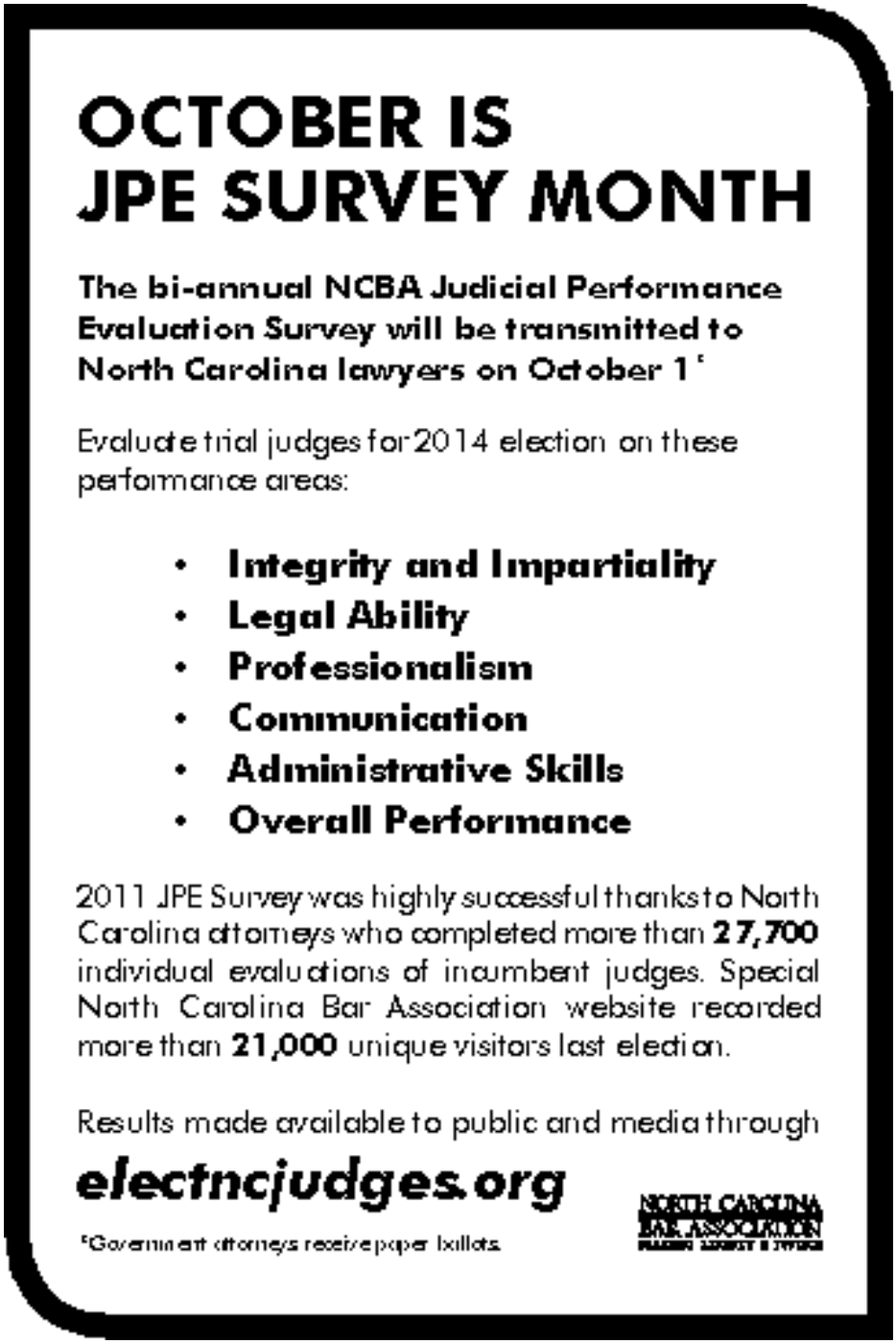
In addition to providing comprehensive information about judicial candidates and the importance of the role of the judge to members of the public, the JPE also aims to focus on procedural fairness rather than case outcomes, and to provide constructive feedback to individual trial judges to foster self-improvement and growth. In short, its purpose is to enhance the public's confidence in its trial courts.

"I find the JPE helpful in understanding the strengths and weaknesses of judges up for election," says Moore & VanAllen's Ben Hawfield. "I have circulated the evaluation report within my firm, and also to friends and clients who ask for help in making informed voting decisions."

First conducted in 2011 to gather information to be used for the 2012 election, the inaugural JPE elicited more than 27,000 individual evaluations of judges from attorneys across the state. "This translated into a wealth of information that the public was able to access prior to casting their ballots," says Mike Wells, immediate past-president of the NCBA. "This survey is here to stay due to its remarkable success. With the help once again of lawyers, voters in 2014 will have a side-by-side analysis of the candidates in the general election in 2014."

The JPE's website, ElectNCJudges.org, registered more than 20,000 unique visitors and over 100,000 page views in spite of its fledging status. Coupled with the website's success was the public service announcement posted on YouTube that generated more than 1,000 hits. The information was also posted on a host of additional local bar websites, special interest bar websites, and voter education websites. Positive response to publication of the survey results revealed the public's hunger for consolidated and trustworthy information.

"I passed this on to everyone I know," says Rolaine Vandenburg. "I really do not think we



should vote for judges since we know so little, but until that changes this is an excellent resource."

Anecdotally, the greatest impact of the inaugural JPE can be measured by reviewing election results in two presidential election years. In a side-by-side comparison with the presidential election in 2008, the number of ballots cast for judges in Mecklenburg County in 2012 after the release of the results from the first JPE survey rose by 5.27%.[1]

Another citizen summed up the feelings of many: "These [judicial] elections always trouble me and I can't stand to cast a vote for someone I know nothing about or have to skip that part of the ballot," says Yvonne Rayburn. "This is wonderful!"

As a corollary to providing the public with information about judges, the JPE Committee also aims to assist newly appointed or elected judges in assessing their own performance on the bench prior to being subject to the JPE survey with public results. A special evaluation program is used to give these judges feedback from local attorneys who appear before them on a regular basis. A volunteer retired judge, attorney, or an active mediator will oversee each of these evaluations, which is conducted in a completely confidential manner. New judges must volunteer to be a part of this program, and the questionnaires presented to local attorneys are gathered and compiled in complete privacy with no names revealed to the judges who agree to participate.

"Most of the new judges have welcomed this program. Many of the evaluators are retired judges who readily agreed to participate, saying they wished there had been something like this when they were starting out," says retired District Court Judge Jane Harper, who chairs the JPE subcommittee working on this project. "The new judges will be able to use this confidential feedback to better understand how they are doing, and make corrections if necessary and appropriate."

The 2013 JPE survey will begin circulating to attorneys across North Carolina in October. In order to ensure fairness and to eliminate any claims of bias, the JPE survey is conducted through a system managed by an independent accounting firm. The compilation and analysis of the survey results is slated to be completed by December, with the results to be released publicly in January 2014. The survey of non-incumbent candidates will be conducted in March 2014, with those results released prior to the spring primary election.

"I encourage every attorney to take part in the JPE survey," says Mike Wells. "The more information we can gather, the better and more complete our reports will be and the more informed the public can become on the critical issue of judicial elections. It's an issue that affects us all." ■

Norelli, who practices law in Charlotte, currently chairs the of NCBA Judicial Performance Evaluation committee and is a member JPE Working Group at the Institute for the Advancement of the American Legal System.

Endnote

1. In 2008, 410,817 votes were cast for presidential candidates and 260,895 votes (63.51%) were cast in six contested district court races. Four years later, that number rose to 446.092 votes for presidential candidates and 298,258 (66.86%) votes in six contested district court races, for an increase of votes in judicial races of 5.27%. (66.86% – 63.51% / 63.51% = 5.27%)

Nylon and Steel

By Jay Reeves

When I tell people I once practiced law—without ever attending a day of law school or being sworn into any bar—they are usually surprised.

They know me as the old guy who sits on the bench outside all day. Sometimes with my guitar and sometimes my book of crossword puzzles. Sometimes with nothing but memories.

Then when I tell them my law career lasted exactly two days, they are skeptical.

What kind of lawyer never goes to school and practices just two days?

And by the time I start explaining how I handled only one case and won that one big-time, they all wear the same funny smile.

He's crazy, they're thinking. Loony, senile, loco.

And why wouldn't they? The only thing they've ever seen me win is the right to keep sitting on my bench after grumpy old Hardwick complained to the cops that I was acting like I owned the thing and would not let anyone else use it, but Officer Vasquez—with his short pants and bicycle helmet—put old Hardwick in his place by saying, "Oh leave him alone, he's not hurting anything, and besides, I like his guitar playing."

So I sit on my bench and tell my little law story and people walk off smiling funny and shaking their heads. But it's me who has the last laugh because I know every word I said was true. Though I don't really laugh because every time I tell the story I think of my brother Tom, and that always makes me feel hollow inside.

Part One: We Are Born

We were identical twins. We looked so much alike that even Mama sometimes got us confused. But in every other way we could not have been more different.

Tom had the brains. Even as a little boy he could figure things out. He figured out how to get through the wire fence into the Granderson's yard, and how to make invisible ink, and how to sneak into the Anderson Theater without paying.

I could not have figured any of those things out. All I could do was play guitar. One of Mama's special friends who no longer came around had left behind a beat-up Washburn that I picked up one day and started playing, which is how these things usually start.

"He sounds real good," said Mama to the new special friend who had started coming around. "Don't he?"

"Maybe," said the special friend, who had a bald head and tiny hands. "But isn't that thing supposed to have six strings?"

And so the next day Tom figured out how to pinch a pair of strings from Mickey's Music Box, only they were nylon strings unlike the four steel ones that were already on the Washburn, which did not bother me. I liked the way they sounded together, nylon and steel. And other people liked it too. It's what got me in my first band, the unusual sound.

"Distinctive," said Wally, the singer and leader of that first band, though for the life of me I cannot remember what that band was named.

Tom with his brains graduated from high school and then figured out how to get into the University of North Carolina where he studied history.

Meanwhile I quit school after ninth grade because I was too busy playing music. By then I was in two bands. Hank and the Folded Hands was a gospel group and the Boll Weevils were a lively string band. Then I got a sunburst Silvertone and a Fender amp and joined a third outfit called Rick and the Poor Richards. This was the 1950s and rock and roll had arrived—Elvis and Jerry Lee Lewis. That's when things really started to happen.

By then Tom and his brains were in law school, and he was all proud and braggy.

"I'll be riding high while you're still scrounging for tips," he'd say to me.

And I'd just grin because Tom was not only my brother but my identical twin, and I loved him.

The Results Are In!

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

Part Two: Our Futures Arrive

They say rock and roll is a rollercoaster and that is the truth.

For a while there, Rick and the Poor Richards had it going. We played clubs all up and down the coast, from Fort Fredericka up to Virginia Beach. Summers we were the house band at the Pro Club on Pawleys Island. I got a fuzz box and a cry baby and played Dick Dale and Duane Eddy and Wipe Out and such.

Oh we had it going. Good hair and sparkly shirts. We even had a manager, who said any minute now our ship was coming in, just wait.

And I waited because I was not the one with the brains, that was Tom.

He got his law license and joined Gaskins, Butters and Bent in Greenville before opening his own office in Wilson.

He married a woman with bleached hair piled high named Dolores, and that lasted about six months. Then he took up with a 19-year-old in a tube top whose name I cannot recall, and that lasted about six weeks.

But Tom was riding high.

"I was born for the courtroom," he said.

His business card said he was a trial lawyer. He had a pinky ring and a Buick LeSabre. He said he would not even take your call for less

than a thousand dollars.

Part Three: The Ship Takes on Water

They say it is wine, women, and song, but for me personally it was cocaine. Oh there was plenty of the other two, but we all have different tastes, different vices.

This was the early 70s and everyone was doing it. Cocaine and everything else. By then we had shortened our name to Poor Richard and signed with Capricorn Records. We spent a month in the studio high every day, but made very little music. Then our bass player overdosed and was never right in the head again, and our drummer got arrested, followed by our manager running off with the PA and what little money was left. I cannot say I blame him.

A rollercoaster, like they say, it can mess you up.

But Tom was soaring.

Every time we got together he had a new girl and a bigger car. He said practicing law was like printing money. He said he had two rules. Number one, get paid up front, and number two, get paid up front.

"Who would ever have imagined," he said, shaking his head.

He was drinking scotch from a bottle that came in a velvet pouch.

"Nobody," I said, and it was the truth.

Part Four: A Miracle Happens

On Memorial Day I woke up on the floor of a trailer on the Santee River. I had no idea where I was or how I got there. This was 1979 and Jimmy Carter was president. I walked outside and was nearly blinded. The sun was shining on the water. It looked like the river was on fire. I had to cover my eyes.

I had been living the rock and roll lifestyle so long I was lost in my own shadow. But that morning all I could see was the light.

Well that was that.

I moved all the way out to Pocatello Idaho and got a job at the Union Pacific yard. I rented a little duplex by the tracks. From my window I could see the mountains. There was snow on the peaks even in July—beautiful. At night I could hear the big cars banging together, the whistle-whine of the overnighter from Yellow River.

"Iowa?"

Tom could not believe it.

"Not Iowa," I said. "Idaho."

"Same thing."

It was Christmas. By then it had been some years since we had gotten together. Tom was married again, this time to a woman with four children, one of which had a learning disability and kept setting things on fire.

"How's your law practice?"

Tom made a face.

"Fine except for clients. And judges. And everything else."

And in truth he did not look good. There were stains on his necktie and bags under his eyes and he was puffy like he had been pumped full of air.

"Here," he said, leaning my way with the bottle of champagne, it being the holiday season and all. "Drink up."

"No thanks."

I was drinking sweet tea.

"What? Too good to have a drink with your own brother?"

"No no," I said. "Not that at all."

But then his new wife was yelling.

"Tom!"

And Tom hopped up because we could both smell the smoke coming from the other room.

Part Five: A Visit From a Stranger

The boys at the train yard called me Lipton because that's all I would drink while they passed around the paper sack and smoked their reefer. I did not blame them. Railroading can be harsh.

"Say Lipton," one of them said, "you're pretty good on that thing."

I had picked up a battered old Guild acoustic that had a nice tone to it. Some days I would bring it out to the yard while we were sitting around waiting for Layton or Twin Falls to come in.

This was 2001 and the mountains were green and blue and it felt good to be strumming again.

"Yeah," said another of the boys, "you ought to join a band."

I just grinned and kept playing.

But when I got back to my place there was a dust-covered Taurus with North Carolina plates in the driveway and Tom was sitting on the front steps.

"Why didn't you tell me it was this far?"

He looked terrible. Slits for eyes and a big belly and hands that would not stop trembling. It looked like he had not changed clothes in a week. We went inside and sat at the kitchen table. He reeked.

"Two solid days of driving," he said, and took a shaky sip from a Coke can that smelled of bourbon. "Only stopped for gas. Man, I was thinking it was Iowa."

It was a new century and everything was different.

"Tom," I said, "you don't look good."

He gave a bitter laugh.

"Tell me about it."

I asked if he was hungry and he said no. Coffee? No. For a long time we just sat there.

"I came to ask you a favor," he said.

"Okay."

He said he wanted me to bury him next to Mama.

"What?"

"Promise you'll do that."

"Tom," I said, "is there something I need to know?"

He gave that laugh that was not really a laugh.

"No. I've got no immediate plans. But when the time comes will you do it?"

"Yes. Of course."

"Well," he said, crumpling his empty can and standing up, "I better be going."

"Tom," I said, and stood too.

But he waved me off and said he was fine, just tired from the long drive, and that he had gotten a room overnight at the Sho-Ban Motor Lodge and would head back in the morning.

"Meet for breakfast?"

"Sounds good," said Tom.

I walked out with him and we stood on the stoop. The dusky light lay over the Portneuf notch like a red and gold blanket. You could see the geese flying.

"It's a pretty sight," said Tom.

I said I agreed.

"You know," he said, "you always were the smart one."

And though I did not know it, that would be the last time I ever hugged my brother, or saw him alive.

Part Six: My Legal Career

We never did have that breakfast. Next morning we found him dead in bed at the Sho-Ban Motor Lodge, in his pajamas with the blankets pulled up to his chin. They said he died peacefully, though I do not understand how they could possibly have known that.

I did like I promised and brought him back to Tabor City and buried him next to Mama in Waccamaw Memorial Gardens. The handful of people who came to the service kept looking over at me like they were looking at a ghost. And I wondered if even Mama would be able to tell which one of us was laying there

beside her.

It turned out Tom was renting a house in Lumberton. I drove up there to clear out his things. He was single again and had little to show for all his years of riding high. I got a box and put a framed picture of me and him and Mama in it, a pair of ruby cufflinks, and the certificate saying he was a Juris Doctor.

His law office, if you could call it that, was in a spare bedroom. There was a desk and a telephone and a few folders stamped "Closed." The window shade was pulled all the way down.

A file cabinet in the corner said Benson – Wrongful Death, but when I opened the drawer it looked like it had not been touched in a long time.

I was fixing to leave when the phone rang.

- Mr. Rawlins?

Without thinking I said yes. And before I could clarify things the man was talking.

- I'm with Old South Accident and Casualty Insurance Company, he said. I'm calling to make an offer in the Benson case.

He said his company was being acquired and they wanted to wrap up all pending matters before the acquisition, which apparently included the Benson case.

- This is a one-time proposal, the insurance man said. Two hundred and fifty.

- Two hundred and fifty.

- Two hundred and fifty. Take it or leave it. There won't be any more offers.

- I guess that'll be fine, I said.

Silence on the other end. Then, Well okay then. I'll get the paperwork started.

I spent the night in Tom's house. The next day a delivery girl in a brown ballcap knocked on the front door with an envelope from Old South Accident and Casualty Insurance Company. I signed for it but did not look inside.

Instead I went to the file cabinet and found an address for a Rosa Benson. She lived way out in the county past the water treatment plant. I rattled down a long dirt road until I reached Bethel Temple of the Blessed Redeemer, with its broken shutters and a hole in the roof, and right next to the church was a double-wide mobile home. It had no skirting and sat on cinderblocks, but the yard was tidy with beds of daffodils bordered by scalloped truck tires painted white.

Rosa Benson came out to meet me. She was a wiry old black lady, had to be deep into her 80s or even older, clomping along in her walker. But her eyes were bright and her voice was strong.

"Well," she said, "look who shows up after forever."

She thought I was Tom of course and I did not bother correcting her.

"I brought you this," I said, and handed her the envelope.

"Oh," she said, with a little salt, "I suppose I won the lottery."

I just stood there as she opened the envelope. Then her eyes grew wide.

"The man said that was all they had," I said.

"That's all?"

"Yes ma'am."

She pulled back a bit, narrowed her eyes.

"And how much of this do you want?"

"Nothing."

"Nothing," she said, and looked at me funny.

"I didn't really do anything."

For a long time it was just us and the wind blowing the flowers and the squirrels chittering in the tall oaks.

"You know how much this is?"

"The man said $250."

"Two hundred fifty dollars?"

"Yes ma'am."

She showed me the check. It was $250,000.

"Well," I said.

"So, how much of this do you claim?"

"None. Like I said, I didn't do anything."

She leaned closer and studied my face. And I knew then she realized I was not Tom. Though who she thought I was only God knows.

"You know what this insurance money is for?"

I said nothing. She said it was for the death of her husband, who had been the pastor at the falling-down Bethel church before he got run over by a propane truck. She said that's what the money was for. And I thought she was going to start crying but she did not.

"Well," I said after a respectful moment, "I guess that's it."

So I signed the papers Thomas Rawlins. And it did not feel at all peculiar to be signing my brother's name, it felt exactly right. Though when I got to the car I had a sudden thought.

"Ma'am," I said, turning, "about that money. I do have one request."

Part Seven: Brothers

The following spring I went back to North Carolina and again drove way out into Robeson County, past the treatment plant and down the bumpy road. But this time Bethel Temple of the Blessed Redeemer was sparkling. It had a patched roof and a fresh coat of paint, a new sign out front.

And on the east side of the church, lit up by the rising sun, was a brass plaque that said: Dedicated to the memory of Thomas Jacob Rawlins. A loyal son, brother, and lawyer.

So there it is, my little story.

Though I never get to the end of it, the part about the plaque. The people have walked off by then, smiling funny at the crazy old man.

And I suppose they are right. But I have my bench and my crossword puzzles, my Guild guitar. I've strung it in an unusual manner, with four steel strings and two nylon ones. I like how it sounds that way. Distinctive.

Old Hardwick still complains now and then, but Officer Vasquez shoos him off. Officer Vasquez likes to hear me play. The other day I played him a new one, the first song I've written in years. I starts off on E-minor, which I think is the prettiest of all chords—sweet and sad all at once.

I call it Brothers.

But here, let me play it for you. It goes like this. ■

In addition to practicing law, Jay Reeves was also the drummer for the rock band Poor Richard, a 70s drivetime deejay at WKSP, a winner of the Doris Betts fiction contest, a legal editor at Lawyers Weekly*, and a risk manager at Lawyers Mutual. He enjoys declining his children's requests for money, thinking up stories, and painting things blue.*

Profiles (cont.)

that it sounds base or cliché. When I left the Cherokee courthouse on Thursday evening, I was tired, hungry, and ready for comfortable clothes. But I had the warmest feeling from knowing that my Carolina Law friends and I had helped people, and it's a feeling that I never want to forget."

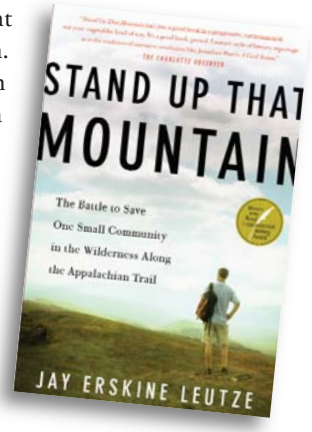
George Hausen, director of Legal Aid of NC, sums it up: "Larry epitomizes a lawyer who not only loves the law, but also uses it for the good of his clients and the community." ■

Evelyn Pursley has been the executive director of NC IOLTA since July 1997.

Book Review—*Stand Up That Mountain*

By John A. Bowman

Jay Leutze's first book, *Stand Up That Mountain*, is a page-turner that serves up a compelling story of the mountain people who engage the author in their fight to save their piece of Appalachia—and the integrity of the Appalachian Trail—through a tangle of lawsuits championed by several of North Carolina's most colorful lawyers.



The author is a graduate of UNC Law School, who elected to live in his family cabin on Big Yellow Mountain in Avery County, North Carolina, with his two Labrador Retrievers. Leutze's parents had purchased acreage on the mountain in 1969, and he and his siblings helped build their simple cabin retreat out of a pair of old farmhouses from Durham County. The family spent their summer days on the mountain in the garden, hiking, and fishing. And it is Leutze's affinity for the mountain and its people, and the importance of the Appalachian Trail, that shines through the story.

The story revolves around the actions of a mining company—Clark Stone Company—that began clearing a piece of the mountain without notice to adjoining landowners and other interests. A state agency had approved the mining permit; however, they failed to comply with certain guidelines for the permitting of mining operations contained in the North Carolina General Statutes and in the Mining Act of 1971. Among other things, there had been no public hearings prior to the Division of Land Resources' approval of the permit for the Putnam Mine. As a result, adjoining landowners and interested parties, such as the Appalachian Trail Conservancy, were unaware of the project.

At the urging of adjoining landowners, Ollie Cox, and her niece Ashley Cook, Leutze was convinced to take on the cause of the local folks to preserve Belview Mountain against the mining company and larger political interests unwilling to revoke the improperly issued mining permit. They referred to themselves as the "Dog Town Bunch." In the face of tremendous challenges, Leutze found his way to retired superior court judge, Forrest Ferrell, in Hickory, North Carolina; and, at Forrest's suggestion they associated another former superior court judge, Ron Howell (known as the "Heel Hound of the Mountains") in Burnsville, North Carolina. As Howell was introduced to Leutze by Forrest, "Once you've got Ron Howell on your scent, he'll nip you until you tire. He don't ever give up."

Judge Howell had represented adjoining landowners in mining cases before. The team now had to act quickly to stop Clark Stone's work at the Putnam Mine before the crushing equipment was turned on. The Dog Town Bunch, with Judges Ferrell and Howell, took on the challenge with meetings and judicial hearings intended to inform and engage the larger interests who wished to preserve the Appalachian Trail experience in one of its most stunning stretches.

Additionally, Leutze was able to engage the assistance of the Southern Environmental Law Center. As the cause developed, and as more people and agencies supportive of the Appalachian Trail's purpose joined in through the various judicial and administrative hearings, Leutze shares his inside view of the legal machinations against the state of North Carolina, as well as the outpouring of support from hiking clubs and supporters of the Appalachian Trail.

Leutze's story brings alive the personalities and voices of the mountain people with whom he aligns to challenge the bureaucratic and legal obstacles affecting their land, and, more importantly, the national public interest in the Appalachian Trail. It is a wonderful tale of the grassroots action that can, indeed, make a difference. ■

John A. Bowman is a family law attorney and mediator with Maxwell, Freeman & Bowman, PA, in Durham, North Carolina. He is a State Bar councilor from the 14th Judicial District.

Helpful Tips for Maintaining Certification

By Kelly Farrow

Keeping your paralegal certification up to date is important, but you may not know how the certification process works or about the resources that are available to help. Here are some quick tips.

Check the Web

The paralegal certification website, nccertifiedparalegal.gov, has information about the certification program in North Carolina, especially about becoming certified. It also has pages for checking your status, finding approved continuing paralegal education (CPE) courses, and downloading forms and documents related to certification and recertification. Additionally, the FAQs page has the answers to almost any question about the program, from eligibility requirements to recertification requirements. In addition, our website has information about related topics, including the current members of the Board of Paralegal Certification (the "board"), guidelines for the proper utilization of paralegals, and website links to paralegal organizations.

Renewal Dates and Checking Status

The renewal dates for certified paralegals were shifted in 2012. Renewal applications are now due on either July 1 or January 1 each year. If you are unsure about your renewal date, you can find it on the Paralegal Search page of our website. Just enter your last name, click Search, and then click View beside your name. The View page will list your next renewal due date as well as your current status. A status of Recertification Pending means that we have received your recertification application, and that it will be reviewed by the board at the next quarterly board meeting (February, May, August, or November) after your renewal date.

Recertification Applications

We mail recertification applications approximately 60 days before your renewal date. For example, if you are due for renewal on January 1, 2014, your recertification application will be mailed to you on November 1, 2013. *Please always read the cover letter mailed with the recertification application as it contains important information, including policy and procedural changes.* If for some reason you do not receive your application in the mail, you can find a blank application on the Forms page of our website. Please note that we will not accept a recertification application that is submitted more than 60 days before the renewal date.

Finding CPE

The key to maintaining certification is the fulfillment of the continuing education requirement each certification year. Paralegals may take either accredited CPE or continuing legal education (CLE) programs, and may take all six hours online. You can search for accredited CLE courses at nccle.org. To search for online courses, choose "Computer Based" as the Course Type. Additionally, there are accredited CPE courses listed on the CPE page of our website. For both of these search options, you will need to contact the sponsors directly to register for courses. Please remember that paralegals *may not* carry over excess CLE/CPE hours to the next certification period, and that all CLE/CPE courses that you take to maintain your certification must be accredited by the North Carolina State Bar. If you want to take a course that has not been accredited, you may apply to have the course accredited by completing and returning the Paralegal's Request for Approval of a CPE Activity form available on the Forms page of our website.

Certificates of Attendance

Certificates of Attendance/Completion for completed CPE/CLE courses must now be submitted with renewal applications. The sponsor of a continuing education course should be able to provide you with a certificate upon completion of the course. However, it is also recommended that you take a blank Certificate of Attendance to each CLE/CPE course you attend in case the sponsor does not provide one. A blank form can be printed from the Forms page of our website. If you have already attended a CLE/CPE course and did not receive a Certificate of Attendance upon completion of the course, contact the sponsor to see if it can issue another one. Please make sure that your name is on the Certificate of Attendance, and that you sign the form if a space is provided.

Grace Period for Renewal

Pursuant to our rules, there is an automatic 45-day grace period for the completion of the required CPE and the submission of the recertification application. *No late fee is due during this first 45-day grace period.* There is an additional 45-day grace period after that, during which you must pay a $25 late fee. You may not submit your recertification application after 90 days from your renewal date—on this date your certification will automatically lapse. *If your certification lapses, you must meet the eligibility requirements and pass the certification exam to become certified again, even if you were originally certified under the grandfathering provision available in 2005-2007.*

Keep It Current!

It is very important that you update your mailing address and email address on file with the State Bar Paralegal Certification Program to ensure that you receive correspondence regarding your certification. If your contact information changes, you can update it on our website by logging on to the Paralegal Login page. Once logged in, go to the Membership tab, and click Update Address and Contact Information.

Take a few minutes to explore our website. You may discover something new. ■

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

A Personal Story

By Anonymous

Personal stories can be either the easiest to tell, or the hardest. Easiest, because we know our own stories so well; hardest, because they often reveal things about ourselves or those close to us that we might prefer not to disclose. This story is both.

I was 30 and divorced when I fell in love with a wonderful man. He was smart, handsome, witty, exciting, and, best of all, he was in love with me as well. Like me, he was also divorced and a fellow lawyer. Our relationship filled us both with a zest for life that was intoxicating. We were aware of how fortunate we were to be drinking so deeply from the cup of life, and we cherished the opportunity we had been given to start life anew with each other as soulmates.

Somewhere along the line, however, something began to change. It happened gradually, so that I cannot now identify when or where the shift occurred. At the time, I didn't know the signs—what to look for or what they meant. All I knew was that the man I had married so happily years prior was no longer the man to whom I was married. What I didn't realize for some time yet was that I was married to an alcoholic.

And why should I? There were no alcoholics in my own family, and my vision of an alcoholic bore little resemblance to my husband. He wasn't sleeping under bridges or in jail—he was a successful lawyer and respected member of the community. Sure, he drank more than he had in the early years of our marriage, but I didn't yet know the full extent of his drinking—he was keeping that hidden. With two young children at home, we had worked out an arrangement where I would stay at the house later in the morning, and in return he would come home earlier at the end of the day. Unbeknownst to me, that arrangement gave him the opportunity to start drinking at the house before I arrived home for supper. He may have had a drink in his hand when I walked in the door, but he wasn't throwing up or passing out from drinking; in fact, I don't think I had ever seen him drunk. The signs were more subtle than that.

What I did notice was that the man who used to be so interested in our relationship had become distant and inaccessible to me. He was still the life of the party in a group, but my efforts to engage with him one-on-one were met with hollow stares. His needs became paramount as he pushed aside the needs of others, annoyed by anything or anyone that asked of him some commitment or sacrifice. Like many spouses in the face of similar conduct, I assumed the problem was me—that I had done something wrong or had become boring to him. It was a time of pain, confusion, self-doubt, and despair. I could not grasp what had gone wrong with our storybook relationship. Although I tried desperately to understand, my entreaties yielded no answers.

Often, when I am overwhelmed by feelings that I cannot contain or understand, I try instead to capture those feelings in a poem. My poem from those days follows:

An Island

You sit just an arm's length away, yet you remain beyond my reach.
Once again, you have retreated into your private sanctuary,
    that unnamed place from which you stare at me with vacant eyes—
    your physical presence with me a mere charade.
My words bounce off and return to me unanswered.
What emotion lies behind your empty gaze?
Is it anger, disgust, or simply boredom?
Is it directed at me, at life, or at someone or something I don't yet know?
I crawl frantically about the surface of your glass shell,
    groping for an opening, for some crack or weakness I might penetrate
    and find again the man I once knew and loved.

But you are prepared—the gates are already closed,
    the soft spots protected against intruders.
Your eyes tell me you are only passing time until I have exhausted
    my efforts and retreated in defeat,
    leaving you to satisfy your needs free of my expectations or demands.
You are an island without a bridge, a fortress no one can reach—
    disconnected from anyone who might ask you to give something of yourself,
    to relinquish any control to someone else's needs;
    disconnected from me,
    disconnected from life,
    disconnected from love. (© 2008)

Looking back now, I believe those times of uncertainty were the hardest for me. My marriage was falling apart and I had no clue why or how to fix it. With alcoholism, however, things seldom stay the same for long. And so it was with us. As my husband began, inevitably, to drink more, I finally started to realize that alcohol was in some way connected to our problem. At my urging he talked to a doctor and then a counselor about his drinking; they merely suggested that he try to moderate his intake. Naively, I offered to help him moderate by keeping track of the level of alcohol in the bottles on the pantry

shelf. I thought he was doing better until I noticed the condensation on the inside of the gin bottle and discovered he had drunk the gin and refilled the bottle with water. That discovery brought with it another one—that he was deliberately deceiving me. The honesty in our relationship had been sacrificed to his need to drink.

Of course, once I knew the game he was playing, I became more alert to other signs—the bottles of alcohol hidden behind the sofa and in his gym bag, the increasingly frequent moments of forgetfulness, his flirtatiousness with other women, and a growing immaturity. I became fearful of where this path would lead him—to malpractice, an affair, a terrible car accident, emotional scarring of our children, his own personal and professional downfall? It was a horrible vision of the future, but one I was certain would play itself out in reality if he failed to change course. At the same time, I was struck with the equally painful recognition that I would become the sole source of support for our children, both financially and emotionally.

Since my spoken words didn't reach him, I wrote him a letter. In it I expressed my fear that he was going to make some mistake, or otherwise do or fail to do something that would be very hard for him to live with. I knew that, above all, he valued his reputation and his intelligence—if he destroyed them, he would have struck a blow at the deepest core of his self esteem.

At my request, we went to see an alcohol counselor. For the first time, she applied the label of "alcoholic" to my husband. He rejected it and her suggestion that he go to an AA meeting. She advised me, in turn, not to be an enabler of his conduct. Her words struck home for me. He might destroy his own life, but I was unwilling to allow him to destroy my life or the lives of our young children as well. I accepted that, if there was to be any hope of improvement, I had to stop protecting him from the consequences of his conduct. I told him that he could no longer drink at home, and if he thought he would get around me by simply drinking away from home, then I would not allow him to enter our house after drinking. It was a sobering pronouncement, at least to me.

As Easter was approaching, my husband declared he would prove he was not an alcoholic by giving up alcohol for Lent. And he almost made it, although he was miserable the entire time. He declared victory a few hours early—on Easter eve—and celebrated with several drinks. His Lenten sacrifice, however, did not disprove his alcoholism, as his path took an even sharper decline upon his resumption of drinking.

As the saying goes, when one door closes, another one opens. As my husband was closing the door on our relationship, another door to help was being opened to me. Several months earlier I had attended the Festival of Legal Learning CLE program in Chapel Hill. The program was structured in a "buffet" style—for every block of time there were several offerings. For one block, I had selected a topic that offered ethics credit. One of the speakers was Ed Ward with the State Bar's Lawyers Assistance Program (LAP), who talked about alcoholism and the role of the LAP. Ed's words struck several chords with me. What I remembered most, however, was his offer of help should it ever be needed by either a lawyer alcoholic or a family member of an alcoholic.

One night in early June, my husband had his first blackout. He had scared me when I found him perched precariously on the top of a stepladder, trying to change a light bulb in the ceiling of our garage. It was a wonder he didn't fall and crack his scull on the cement floor. The next day, however, he remembered nothing of this escapade. That incident was my last straw—I knew instinctively that there was nothing more I could do to help my husband. At the same time, I recognized that I needed to do something to help myself. That day I called Ed Ward at the State Bar.

Looking back now, I am amazed that I had the courage to take this step. Had I taken the time to think about it, I might not have done so. Unaware of the confidentiality of the LAP program, I might have been scared off by the prospect of revealing my husband's name to the State Bar, or by the uncertainty of what they would do with that knowledge. It was a blessing, however, that I didn't stop to think. The truth though is that I didn't call for help for my husband—I called for help for myself. But in doing so, I did the best thing I could have done for either of us.

I told Ed that I thought my husband was an alcoholic, that there was nothing more I knew to do to help him, and that I needed help myself. Ed has a voice that immediately conveys compassion and inspires trust. I answered his questions about my husband's behavior, and when he asked me my husband's name, I gave it to him. Ed then asked me if I thought my husband would call him, and I agreed to ask him.

That night, standing in our bathroom, I told my husband what I had done and asked him to call Ed . I watched the color drain from his face. He agreed, however, to make the call. I immediately felt a load lift from my shoulders—someone else was going to take charge of this huge problem that I no longer knew how to handle on my own. I slept well for the first time in months.

The story both ends and begins with the phone call my husband made to Ed the next day. It ended the downward spiral—my husband didn't have another drink, he accepted his alcoholism, and he agreed to go to 90 AA meetings in the next 90 days. And it began his recovery process—a process that was slow, but was also steady and continuous. As the alcohol left his system, we began communicating again and our marriage started to feel like a partnership once more. By the end of the first year he had regained his maturity, and I was starting to trust his commitment to sobriety. Over the next few years I was able to recognize and articulate the ways his conduct had hurt me, and he was able to apologize. He became concerned again for my needs and was willing to balance those needs with his own. We talked, we shared, we rebuilt the bridges between us, and we re-forged our relationship.

Ten years later, my husband's sobriety is intact. He takes his recovery seriously, and still attends AA meetings twice a week. Ed has continued to play a vital role in his sobriety, and they are good friends. My husband and I are good friends again as well. Once more, we see life as bountiful. Help was there when we needed it. Help is there for anyone in our shoes who asks for it. ■

To contact the author, send an email to LAP Director Robynn Moraites at robynnmoraites@gmail.com.

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 Robynn Moraites (for Raleigh and down east) at 704-892-5699.

NC IOLTA Depends on Cy Pres Funds to Bolster Lagging Income

Income

NC IOLTA continues to ride the good news/bad news roller coaster. Though 2012 total income exceeded $3 million for the first time since 2008, it was only because of the $1.2 million received from the residual funds of a class action case. The picture for our traditional income sources remains bleak, though additional cy pres funds received or on the horizon would also improve the income picture for 2013.

IOLTA Account Income—Income from IOLTA accounts for 2012 decreased by almost 14% and was under $2 million for the first time since 1994. First quarter 2013 income from the accounts has decreased by *another* 14%. We do not expect this situation to change until interest rates go back up and transactions increase.

Settlement Agent Accounts—In the first quarter of 2013 we received just under $11,500 from 53 settlement agent accounts (those not associated with an attorney licensed in North Carolina). We have added eight new accounts in the second quarter. In 2012—the first year in which interest-bearing trust and escrow accounts of settlement agents handling closing and loan funds were to be set up as IOLTA accounts—we brought in $35,000 from those accounts.

Many of these accounts are not interest-bearing and are not being set up as IOLTA accounts.

Though we will receive more income from these accounts when transactions and interest rates increase, we expect no large increase unless establishing all such accounts as interest bearing IOLTA accounts is required.

Cy Pres—It is cy pres funds that are keeping the program alive in this difficult income climate. In addition to the $1.2 million award of residual funds from an out-of-state class action case received in 2012, we have received a cy pres award of almost $130,000 from a class action case filed in Buncombe County in 2004 by Asheville law firm Wimer & Associates. The settlement provided for a cy pres distribution in lieu of a claims process. With court approval, the funds were distributed to regional charitable organizations including NC IOLTA and Pisgah Legal Services in Asheville.

Strategically positioned to serve the entire state, NC IOLTA is an ideal nexus for the simple and effective distribution of such awards in North Carolina for civil legal services for low income residents. We are working hard to educate lawyers and judges about using the cy pres doctrine and other settlements and court orders to improve access to justice. A manual on *Cy Pres and Other Court Awards* published by the Equal Access to Justice Commission (EAJC) to educate judges and attorneys regarding such awards is available on the NC IOLTA website, nciolta.org, and the NC Equal Access to Justice website, ncequalaccesstojustice.com.

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 had dramatically decreased (by over 40%). Receiving $1.2 million in cy pres funds in 2012, 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 replenished the reserve to a total of just under $1 million to assist with grants in 2014.

Grantee Spotlights—We are continuing to highlight the work of our grantees in Grantee Spotlights. Look for these articles in the quarterly State Bar *Journal* or access them on our website, nciolta.org. We are focusing on work where more than one program can be highlighted.

State Funds

In addition to its own funds, NC IOLTA administers the state funding for legal aid on behalf of the NC State Bar. State funding has decreased due to reductions to both the appropriated funds and the filing fee allocations. Total state funding distributed for calendar year 2012 was $3.6 million, a decrease from $4.4 million in 2011. The Equal Access to Justice Commission and the NCBA continue to work to sustain and improve the funding for legal aid.

NC IOLTA Trustees and Leadership Appointed

At their July meeting the NC State Bar Council appointed IOLTA trustees to begin a three-year term on September 1, 2013, and IOLTA leadership for 2013-14. The council reappointed Charles Burgin of Morganton, a former NC Bar Association president, and Janice Cole of Hertford, a former US attorney and district court judge, to a second three-year term as IOLTA trustees and appointed Edward C. Winslow III as a new trustee. Winslow practices in Greensboro in the areas of banking and financial services. Former NC Bar Association president, Michael C. Colombo, and former NC Bankers Association chair, F. Edward Broadwell Jr., were re-appointed chair and vice-chair, respectively, of the NC IOLTA Board of Trustees for 2013-2014.

IOLTA Responds to NC State Audit Report

The NC State Bar and NC IOLTA received a financial-related audit (the objective of which was "to identify improvements needed in internal control over selected fiscal matters") by the NC state auditor. Their report is available on the NC state auditor's website. Two recommendations made for IOLTA with action taken in response are:

1. "Management should consider depositing checks daily..."

We have implemented remote capture capability so checks can be deposited daily.

Most income from banks is now received electronically, and IOLTA is continuing to work toward having all banks transfer funds electronically.

2. "The Board should strengthen its monitoring of grants by including procedures to validate the reported use of funds and performance outcomes."

The IOLTA staff and board are reviewing and revising grant monitoring protocols to include procedures for validating and further documenting the reported use of funds and performance outcomes. Revised protocols will be implemented by the next grant cycle.

The trustees and staff of NC IOLTA have worked hard to develop a diverse and effective evaluation program for its grantees. NC IOLTA has designed and uses report formats that regularly collect objective information about the activities undertaken by the grantees with IOLTA funds, including case report numbers. As noted by the state auditor's report, "We found the reports adequately explained how the grant funds were spent, and assuming valid information was provided, the reports indicated that the funds were spent in accordance with grant requirements." We also review financial reports that detail how the funds were spent as well as annual financial audits.

In addition, the staff is in regular personal contact with the grantee programs as NC IOLTA is an integral part of the legal aid community. Such contact includes knowing the staff responsible for all reporting (compliance staff, financial staff, data management staff, program managers, etc.) so that queries may be appropriately directed and answered. It also includes attendance at grantee board meetings, which allows for evaluation of board governance of these non-profit organizations. Of course, many of our trustees also have close knowledge of the grantees from having served on their boards or as *pro bono* attorneys for the programs.

Our relationship with our grantees also includes meetings with them in collaborative efforts. IOLTA was responsible for establishing the Equal Justice Alliance, a group of legal aid program directors, and the Equal Access to Justice Commission, a group of representatives from the judiciary, state government, business and foundation community, and other stakeholders in the improvement of legal aid chaired by the chief justice of the NC Supreme Court. ■

HIV Clients (cont.)

18. An opinion from the District of Columbia Bar Association is one of few addressing implied authorization. In DC Bar Opinion 290, the Bar considered whether a firm that represents insured clients could release confidential information to the auditor of the insurance company. The Bar concluded that the "circumstances of the retention" did not in themselves "imply authorization" to disclose confidential information to auditors. It limited Rule 1.6 "to situations in which disclosure is essential" to the representation. The opinion can be found at dcbar.org/for_lawyers/ethics/legal_ethics/opinions/opinion290.cfm.
19. The Model Rule's language on implied authorization and its comment 5 are identical to North Carolina's.
20. ABA Formal Ethics Op. 08-450 (2008) (emphasis added). We think this is a better approach than what might appear in other authorities, such as the Restatement (Third) of the Law Governing Lawyers. Section 61 of the Restatement could be read to endorse more attorney latitude on implied authority, but we do not think this should extend to the disclosure of sensitive information like an HIV diagnosis.
21. NC Rules of Prof'l Conduct 1.4, cmt 3.
22. NC Rules of Prof'l Conduct 1.6, cmt15.
23. NC Gen. Stat § 130A-25.
24. *See* Centers for Disease Control, *Estimated Per-Act Probability of Acquiring HIV from an Infected Source, by Exposure Act*, cdc.gov/hiv/law/transmission.htm.
25. Suzanna Attia et al., *Sexual transmission of HIV according to viral load and antiretroviral therapy: systematic review and meta-analysis*, 23 AIDS 11 (2009) (compiling study results and finding no record of transmission when persons having intercourse have undetectable viral loads), David P Wilson et al., *Relation between HIV viral load and infectiousness: a model-based analysis*, 372 LANCET 9635, 314-320 (2008) (finding low transmission rates related to viral load, but pointing out that statistical probability of infection increases with frequency of intercourse).
26. Cohen, M., et al, *Prevention of HIV-1 Infection with Early Antiretroviral Therapy*, N Engl J Med 2011, 365:493-505, August 11, 2011.
27. NC Rules of Prof'l Conduct 1.6, cmt. 15.
28. *Id.*

In Memoriam

Zebulon Doyle Alley
Raleigh, NC

Francis Joseph Blanchfield Jr.
Charlotte, NC

Deborah Collins Chapman
Charlotte, NC

Robert George Cowen
Sylva, NC

Clifton White Everett Jr.
Greenville, NC

Rossie Garnet Gardner
High Point, NC

Barbara Marie Bosma Garlock
Raleigh, NC

Frank Wade Hall Jr.
Arden, NC

Helen Kelly Hinn
Wilmington, NC

James E. Holshouser Jr.
Pinehurst, NC

Lee Edward Knott Jr.
Washington, NC

Mitchell L. McLean
Wilkesboro, NC

Wallace Carmichael Murchison
Wilmington, NC

Ronald Terry Penny
Sanford, NC

Benjamin Gibbs Philpott
Lexington, NC

William A. Powell
Shallotte, NC

James Edward Ramsey
Roxboro, NC

Philip O. Redwine
Raleigh, NC

Marnite Shuford
Charlotte, NC

Harold Ingram Spainhour
High Point, NC

Edward Nathaniel Swanson
Pilot Mountain, NC

Michele Rose Tart
Pittsboro, NC

Richard Fountain Thurston
San Jose, Costa Rica

Ronald Carl True
Asheville, NC

Richard Edgar Widin
Raleigh, NC

Donald A. Williams
Chapel Hill, NC

"Who you gonna call?" New Admittee's FAQs, Part Three

By Suzanne Lever

Welcome back. Hopefully you have read the first and second article in this series and have been anxiously awaiting the third and final installment.

But first, let's recap:

The North Carolina State Bar (the Bar) is the state agency responsible for regulating the practice of law in North Carolina. The Bar 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 where to find or who to ask for the information you need? Check out our Bar Staff Contacts page: ncbar.gov/contacts/c_staff.asp.

Now for the new stuff.

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

FAQs Relating to Client Files

Q: Do I have to give the client a copy of her file at the termination of the representation?

The original file belongs to the client. If the client requests the file at the conclusion of the representation, Rule 1.16 of the Rules of Professional Conduct obligates the lawyer to surrender to the former client all papers and property to which the client is entitled. Comment [10] to Rule 1.16 provides further guidance:

> Generally, anything in the file that would be helpful to successor counsel should be turned over. This includes papers and other things delivered to the discharged lawyer by the client such as original instruments, correspondence, and canceled checks. Copies of all correspondence received and generated by the withdrawing or discharged lawyer should be released as well as legal instruments, pleadings, and briefs submitted by either side or prepared and ready for submission. The lawyer's personal notes and incomplete work product need not be released.

If the lawyer turns over the original file but elects to keep a copy of the client's file for her own records, the lawyer must pay the copying costs.

Q: How long am I required to keep original closed client files?

If a lawyer retains the original file, the ethics opinions require the lawyer to keep a file for six years unless there is a limitations period requiring the lawyer to keep it longer. *See* RPC 209 for additional requirements. The lawyer should check with her malpractice carrier to see what it requires.

RPC 234 addresses the electronic storage of inactive client files. The opinion provides that an inactive client file may be stored in an electronic format so long as original documents with legal significance are preserved and documents in the electronic file can be reproduced on paper.

Q: When a client fails to pay a legal bill, may a lawyer withdraw from the representation? May the lawyer retain the file until the bills are paid?

A lawyer generally may withdraw from the representation when the client fails to pay the lawyer's fees if the client has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled. *See* Rule 1.16(b)(6). However, be aware that in litigation proceedings, court rules commonly require consent of the court before withdrawing.

Upon withdrawal, the lawyer must take steps to the extent reasonably practicable to protect the client's interests, including giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled, and refunding any part of a fee paid in advance that has not been earned. *See* Rule 1.16(d). The lawyer must surrender the client file regardless of whether the client has paid the lawyer's fees.

Discharge by a Contingency Fee Client

Q: When a lawyer is discharged by a client who was represented on a contingent fee basis, may that lawyer recover a fee for the legal services that were rendered prior to the discharge?

Every client has the right to select a lawyer and to discharge that lawyer at any time. When a client discharges the lawyer before the case is settled or reaches final judgment, the contingent fee provision in the employment contract no longer has any meaning. In addition, North Carolina strictly limits the availability of lawyer charging liens (an equitable lien that gives a lawyer the right to recover his fee from a fund recovered by his aid). Therefore, when the contingent fee agreement has been rendered moot by discharge of the lawyer before recovery, the exclusive remedy for the former lawyer is to bring an action in *quantum meruit* to recover the reasonable value of the legal services he performed for the client.

Changing Firms

Q: May a lawyer who is planning to leave a law firm let her clients know her plans and ask them to take their business to her new firm?

When a lawyer leaves a firm, every current client with whom the departing lawyer has a personal professional relationship must be notified. *See* RPC 200. The State Bar encourages the departing lawyer and the firm to agree on a joint written notice. The notice must inform the client of the lawyer's departure and of the client's right to stay with the firm, continue with the departing lawyer, or retain completely new counsel. *See* RPCs 48 and 200.

Although a written joint notice is preferable, it is not required. *See* RPC 200. If the lawyer has a personal professional relationship with the client, she may contact the client personally or by telephone, but the communication may not interfere with the client's right to select counsel. Likewise, a representative lawyer with the firm also may contact the client directly to notify the client of the departure and advise the client of the right to freely choose counsel.

The Anti-Contact Rule

Q: When may I interview an opposing party's employee?

Rule 4.2 prohibits a lawyer who is representing a client in a matter from communicating directly with a person who is represented by counsel in the same matter, unless the person's lawyer consents. When the opposing party is an organization, there is a distinction between communications with management and "rank and file" employees of the organization and between current and former employees.

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

There is a different standard for former employees. Rule 4.2 generally permits *ex parte* communications with former employees. This is true even though a former employee's acts or omissions may be the subject of the representation. A lawyer may communicate directly with a former employee of a represented organization, unless the former employee participated substantially in the legal representation of the organization relative to the particular matter.

Conflicts

Q: When can I represent a client in a matter against a former client?

Clients often believe that once a lawyer has represented them, that lawyer may never be adverse to them in any other matter. That is not correct. However, there are limitations on when a lawyer may represent a client in a matter against a former client.

Pursuant to Rule 1.9(a), a lawyer who has formerly represented a client in a matter is restricted from thereafter representing another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client (unless the former client gives informed consent, confirmed in writing).

Matters are "substantially related" if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that information that would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter. Rule 1.9, cmt. [3].

If the current matter is the same or substantially related to your representation of a former client, you have a conflict and cannot represent the new client unless the former client gives consent. If the matters are unrelated, you still have a conflict if information from your representation of the former client must be used to the detriment of the former client or must be disclosed to competently represent the current client in the current litigation *See* Rule 1.9(c). (For example, financial information obtained during the representation of a former client in a business matter may be relevant to a subsequent domestic matter involving the former client.)

Reporting Lawyer Misconduct

Q: When am I required to report another lawyer's misconduct to the Bar?

The relevant parts of Rule 8.3 provide:

> (a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer...shall inform the North Carolina State Bar or the court having jurisdiction over the matter.
>
> …
>
> (c) This Rule does not require disclosure of information otherwise protected by Rule 1.6.

The mandatory reporting requirement is an important way that our profession enforces the Rules of Professional Conduct. However, only serious violations must be reported. Note that the reporting requirement is triggered by the lawyer's actual knowledge of a violation of the Rules—not speculation or conjecture. Next, note that only a violation that "raises a substantial question" about specific traits of the other lawyer—honesty, trustworthiness, or fitness —must be reported. For example, in most instances, failure to follow the technical requirements of the advertising rules would not raise a "substantial question" about honesty, trustworthiness, or fitness. Similarly, a conflict of interest or an inadvertent communication with a represented person would not ordinarily rise to this level. One other thing to note: the duty of confidentiality, as set forth in Rule 1.6, limits a lawyer's duty to report the misconduct of another lawyer. If a client's interests would be harmed by reporting to the Bar (or a court with jurisdiction) or the client instructs the lawyer not to report, the lawyer may not report unless one of the exceptions in Rule 1.6(b) applies.

Many of these issues, as well as other issues pertaining to professional responsibility, have been the subject of articles previously published in the *Journal*. These articles are great resources and can be found on the Bar website: ncbar.gov/ethics/eth_articles. asp. ■

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

Profiles in Specialization—Beth Tillman and Christina Goshaw Hinkle

By Denise Mullen, Assistant Director of Legal Specialization

I recently had an opportunity to talk with law partners Beth Tillman and Christina Goshaw Hinkle, board certified specialists practicing in Chapel Hill. Tillman attended Vanderbilt for her undergraduate degree and then earned a Masters in English and her JD from UNC - Chapel Hill. Hinkle earned her Bachelor's degree from Duke and her law degree from UNC - Chapel Hill. While Tillman knew that her focus would be estate planning, Hinkle made that decision a few years into her practice. They worked together as associates in a small Chapel Hill firm before Tillman started her own law practice. They both became board certified specialists in estate planning and probate law in 2008. Hinkle joined Tillman's firm in 2011 and the name changed to Tillman Hinkle, PLLC. They have one associate, Amy Walker, who hopes to also become board certified when she is eligible. Former North Carolina Supreme Court Justice Willis Whichard will join the firm on September 1 of this year. Following are some of their comments about the specialization program and the impact it has had on their firm.

Q: Why did you pursue certification?

Tillman: I wanted to enhance my knowledge of the practice and knew that I would learn more by signing up to take the exam and then setting aside the time to study. I wanted to prepare well and waited until the timing was right.


Tillman

Hinkle: I had considered pursuing an LL.M. (Master of Laws) in tax, but was put off by both the cost and the necessary time. It was important to me to find a way to show my clients that I was dedicated to this practice area and that I knew what I was doing. It was also the first time since I became eligible that I felt I could adequately prepare. My children were a bit older and I was able to dedicate the time necessary to study.

Q: How did you prepare for the examination?

Tillman: We studied together and followed the course materials from the NCBA Estate Planning Study CLE course that is offered every couple of years.

Hinkle: It was such a different experience to study after being in practice. The content means so much more because you've experienced those situations in your daily work with clients. I really found that you can't just study for a specialty certification exam; you have to have the experience to draw from as well.


Hinkle

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

Hinkle: In an estate planning practice we usually don't have opposing counsel, so it was an interesting exercise to make sure I had enough peer references and mentors.

Tillman: It provided a moment to take a self-assessment and make sure that I had a close relationship with at least ten colleagues in my field. I also found that studying for the exam provided a real confidence boost.

Q: Has certification been helpful to your firm?

Tillman: It has been quite helpful, especially because we are both certified. We are able to give our clients some confidence and faith in our firm even before they come in to the office for the first time. It shows our clients that we are really dedicated to this practice area and that they can trust our advice, even if it's not what they had hoped to hear.

Hinkle: It's hard for potential clients to evaluate legal services and this is one way to provide additional information to them about what we do. We have limited our practice to estate planning and probate law. This is what we do, it's not something that's added on to a broader practice. I think having that information is helpful to clients as they make those difficult decisions.

Q: What do others say about the certification?

Hinkle: Some clients know before they come in, particularly the more savvy clients who have researched the firm online. They see the certification as a distinction and sometimes it influences their decision to schedule a consultation.

Tillman: I also recently went to a doctor who didn't know that lawyers could be board certified specialists. She was excited to learn about the program and asked questions about the practice areas and where she could access the list.

Q: Are there any hot topics in your practice area?

Hinkle: There have been constant changes in the estate planning laws over the past 16 years. This is the first time in a long time that we have permanent laws with which to work. That means that anyone who has an existing estate plan should have it reviewed to see if anything needs to be changed.

Q: How do you stay current in your field?

Hinkle: There are two list-serves we use that are very active, one through the North Carolina Bar Association and the other through the American Bar Association. Both are excellent resources to learn about updates, law changes, and how others are interpreting various situations.

Tillman: There are also many continuing

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Lawyers Receive Professional Discipline

Disbarments

The Disciplinary Hearing Commission concluded that **John Mauney** of Kitty Hawk misappropriated entrusted funds, mismanaged his trust account, did not pay over to taxing authorities funds withheld from employee paychecks, and abandoned his law practice. He was disbarred.

Stephen Melvin of Fayetteville misappropriated funds held in trust to pay clients' Medicare liens and medical providers. He surrendered his law license and was disbarred by the DHC.

Matthew G. Nestor of Wilson surrendered his license and was disbarred by the Wake County Superior Court. Nestor admitted that he knowingly facilitated fraudulent real estate transactions by preparing HUD-1 Settlement Statements that did not accurately reflect disbursement of loan proceeds.

Phillip G. Rose of Raleigh surrendered his license and was disbarred by the Wake County Superior Court. Rose pled guilty in federal court to engaging in a conspiracy to commit mail fraud, wire fraud, and bank fraud. Rose prepared HUD-1 Settlement Statements falsely representing that the borrowers brought funds to closing when the funds were actually provided by the sellers.

The DHC concluded that **Alan Roughton** of Greenville mishandled entrusted funds, neglected multiple clients, did not respond to the State Bar, and abandoned his law practice. He was disbarred.

The DHC concluded that Creedmoor lawyer **David Vesel** misappropriated entrusted funds, split fees with his non-lawyer assistant, commingled, and did not reconcile three trust accounts. He was disbarred.

Suspensions & Stayed Suspensions

The DHC concluded that **Kenneth Andresen** of Charlotte entered into a prohibited business transaction with a client, applied funds held in trust to pay his fee without authorization, did not promptly remove an earned fee from his trust account, and used entrusted property for one other than the beneficial owner. He was suspended for four years. After serving one year, Andresen will be eligible to seek a stay of the balance upon compliance with numerous conditions.

The DHC concluded that **William Brown** of Fayetteville did not respond to multiple fee disputes and grievances. He was suspended for three years and must satisfy numerous conditions before he will be eligible for reinstatement.

Carole Burley of Oriental modified a fee application after it had been approved and signed by the court, falsely represented on the modified form the date when the legal services were provided, and submitted the application to the clerk of court to obtain payment from IDS. The DHC imposed a one year stayed suspension.

Steven DeCillis of Oxford did all of the following simultaneously: sued L.H. in a personal injury case, represented L.H. in three matters that were unrelated to the personal injury case, and engaged in a sexual relationship with L.H. The DHC suspended him for five years. After serving three years, DeCillis will be eligible to apply for a stay of the remaining two years upon compliance with numerous conditions.

Phillip Dixon of Greenville violated trust accounting rules and did not adequately supervise his non-lawyer assistants, resulting in an employee stealing entrusted funds. The DHC suspended Dixon for two years. The suspension is stayed for two years upon compliance with numerous conditions.

Reid James of Gastonia did not adequately monitor his trust account and did not maintain required trust account records. The DHC suspended him for five years. After serving three years, James will be eligible to seek a stay of the remaining two years upon compliance with numerous conditions.

Elaine Kelley, a former senior assistant district attorney in Bladen County, pled guilty to one count of misprision of felony, a misdemeanor. Kelley admitted that she entered into an agreement with her former employer, former elected district attorney Rex Gore, that in addition to salary, Kelley would be compensated by receiving reimbursement for mileage she did not incur. Pursuant to this agreement, Kelley submitted false mileage reimbursement requests to the Administrative Office of the Courts. Kelley was sentenced to 12 months unsupervised probation and ordered to pay restitution of $14,190.39. The court also suspended Kelley's law license for six months. At Kelley's request, the Grievance Committee will not take action until Gore's criminal proceedings are concluded and Kelley will not engage in the practice of law until State Bar disciplinary proceedings are concluded.

The DHC concluded that Dare County lawyer **Dan Merrell** did not safeguard entrusted funds and engaged in a conflict of interest. He was suspended for two years. The suspension is stayed for two years.

Tina Patrick-Broadway of Charlotte did not follow trust accounting rules and did not supervise her non-lawyer assistants, resulting in two employees stealing entrusted funds. The DHC imposed a four-year suspension, stayed for three years. The conditions of the stay require Patrick-Broadway to demonstrate consistent compliance with trust accounting rules and to meet regularly with a practice monitor.

Bradley Tisdale of Franklin delegated real estate closings and the management of his real estate trust account to a non-lawyer assistant who misappropriated entrusted funds and did not obtain title insurance policies. The DHC suspended Tisdale for two years. The suspension is stayed for two years upon compliance with numerous conditions.

Show Cause Orders

In November 2011 the DHC suspended **D. Lynne Williams** of Wilmington for one year for failing to maintain proper trust account records and failing to reconcile her trust accounts. The suspension was stayed for three years. Williams violated several conditions of the stay, including failing to pay the costs of the DHC case, failing to retain a CPA to assist in reconciling her trust account, and failing to accept communications from the State Bar. The DHC lifted the stay and acti-

vated the suspension. At the end of the suspension, Williams must demonstrate compliance with numerous conditions to be eligible for reinstatement.

Censures

Roxboro lawyer **Ronnie King** was censured by the Grievance Committee. In a personal injury case, King did not respond to discovery requests, did not respond to the court's order compelling discovery, and did not inform his client that the court sanctioned her for failing to respond. When the opposing party filed a motion to dismiss, King took a voluntary dismissal and did not promptly refile the case. After his client terminated the representation, King did not promptly seek the court's permission to withdraw. King also was not candid with the Grievance Committee.

Travis Simpson of Winston-Salem was censured by the Grievance Committee. Simpson did not respond to letters of notice from the 21st Judicial District Bar Grievance Committee and the State Bar. Simpson had previously received discipline for failing to respond promptly to letters of notice.

Reprimands

Phillip Kleinsmith of Colorado Springs, Colorado, was reprimanded by the Supreme Court of Arizona, which found that Kleinsmith filed complaints that were dismissed for lack of service and made errors in cases filed in Florida, Wisconsin, and Texas. The Grievance Committee reprimanded Kleinsmith by order of reciprocal discipline.

Jeffrey G. Marscocci of Raleigh was reprimanded by the Grievance Committee. Marscocci's website contained numerous misleading statements. The website also represented that Marscocci specializes in financial planning. Financial planning is not recognized by the State Bar as a practice specialty.

Linda McCown of Manteo was reprimanded by the Grievance Committee. McCown engaged in a conflict of interest, had another attorney sign a pleading she prepared to conceal her conflict, and was not candid with the Grievance Committee.

James E. Vaughan of Winston-Salem was reprimanded by the Grievance Committee. Vaughan assisted a New York law firm's unauthorized practice of law. He also made misleading communications by allowing his name to be included in demand letters sent by the New York firm when he had no active role in the representation.

Reinstatements

Evelyn Dove-Coleman was disbarred in 2003 for misappropriating client funds and engaging in multiple acts of dishonest conduct. The DHC dismissed Dove-Coleman's petition for reinstatement because it did not comply with applicable rules.

The DHC suspended **Gary Kivett** of Spruce Pine for having and attempting to have sex with several clients. The order of discipline provides that Kivett can apply for a stay of the suspension upon showing compliance with numerous conditions. On May 23 the DHC concluded that Kivett had not satisfied all conditions and denied Kivett's motion for a stay.

In May 2012 **Thomas Norwood** was suspended for one year by the DHC because he abandoned clients and made false representations to the federal court. The secretary entered an order reinstating Norwood to active practice effective July 8, 2013.

Notice of Intent to Seek Reinstatement

Individuals who wish to note their concurrence with or opposition to these petitions should file written notice with the secretary of the State Bar, PO Box 25908, Raleigh, NC 27611, before November 1, 2013 (60 days from publication).

In the Matter of Douglas T. Simons

Notice is hereby given that Douglas T. Simons intends to file a petition for reinstatement before the Disciplinary Hearing Commission of the North Carolina State Bar. Simons surrendered his law license and was disbarred on April 14, 2005, for misappropriating clients' funds (for which restitution has been made) and submitting false documentation to the NC State Bar. ■

Legal Specialization (cont.)

legal education courses offered that provide an in-depth look at various estate planning topics. I have also found that I learn from teaching CLE courses.

Q: Does certification benefit clients?

Tillman: Yes, I feel that if you've devoted your life and career to the practice of law, you need to be the best you can be for your clients. Particularly in estate planning law, we work with clients in their frailty years. They need our best service, care, and legal advice.

Becoming board certified encourages lawyers to continue to learn and provide the best service possible.

Hinkle: Because we have additional CLE requirements, we have a built-in incentive to make the time to take longer, in-depth courses that we may not otherwise have taken. Our clients benefit from that deeper knowledge base.

Q: Does certification benefit the legal profession?

Tillman: It absolutely does. I recently taught a CLE on estate planning basics, covering how to work with a client from the initial consult through the signing of the documents. I got good feedback from the attorneys in attendance and hope to offer the CLE again. I value the service that estate planning lawyers offer to clients and recognize that we all benefit from lawyers doing good work. As we elevate the work of lawyers in general, we all feel better about what we do and that can only enhance how the public perceives us.

Hinkle: It's important for each of us to do what's best for our clients as well as we can. The law is so broad and complicated that we can't know everything. When we limit our practice it allows us to delve into complicated issues and really focus. That improves the quality of work we are able to provide.

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

Hinkle: I would encourage lawyers to look at their career path and to think about the future. Dedicate yourself to your practice area and do all that you can to excel in that work.

Tillman: I encourage lawyers to pursue board certification. I love what I do and I love having a good work situation. Board certification is a part of that—it has changed how I felt about my career. We have an aging population and there's enough work for all. I view it not as a competition, but as camaraderie among lawyers. ■

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

Amendments Pending Approval by the Supreme Court

At its meeting on April 19, 2013, the North Carolina State Bar Council voted to adopt the following rule amendments for transmission to the North Carolina Supreme Court for approval (for the complete text see the Spring 2013 edition of the *Journal* or visit the State Bar website):

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.

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.

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 require an applicant for initial and continued certification as a specialist to have a satisfactory disciplinary history.

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 provide a procedure whereby 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 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.

Proposed Amendments

At its meeting on July 19, 2013, the Council voted to publish the following proposed rule amendments for comment from the members of the bar:

Proposed Amendments to the Rule on Classes of Membership

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

The proposed amendments allow a lawyer who is changing his or her status to inactive to be designated as "retired" in the State Bar membership records and to hold himself or herself out as a "Retired Member of the State Bar."

.0201 Classes of Membership

(a) Two Classes of Membership

Members of the North Carolina State Bar shall be divided into two classes: active members and inactive members.

...

(c) Inactive Members

...

(2) Inactive members of the North Carolina State Bar may not practice law, except as provided in this rule for persons granted *emeritus pro bono* status, and are exempt from payment of membership dues during the period in which they are inactive members. For purposes of the State Bar's membership records, the category of inactive members shall be further divided into the following subcategories:

(A) ~~Retired/nonpracticing~~ **Non-practicing**

This subcategory includes those members who are not engaged in the practice of law or holding themselves out as practicing attorneys and who ~~are retired,~~ hold positions unrelated to the practice of law, or practice law in other jurisdictions.

(B) Retired

This subcategory includes those members who are retired from the practice of law and who no longer hold themselves out as practicing attorneys. A retired member must hold himself or herself out as a "Retired Member of the North Carolina State Bar" or by some similar designation provided such designation clearly indicates that the attorney is "retired."

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.**

~~(B)~~ (C) Disability inactive status

[Re-lettering remaining paragraphs.]

Proposed Amendments to the Rules for Judicial District Bars

27 N.C.A.C. 1A, Section .0900, Organization of the Judicial District Bars

The proposed amendments exempt members who are on active military duty and new admittees from the obligation to pay a judicial district bar annual membership fee. This is consistent with the fee obligations the same members have to the State Bar. The proposed amendments also require judicial district bars that assess mandatory membership fees for the first time after 2013 to adopt a fiscal year of July 1- June 30. This requirement will not apply to judicial district bars that assess mandatory membership fees prior to January 1, 2014.

.0902 Annual Membership Fee

If a judicial district bar elects to assess an annual membership fee from its active members pursuant to N.C.G.S. §84-18.1(b), the following procedures shall apply:

(a) Notice to State Bar.

...

(e) Members Subject to Assessment. Only those lawyers who are active members of a judicial district bar may be assessed an annual membership fee. ~~A lawyer who joins a judicial district bar after the beginning of its fiscal year shall be exempt from the obligation to pay the annual membership fee for that fiscal year only if the lawyer can demonstrate that he or she previously paid an annual membership fee to another judicial district bar with a fiscal year that runs coterminously, for a period of three (3) months or more, with the fiscal year of the lawyer's new judicial district bar.~~

(f) Members Exempt from Assessment.

(1) A person licensed to practice law in North Carolina for the first time by examination is not liable for judicial district bar membership fees during the year in which the person is admitted;

(2) A person licensed to practice law in North Carolina serving in the United States Armed Forces, whether in a legal or nonlegal capacity, is exempt from judicial district bar membership fees for any year in which the member serves some portion thereof on full-time active duty in the military service;

(3) A lawyer who joins a judicial district bar after the beginning of its fiscal year is exempt from the obligation to pay the annual membership fee for that fiscal year only if the lawyer can demonstrate that he or she previously paid an annual membership fee to another judicial district bar with a fiscal year that runs coterminously, for a period of three (3) months or more, with the fiscal year of the lawyer's new judicial district bar.

~~(f)~~ (g) Hardship waivers.

...

[Re-lettering remaining paragraphs.]

.0903 Fiscal Period

To avoid conflict with the assessment of the membership fees for the North Carolina State Bar, each judicial district bar that assesses a membership fee shall adopt a fiscal year that is not a calendar year. **Any judicial district bar that assesses a mandatory membership fee for the first time after December 31, 2013, must adopt a fiscal year that begins July 1 and ends July 30.**

Proposed Amendments to the Rules and Regulations Governing the CLE Program

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

The proposed amendments make the following changes to the rules and regulations for the CLE program: re-name the professionalism requirement for new lawyers the "Professionalism for New Admittees Program" (PNA Program); specify that the PNA Program may be presented by live webcast or by video replay if one hour of every six hours of programming is live; revise the accredited sponsor rule to reflect accurately the process that is used to approve programs presented by accredited sponsors; permit the accreditation of a product-specific technology course if there is a nexus to the practice of law and certain other conditions are met; increase the number of CLE credits that may be taken online each year from 4 to 6 credits; correct a typographical error that implies that more than 6 hours of computer-based CLE may be carried over to the next year; and clarify that webcasting is a live simultaneous broadcast that is not subject to the restrictions on video replay presentations.

.1518 Continuing Legal Education Program

(a) Annual Requirement

...

(b) ...

(c) Professionalism Requirement for New Members. Except as provided in paragraph (d)(1), each active member admitted to the North Carolina State Bar after January 1, 2011, must complete the North Carolina State Bar ~~New Admittee~~ Professionalism **for New Admittees** Program (~~New Admittee Program~~ **PNA Program**) in the year the member is first required to meet the continuing legal education requirements as set forth in Rule .1526(b) and (c) of this subchapter. CLE credit for the ~~New Admittee~~ **PNA** Program shall be applied to the annual mandatory continuing legal education requirements set forth in paragraph (a) above.

(1) Content and Accreditation. The State Bar ~~New Admittee~~ **PNA** Program shall consist of 12 hours of training in subjects designated by the State Bar including, but not limited to, professional responsibility, professionalism, and law office management. The chairs of the Ethics and Grievance Committees, in consultation with the chief counsel to those committees, shall annually establish the content of the program and shall publish the required content on or before January 1 of each year. To be approved as a ~~New Admittee~~ **PNA** Program ~~CLE activity~~, a sponsor must satisfy the annual content requirements. At least 45 days prior to the presentation of a ~~New Admittee~~ **PNA** Program, a sponsor must submit a detailed description of the program to the board for approval. Accredited sponsors shall not be exempt from the prior submission requirement and may not advertise a ~~New Admittee~~ **PNA** Program until approved by the board. ~~New Admittee~~ **PNA** Programs shall be specially designated by the board and no course that is not so designated shall satisfy the ~~New Admittee~~ **PNA** Program requirement for new members.

(2) Evaluation. To receive CLE credit for attending a ~~New Admittee~~ **PNA** Program, the participant must complete a written evaluation of the program which shall contain questions specified by the State Bar. Sponsors shall collate the information on the completed evaluation forms and shall send a report showing the collated information, together with the original forms, to the State Bar

when reporting attendance pursuant to Rule .1601(e)(1) of this subchapter.

(3) Format and Partial Credit. The ~~New Admittee~~ **PNA** Program shall be presented in two six-hour blocks (with appropriate breaks) over two days. The six-hour blocks do not have to be attended on consecutive days or taken from the same provider; however, no partial credit shall be awarded for attending less than an entire six-hour block unless a special circumstances exemption is granted by the board. **The PNA Program may be distributed over the Internet by live web streaming (webcasting) but ~~No~~ no** part of the program may be taken online (via the Internet) **on demand**. **The program may also be taken as a prerecorded program provided the requirements of Rule .1604(d) of this subchapter are satisfied and at least one hour of each six-hour block consists of live programming.**

(d) Exemptions from Professionalism Requirement for New Members.

(1) Licensed in Another Jurisdiction. A member 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 ~~New Admittee~~ **PNA** Program requirement and must notify the board of the exemption in the first annual report sent to the member pursuant to Rule .1522 of this subchapter.

(2) Inactive Status. A newly admitted member who is transferred to inactive status in the year of admission to the State Bar is exempt from the ~~New Admittee~~ **PNA** Program requirement but, upon the entry of an order transferring the member back to active status, must complete the ~~New Admittee~~ **PNA** Program in the year that the member is subject to the requirements set forth in paragraph (a) above unless the member qualifies for the exemption under paragraph (d)(1) of this rule.

(3) Exemptions Under Rule .1517. A newly admitted active member who qualifies for an exemption under Rule .1517 of this subchapter shall be exempt from the ~~New Admittee~~ **PNA** Program requirement during the period of the Rule .1517 exemption. The member shall notify the board of the exemption in the first annual report sent to the member pursuant to Rule .1522 of this subchapter. The member must complete the ~~New Admittee~~ **PNA** Program in the year the member no longer qualifies for the Rule .1517 exemption or the next calendar year unless the member qualifies for the exemption under paragraph (d)(1) of this rule.

.1520 Accreditation of Sponsors and Programs

(a) Accreditation of Sponsors. ….

(b) ~~Presumptive~~ **Program** Approval for Accredited Sponsors.

(1) Once an organization is approved as an accredited sponsor, the continuing legal education programs sponsored by that organization are presumptively approved for credit**; however, ~~and no~~** application must be made to the board for approval. **At least 50 days prior to the presentation of a program, an accredited sponsor shall file an application, on a form prescribed by the board, notifying the board of the dates and locations of presentations of the program and the sponsor's calculation of the CLE credit hours for the program.**

(2) The board may at any time revoke the accreditation of an accredited sponsor for failure to satisfy the requirements of Rule .1512 and Rule .1519 of this subchapter, and for failure to satisfy the Regulations Governing the Administration of the Continuing Legal Education Program set forth in Section .1600 of this subchapter. ~~(2)~~**(3)**The board ~~may~~ **shall** evaluate a program presented by an accredited sponsor and, upon a determination that the program does not satisfy the requirements of Rule .1519, notify the accredited sponsor that ~~any presentation of the same~~ **the** program~~, the date for which was not included in the announcement required by Rule .1520(c) below,~~ is not approved for credit. Such notice shall be sent by the board to the accredited sponsor within 45 days after the receipt of the ~~announcement~~ **application**. **If notice is not sent to the accredited sponsor within the 45-day period, the program shall be presumed to be approved**. The accredited sponsor may request reconsideration of ~~such a~~ **an unfavorable accreditation** decision by submitting a letter of appeal to the board within 15 days of receipt of the notice of disapproval. The decision by the board on an appeal is final.

(c) Unaccredited Sponsor Request for Program Approval.

…

~~(c) Program Announcements of Accredited Sponsors. At least 50 days prior to the presentation of a program, an accredited sponsor shall file an announcement, on a form prescribed by the board, notifying the board of the dates and locations of presentations of the program and the sponsor's calculation of the CLE credit hours for the program.~~

~~(f)~~ **(e)** Records...

.1602 Course Content Requirements

(a) Professional Responsibility Courses on Stress, Substance Abuse, Chemical Dependency, and Debilitating Mental Conditions

….

(d) Skills and Training Courses - A course that teaches a skill specific to the practice of law may be accredited for CLE if it satisfies the accreditation standards set forth in Rule .1519 of this subchapter with the primary objective of increasing the participant's professional competence and proficiency as a lawyer. The following are illustrative, non-exclusive examples of subject matter that may earn CLE credit: legal writing; oral argument; courtroom presentation; and legal research. A course that provides general instruction in non-legal skills shall NOT be accredited. The following are illustrative, non-exclusive examples of subject matter that will NOT receive CLE credit: learning to use ~~computer hardware, non-legal~~ software **for an application that is not specific to the practice of law (e.g. word processing)~~,~~; ~~or~~ learning to use** office equipment **(except as permitted by paragraph (e) of this rule)**; public speaking; speed reading; efficiency training; personal money management or investing; career building; marketing; and general office management techniques.

(e) Technology Courses – A course on a specific information technology product, device, platform, application, or other technology solution (IT solution) may be accredited for CLE if the course satisfies the accreditation standards in Rule .1519 of this subchapter; specifically, the primary objective of the course must be to increase the participant's professional competence and proficiency as a lawyer. The following are illustrative, non-exclusive examples of courses that may earn CLE credit: electronic discovery software for litigation; docu-

ment automation/assembly software; document management software; practice management software; digital forensics for litigation; and digital security. A course on the selection of an IT solution or the use of an IT solution to enhance a lawyer's proficiency as a lawyer or to improve law office management may be accredited if the requirements of paragraphs (c) and (d) of this rule are satisfied. A course that provides general instruction on an IT solution but does not include instruction on the practical application of the IT solution to the practice of law shall not be accredited. The following are illustrative, non-exclusive examples of subject matter that will NOT receive CLE credit: generic education on how to use a tablet computer, laptop computer, or smart phone; training courses on Microsoft Office, Excel, Access, Word, Adobe, etc. programs; and instruction in the use of a particular desktop or mobile operating system. No credit will be given to a course that is sponsored by a manufacturer, distributor, broker, or merchandiser of the IT solution. A sponsor may not accept compensation from a manufacturer, distributor, broker, or merchandiser of an IT solution in return for presenting a CLE program about the IT solution. Presenters may include representatives of a manufacturer, distributor, broker, or merchandiser of the IT solution but they may not be the only presenters at the course and they may not determine the content of the course.

(f) ~~(e)~~ Activities That Shall Not Be Accredited ...

[Re-lettering remaining paragraphs.]

.1604 Accreditation of Prerecorded Simultaneous Broadcast, and Computer-Based Programs

(a) Presentation Including Prerecorded Material. ...

(b) Simultaneous Broadcast. An active member may receive credit for participation in a live presentation which is simultaneously broadcast by telephone, satellite, **live web streaming (webcasting),** or video conferencing equipment. The member may participate in the presentation by listening to or viewing the broadcast from a location that is remote from the origin of the broadcast. The broadcast may include prerecorded material provided it also includes a live question and answer session with the presenter.

(c) Accreditation Requirements.

....

(e) Computer-Based CLE. Effective ~~for courses attended on or after July 1, 2001~~ **January 1, 2014**, a member may receive up to ~~four (4)~~ **six** hours of credit annually for participation in a course on CD-ROM or online. A CD-ROM course is an educational seminar on a compact disk that is accessed through the CD-ROM drive of the user's personal computer. An online course is an educational seminar available on a provider's website reached via the Internet.

(1) A member may apply up to ~~four~~ **six** credit hours of computer-based CLE to a CLE deficit from a preceding calendar year. Any computer-based CLE credit hours applied to a deficit from a preceding year will be included in calculating the maximum of ~~four (4)~~ **six** hours of computer-based CLE allowed in the preceding calendar year. A member may carry over to the next calendar year no more than ~~four~~ **six** credit hours of computer-based CLE pursuant to Rule .1518~~(c)~~**(b)** of this subchapter. Any credit hours carried over pursuant to Rule .1518~~(c)~~**(b)** of this subchapter will ~~not~~ be included in calculating the ~~four (4)~~ **six** hours of computer-based CLE allowed in any one calendar year.

(2) ...

Proposed Amendments to the Rules on the Registration of Interstate and International Law Firms

27 N.C.A.C. 1E, Section .0200, Registration of Interstate and International Law Firms

The proposed amendments require any law firm filing a certificate of authority to transact business in North Carolina with the North Carolina Secretary of State to register with the State Bar as an interstate law firm.

.0201 Registration Requirement

No law firm or professional organization **that** ~~which~~ **(1)** maintains offices in North Carolina and one or more other jurisdictions**, or (2) files for a certificate of authority to transact business in North Carolina from the North Carolina Secretary of State,** may do business in North Carolina without first obtaining a certificate of registration from the North Carolina State Bar provided, however, that no law firm or professional organization shall be required to obtain a certificate of registration if all attorneys associated with the law firm or professional organization, or any law firm or professional organization that is in partnership with said law firm or professional organization, are licensed to practice law in North Carolina.

Proposed Amendments to the Rules for the Paralegal Certification Program

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 the Plan for Certification of Paralegals clarify the current duties of the Paralegal Certification Committee. The proposed amendments to the rules on continuing paralegal education (CPE) allow stress management courses to be approved for CPE.

.0118 Certification Committee

(a) ...

(c) The committee shall advise and assist the board in carrying out the board's objectives and in the implementation and regulation of this plan by advising the board as to standards for certification of individuals as paralegals. The committee shall be charged with actively administering the plan as follows:

(1) **upon request of the board,** make recommendations to the board for certification, continued certification, denial, suspension, or revocation of certification of paralegals and for procedures with respect thereto;

~~(2) administer procedures established by the board for evaluation of applications for certification and continued certification as a paralegal and for denial, suspension, or revocation of such certification;~~

~~(3)~~ **(2)** ~~administer examinations and other testing procedures, if applicable, investigate references of applicants and, if deemed advisable, seek additional information regarding applicants for certification or continued certification as paralegals~~ **draft and regularly revise the certification examination**; and

~~(4)~~ **(3)** perform such other duties and make such other recommendations as may be delegated to or requested by the board.

.0201 Continuing Paralegal Education (CPE)

(a) Each active certified paralegal subject to these rules shall complete 6 hours of

approved continuing education during each year of certification.

(b) Of the 6 hours, at least 1 hour shall be devoted to the areas of professional responsibility or professionalism or any combination thereof.

(1) A professional responsibility course or segment of a course shall be devoted to (1) the substance, the underlying rationale, and the practical application of the Rules of Professional Conduct; (2) the professional obligations of the lawyer to the client, the court, the public, and other lawyers, and the paralegal's role in assisting the lawyer to fulfill those obligations; ~~or~~ (3) the effects of substance abuse and chemical dependency, or debilitating mental condition on a lawyer's or a paralegal's professional responsibilities**; or (4) the effects of stress on a paralegal's professional responsibilities**.

...

Proposed Amendments to Rules of Professional Conduct

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

Amendments to Rule 1.17, Sale of a Law Practice, and Rule 7.3, Direct Contact with Potential Clients, are proposed. The proposed amendments to Rule 1.17 clarify that a solo practitioner who sells his or her law practice to another lawyer may continue to work for the firm. The proposed amendments also explain the disclosure requirements if the purchaser continues to use the name of the firm. The proposed amendments to Rule 7.3 specify that the advertising notice on written targeted communications soliciting professional employment must be conspicuous and must match in size, color, and type the largest and widest of the fonts used on the envelope or written communication.

Rule 1.17: Sale of A Law Practice

A lawyer or a law firm may sell or purchase a law practice, or an area of law practice, including good will, if the following conditions are satisfied:

(a) The seller ceases to engage in the private practice of law, or in the area of practice that has been sold, from an office that is within a one-hundred (100) mile radius of the purchased law practice, except the seller may ~~work for~~ **continue to practice law with** the purchaser ~~as an independent contractor~~ and may provide legal representation at no charge to indigent persons or to members of the seller's family;

(b) ...

Comment

[1] ...

Termination of Practice by the Seller

[2] ...

[3] The requirement that the seller cease to engage in the private practice of law does not prohibit employment as an independent contract lawyer **or an employee** for the ~~purchaser~~ **practice**. Permitting the seller to continue to work for the practice will assist in the smooth transition of cases and will provide mentoring to new lawyers. The requirement that the seller cease private practice also does not prohibit employment as a lawyer on the staff of a public agency or a legal services entity that provides legal services to the poor, or as in-house counsel to a business. Similarly, the Rule allows the seller to provide *pro bono* representation to indigent persons on his own initiative and to provide legal representation to family members without charge. ***See also* 98 Formal Ethics Opinion 6 (1998)(requirements in rule relative to sale of law practice to lawyer who is stranger to the firm do not apply to the sale of law practice to lawyer who is a current employee of firm).**

[4] ...

Other Applicable Ethical Standards

[11]….

[13] After purchase, the law practice may retain the same name subject to the requirements of Rule 7.5. The seller's retirement or discontinuation of affiliation with the law practice must be indicated on letterhead and other communications as necessary to avoid misleading the public as to the seller's relationship to the law practice. If the seller becomes an independent contract lawyer or employee of the practice, the letterhead and other communications must indicate that the seller is no longer the owner of the firm; an "of counsel" designation would be sufficient to do so.

Applicability of the Rule

~~[13]~~ [14] ...

[Re-numbering remaining paragraphs.]

Rule 7.3: Direct Contact with Potential Clients

(a) ...

(c) Targeted Communications. Unless the recipient of the communication is a person specified in paragraphs (a)(1) or (a)(2), every written, recorded, or electronic communication from a lawyer soliciting professional employment from a potential client known to be in need of legal services in a particular matter shall include the statement, in capital letters, "THIS IS AN ADVERTISEMENT FOR LEGAL SERVICES" (the advertising notice)**, which shall be conspicuous and** subject to the following requirements:

(1) Written Communications. Written communications shall be mailed in an envelope. The advertising notice shall be printed on the front of the envelope, in a font that is as large as any other printing on the **front or the back of the** envelope. **If more than one color or type of font is used on the front or the back of the envelope, the font used for the advertising notice shall match in color, type, and size the largest and widest of the fonts.** The front of the envelope shall contain no printing other than the name of the lawyer or law firm and return address, the name and address of the recipient, and the advertising notice. The advertising notice shall also be printed at the beginning of the body of the **enclosed** ~~letter~~ **written communication** in a font as large as or larger than any other printing contained in the ~~letter~~ **enclosed written communication**. **If more than one color or type of font is used on the enclosed written communication, then the font of the advertising notice shall match in color, type, and size the largest and widest of the fonts. Nothing on the envelope or the enclosed written communication shall be more conspicuous than the advertising notice.**

(2) Electronic Communications. The advertising notice shall appear in the "in reference" **or subject box** ~~block~~ of the address **or header** section of the communication. No other statement shall appear in this block. The advertising notice shall also appear, at the beginning and ending of the electronic communication, in a font as large as or larger than any other printing in the body of the communication or in any masthead on the communication. **If more than one color or type of font is used in the electronic communication, then the font of the advertising notice shall match in color, type, and size**

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Committee Provides Guidance on Responding to the Mental Impairment of a Lawyer in Your Firm

Council Actions

At its meeting on July 19, 2013, the State Bar Council adopted the ethics opinions summarized below:

2012 Formal Ethics Opinion 11

Use of Nonlawyer Field Representatives to Obtain Representation Contracts

Opinion rules that a law firm may send a nonlawyer field representative to meet with a prospective client and obtain a representation contract if a lawyer at the firm has reviewed sufficient information from the prospective client to determine that an offer of representation is appropriate.

2012 Formal Ethics Opinion 13

Duty to Safekeep Client Files upon Suspension, Disbarment, Disappearance, or Death of Firm Lawyer

Opinion rules that the partners and managerial lawyers remaining in a firm are responsible for the safekeeping and proper disposition of both the active and closed files of a suspended, disbarred, missing, or deceased member of the firm.

2013 Formal Ethics Opinion 4

Representation in Purchase of Foreclosed Property

Opinion examines the ethical duties of a lawyer representing both the buyer and the seller on the purchase of a foreclosure property and the lawyer's duties when the representation is limited to the seller.

2013 Formal Ethics Opinion 5

Disclosure of Confidential Information to Lawyer Serving as Foreclosure Trustee

Opinion rules that a lawyer/trustee must explain his role in a foreclosure proceeding to any unrepresented party that is an unsophisticated consumer of legal services; if he fails to do so and that party discloses material confidential information, the lawyer may not represent the other party in a subsequent, related adversarial proceeding unless there is informed consent.

2013 Formal Ethics Opinion 6

State Prosecutor Seeking Order for Arrest for Failure to Appear When Defendant is Detained by ICE

Opinion rules that a state prosecutor does not violate the Rules of Professional Conduct by asking the court to enter an order for arrest when a defendant detained by ICE fails to appear in court on the defendant's scheduled court date.

2013 Formal Ethics Opinion 7

Sharing Fee from Tax Appeal with Nonlawyer

Opinion rules a law firm may not share a fee from a tax appeal with a nonlawyer tax representative unless such nonlawyer representatives are legally permitted by the tax authorities to represent claimants and to be awarded fees for such representation.

Ethics Committee Actions

At its meeting on July 18, 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 2013 FEO 2, *Providing Defendant with Discovery During Representation*. The Ethics Committee also voted to publish two revised proposed opinions (Proposed 2012 FEO 7 and Proposed 2013 FEO 1) and four new proposed opinions. The comments of readers are welcomed.

Proposed 2012 Formal Ethics Opinion 7
Copying Represented Persons on Electronic Communications
July 18, 2013

Proposed opinion provides that consent from opposing counsel must be obtained before copying opposing counsel's clients on electronic communications; however, the consent required by Rule 4.2 may be implied by the facts and circumstances surrounding the communication.

Inquiry #1:

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

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 electronic communication or conventional mail—to opposing counsel is a communication under Rule 4.2(a) and prohibited unless there is consent or other legal authorization.

Inquiry #2:

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

Opinion #2:

The fact that Lawyer B copies her own client on the electronic communication to which Lawyer A is replying, standing alone, does not permit Lawyer A to "reply all." While Rule 4.2(a) does not specifically provide that the consent of the other lawyer must be "expressly" given, the prudent practice is to obtain express consent. Whether consent may be "implied" by the circumstances requires an evaluation of all of the facts and circumstances surrounding the representation, the legal issues involved, and the prior communications between the lawyers and their clients.

The *Restatement of the Law Governing Lawyers* provides that an opposing lawyer's consent to communication with his client "may be implied rather than express." *Rest. (Third) of the Law Governing Lawyers* § 99 cmt. J. 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") have examined this issue. Both committees concluded that, while consent to "reply to all" communications may sometimes be inferred from the facts and circumstances presented, the prudent practice is to secure express consent from opposing counsel. 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.

There are scenarios where the necessary consent may be implied by the totality of the facts and circumstances. However, the fact that a lawyer copies his own client on an electronic communication does not, in and of itself, constitute implied consent to a "reply to all" responsive electronic communication. Other factors need to be considered before a lawyer can reasonably rely on implied consent. These factors include, but are not limited to: (1) how the communication is initiated; (2) the nature of the matter (transactional or adversarial); (3) the prior course of conduct of the lawyers and their clients; and (4) the extent to which the communication might interfere with the client-lawyer relationship. These factors need to be considered in conjunction with the purposes behind Rule 4.2. Comment [1] to Rule 4.2 provides:

> [Rule 4.2] contributes 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.

After considering each of these factors, and the intent of Rule 4.2, Lawyer A must make a good faith determination whether Lawyer B has manifested implied consent to a "reply to all" responsive electronic communication from Lawyer A.

Caution should especially be taken if Lawyer B's *client* responds to a "group" electronic communication by using the "reply to all" function. Lawyer A may need to reevaluate the above factors before responding further. Under no circumstances may Lawyer A respond solely to Lawyer B's client.

Because of the ease with which "reply to all" electronic communications may be sent, the potential for interference with the attorney-client relationship, and the potential for inadvertent waiver by the client of the client-lawyer privilege, it is advisable that a lawyer sending an electronic communication, who wants to ensure that his client does not receive any electronic communication responses from the receiving lawyer or parties, should forward the electronic communication separately to his client, blind copy the client on the original electronic communication, or expressly state to the recipients of the electronic communication, including opposing counsel, that consent is not granted to copy the client on a responsive electronic communication.

To avoid a possible incorrect assumption of implied consent, the prudent practice is for all counsel involved in a matter to establish at the outset a procedure for determining whether it is acceptable to "reply to all" when a represented party is copied on an electronic communication.

Proposed 2013 Formal Ethics Opinion 1
Release/Dismissal Agreement Offered by Prosecutor to Convicted Person
July 18, 2013

Proposed opinion rules that, subject to conditions, a prosecutor may enter into an agreement to consent to vacating 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 a crime in a North Carolina state court and sentenced to the North Carolina prison system. Ten years later, the parties learned of exculpatory evidence. Defendant, with the advice of two defense counsel, signed a release that provided, in pertinent part, as follows:

> [Defendant] for and in consideration of release from the North Carolina Department of Corrections, do[es] hereby voluntarily agree without any threat, coercion, or prosecutorial misconduct, that he will never...bring legal action of any kind against the State of North Carolina, the County of..., the...County Sheriff's Department, Detective...of the...County Sheriff's Department, any and all members and employees of the...County District Attorney's Office.... This Release is given and executed with due knowledge [and] cognizance of the Supreme Court's recognition of the validity and enforceability of Releases of this nature in the case of *Town of Newton v. Rumery*, 480 U.S. 386 (1987).

May a state or federal prosecutor prepare, offer, negotiate, or execute an agreement (a "release/dismissal agreement") that conditions the prosecutor's agreement not to object to or contest a motion for appropriate relief 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:

Yes, but the prosecutor must take great care not to transgress existing ethical rules.

A *per se* ethical rule against prosecutors negotiating post-conviction release/dismissal agreements[1] would effectively prohibit a defense lawyer from offering on behalf of his or her client a waiver of potential civil claims to persuade a prosecutor to support the prisoner's motion to vacate the conviction. Some defense lawyers wish to have this option available when the extent to which new exculpatory evidence casts doubt on the defendant's guilt is debatable.

In negotiating such an agreement, however, a prosecutor must be mindful of his or her ethical obligations. For instance, if recently discovered exculpatory evidence shows that the prisoner was innocent of the charge(s) for which he is currently incarcerated and he files a legally meritorious motion with the appropriate court to vacate his conviction, the prosecutor may not make his or her consent to the motion contingent on the prisoner waiving potential civil claims arising from his wrongful conviction. Rule 3.1 ("A lawyer shall not... defend a proceeding...or...controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous..."). *See also* Rule 3.8, *Special Responsibilities of a Prosecutor*, cmt. [1] (responsibility as minis-

ter of justice carries with it specific obligations to see that defendant is accorded procedural justice and that guilt is decided upon sufficient evidence).

In the fact pattern giving rise to this inquiry, the prisoner was represented by counsel in the negotiation of the release-dismissal agreement. A prosecutor should not negotiate such an agreement with an unrepresented prisoner unless the prisoner insists upon proceeding *pro se*. *Cf.* Rule 3.8(c) (prosecutor shall not seek to obtain from an unrepresented accused a waiver of important pretrial rights). Before negotiating such an agreement with a *pro se* prisoner, judicial approval of the *pro se* representation should be obtained. *Cf.* Rule 3.8, cmt. [3].

Even if the ethical concerns identified above have been addressed, a prosecutor may only negotiate an agreement that includes a waiver of the prisoner's potential civil claims against the sovereign or public officials if the prosecutor has the legal authority to represent the interests of the sovereign or those officials with respect to such civil claims. It would be unethical for the prosecutor explicitly or implicitly to misrepresent the scope of the prosecutor's authority to negotiate with respect to such civil claims. Rule 4.1; Rule 8.4(c).

In communicating with the court regarding the prosecution's position on whether the conviction should be vacated, the prosecutor should disclose the existence of any agreement conditioning the prosecutor's position on the prisoner's agreement to waive potential civil claims. *Cf.* RPC 152 (prosecutor must ensure that all material terms of negotiated plea are disclosed in response to direct questions).

Endnote

1. There is no general legal prohibition against a prosecutor negotiating or entering into a "release-dismissal agreement" in the pre-conviction context. *See Town of Newton v. Rumery*, 480 US 386, 395-97 (1987) (rejecting the assumption "that all–or even a significant number–of release-dismissal agreements stem from prosecutors abandoning 'the independence of judgment required by [their] public trust'" and concluding that a *per se* rule of invalidity of such agreements would fail to credit other relevant public interests and improperly assume prosecutorial misconduct). *See also Rodriguez v. Smithfield Packing Co.*, 338 F.3d 348, 353-54 & n.3 (4th Cir. 2003) (applying *Rumery* to enforce a release-dismissal agreement and noting that such agreements serve the legitimate public interest of avoiding future litigation); and *Senator v. Baltimore County*, 917 F.2d 1302, 1990 WL 173827 (4th Cir. 1990) (unpub.) ("the release agreement serves the public interest").

Proposed 2013 Formal Ethics Opinion 8
Responding to the Mental Impairment of Firm Lawyer
July 18, 2013

Proposed opinion analyzes the responsibilities of the partners and supervisory lawyers in a firm when another firm lawyer has a mental impairment.

Introduction:

As the lawyers from the "Baby Boomer" generation advance in years, there will be more instances of lawyers who suffer from mental impairment or diminished capacity due to age. In addition, lawyers suffer from depression and substance abuse at approximately twice the rate of the general population.[1] This opinion examines the obligations of lawyers in a firm who learn that another firm lawyer suffers from a mental condition that impairs the lawyer's ability to practice law or has resulted in a violation of a Rule of Professional Conduct. This opinion relies upon ABA Commission on Ethics and Professional Responsibility, Formal Opinion 03-429 (2003) [hereinafter ABA Formal Op. 03-429] for its approach to the issues raised by the mental impairment of a lawyer in a firm. For further guidance, readers are encouraged to refer to the ABA opinion.

Inquiry #1:

Attorney X has been practicing law successfully for over 40 years and is a prominent lawyer in his community. In recent years, his ability to remember has diminished and he has become confused on occasion. The other lawyers in his firm are concerned that he may be suffering from the early stages of Alzheimer's disease or dementia.

What are the professional responsibilities[2] of the other lawyers in the firm?[3]

Opinion #1:

The partners[4] in the firm must make reasonable efforts to ensure that Attorney X does not violate the Rules of Professional Conduct.

Mental impairment may lead to inability to competently represent a client as required by Rule 1.1, inability to complete tasks in a diligent manner as required by Rule 1.3, and inability to communicate with clients about their representation as required by Rule 1.4. Although a consequence of the lawyer's impairment, these are violations of the Rules of Professional Conduct nonetheless. As noted in ABA Formal Op. 03-429, "[i]mpaired lawyers have the same obligations under the [Rules of Professional Conduct] as other lawyers. Simply stated, mental impairment does not lessen a lawyer's obligation to provide clients with competent representation." Under Rule 1.16(a)(2), a lawyer is prohibited from representing a client and, where representation has commenced, required to withdraw if "the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client." Unfortunately, an impaired lawyer may not be aware or may deny that his impairment is negatively impacting his ability to represent clients. ABA Formal Op. 03-429.

Rule 5.1(a) requires partners in a firm and all lawyers with comparable managerial

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 September 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.

authority in the firm to "make reasonable efforts to ensure that the firm or the organization has in effect measures giving reasonable assurance that all lawyers in the firm or the organization conform to the Rules of Professional Conduct." Similarly, Rule 5.1(b) requires a lawyer having direct supervisory authority over another lawyer to "make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct." Taken together, these provisions require a managerial or supervisory lawyer who suspects or knows that a lawyer is impaired to closely supervise[5] the conduct of the impaired lawyer because of the risk that the impairment will result in violations of the Rules.

When deciding what should be done in response to a lawyer's apparent mental impairment, it may be helpful to partners and supervising lawyers to consult a mental health professional for advice about identifying mental impairment and assistance for the impaired lawyer. *Id.* As observed in ABA Formal Op. 03-429,

> [t]he firm's paramount obligation is to take steps to protect the interest of its clients. The first step may be to confront the impaired lawyer with the facts of his impairment and insist upon steps to assure that clients are represented appropriately notwithstanding the lawyer's impairment. Other steps include forcefully urging the impaired lawyer to accept assistance to prevent future violations or limiting the ability of the impaired lawyer to handle legal matters or deal with clients.

Id.

If the lawyer's mental impairment can be accommodated by changing the lawyer's work environment or the type of work that the lawyer performs, such steps also should be taken.[6] "Depending on the nature, severity, and permanence (or likelihood of periodic recurrence) of the lawyer's impairment, management of the firm has an obligation to supervise the legal services performed by the lawyer and, in an appropriate case, prevent the lawyer from rendering legal services to clients of the firm." *Id.*

Making a confidential report to the State Bar's Lawyer Assistance Program (LAP) (or to another lawyers' assistance program approved by the State Bar) would also be an appropriate step. The LAP can provide the impaired lawyer with confidential advice, referrals, and other assistance.

Inquiry #2:

Attorney X's mental capacity continues to diminish. Apparently as a consequence of mental impairment, Attorney X failed to deliver client funds to the office manager for deposit in the trust account. It is believed that he converted the funds to his own use. In addition, Attorney X failed to complete discovery for a number of clients although he declined assistance from the other lawyers in the firm. Some clients may face court sanctions as a consequence. Although Attorney X is engaging and articulate when he meets with clients, he no longer seems able to prepare for litigation and, on more than one occasion, Attorney X's presentation in court was muddled, meandering, and confused.

What are the professional responsibilities of the other lawyers in the firm?

Opinion #2:

Attorney X has violated Rule 1.15 by failing to place entrusted funds in the firm trust account. He has also violated Rule 1.1 and Rule 1.3 by providing incompetent representation and by failing to act with reasonable promptness in completing discovery. These are violations of the Rules of Professional Conduct that may have to be reported to the State Bar or to the court. In addition, steps may have to be taken to provide additional ongoing supervision for Attorney X or to change the circumstances or type of work that he performs to avoid additional violations of his professional duties. The other lawyers in the firm must also take steps to mitigate the adverse consequences of Attorney X's past conduct including replacing client funds.

Rule 8.3(a) requires a lawyer "who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects [to] inform the North Carolina State Bar or the court having jurisdiction over the matter." Only misconduct that raises a "substantial question" as to the lawyer's honesty, trustworthiness, or fitness must be reported. As noted in the comment,

> [t]his Rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A measure of judgment is, therefore, required in complying with the provisions of this Rule. The term "substantial" refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware.

Rule 8.3, cmt. [4].

If an impaired lawyer's misconduct is isolated and unlikely to recur because the mental impairment has ended or is controlled by medication or treatment, no report of incompetent or delinquent representation may be required. *See* RPC 243 (an "isolated incident resulting from a momentary lapse of judgment" does not raise a substantial question about honesty, trustworthiness, or fitness). "Similarly, if the firm is able to eliminate the risk of future violations of the duties of competence and diligence under the [Rules] through close supervision of the lawyer's work, it would not be required to report the

impaired lawyer's violation." ABA Formal Op. 03-429.

However, reporting is required if the misconduct is serious, such as the violation of the trust accounting rules described in this inquiry, or the lawyer insists upon continuing to practice although his mental impairment has rendered him unable to represent clients as required by the Rules of Professional Conduct.[7] In either situation, a report of misconduct may not be made if it would require the disclosure of confidential client information in violation of Rule 1.6 and the client does not consent to disclosure. *See* Rule 8.3(c).

Rule 1.4(b) requires a lawyer to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." If the managing lawyers determine that the impaired lawyer cannot provide competent and diligent representation and should be removed from a client's case, the situation must be explained to the client so that the client can decide whether to agree to be represented by another lawyer in the firm or to seek other legal counsel.

Rule 5.1(c) requires a partner or a lawyer with comparable managerial authority or with supervisory authority over another lawyer to take reasonable remedial action to avoid the consequences of the lawyer's violation of the Rules. Even if the impaired lawyer is removed from a representation, the firm lawyers must make every effort to mitigate any adverse consequences of the impaired lawyer's prior representation of the client.

Inquiry #3:

If the firm partners determine that Attorney X has violated the Rules and there is a duty to report under Rule 8.3, may they fulfill the duty by reporting Attorney X to the State Bar's Lawyer Assistance Program (LAP)?

Opinion #3:

No. 2003 Formal Ethics Opinion 2 addressed this issue in the context of reporting opposing counsel as follows:

> The report of misconduct should be made to the Grievance Committee of the State Bar if a lawyer's impairment results in a violation of the Rules that is sufficient to trigger the reporting requirement. The lawyer must be held professionally accountable. *See, e.g.*, Rule .0130(e) of the Rules on Discipline and Disability of Attorneys, 27 N.C.A.C. 1B, Section .0100 (information regarding a member's alleged drug use will be referred to LAP; information regarding the member's alleged additional misconduct will be reported to the chair of the Grievance Committee).
>
> Making a report to the State Bar, as required under Rule 8.3(a), does not diminish the appropriateness of also making a confidential report to LAP. The Bar's disciplinary program and LAP often deal with the same lawyer and are not mutually exclusive. The discipline program addresses conduct; LAP addresses the underlying illness that may have caused the conduct. Both programs, in the long run, protect the public interest.

Inquiry #4:

Attorney X announces his intent to leave the firm to set up his own solo practice and to take all of his client files with him. The other lawyers in the firm are concerned that, absent any supervision or assistance, Attorney X will be unable to competently represent clients because of his mental impairment.

What are the duties of the remaining lawyers in the firm if Attorney X leaves and sets up his own practice?

Opinion #4:

In addition to any duty to report, the remaining lawyers may have a duty to any current client of Attorney X to ensure that the client has sufficient information to make an informed decision about continuing to be represented by Attorney X.

As noted in Opinion #2, Rule 1.4(b) requires a lawyer to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." The clients of an impaired lawyer who leaves a firm must decide whether to follow the departed lawyer to his new law practice. To make an informed decision, the clients must be informed of "the facts surrounding the withdrawal to the extent disclosure is reasonably necessary for those clients to make an informed decision about the selection of counsel." ABA Formal Op. 03-429.[8] There is no comparable duty to former clients of the impaired lawyer as long as the firm avoids any action that might be interpreted as an endorsement of the services of the departed, impaired lawyer, including sending a joint letter regarding the lawyer's departure from the firm.

The remaining lawyers in the firm may conclude that, while under their supervision and support, the impaired lawyer did not violate the Rules and, therefore, there is no duty to report to the State Bar under Rule 8.3. Nevertheless, subject to the duty of confidentiality to clients under Rule 1.6, voluntarily reporting the impaired lawyer to LAP (or another lawyer's assistance program approved by the State Bar) would be appropriate. The impaired lawyer will receive assistance and support from LAP and this may help to prevent harm to the interests of the impaired lawyer's clients.

Inquiry #5:

Associate lawyers and staff members are often the first to observe behavior indicating that a lawyer has a mental impairment. If an associate lawyer or a staff member reports behavior by Attorney X that indicates that Attorney X is impaired and may be unable to represent clients competently and diligently, what is a partner's or supervising lawyer's duty upon receiving such a report?

Opinion #5:

If a partner or supervising lawyer receives a report of impairment from an associate lawyer or a staff member, regardless of whether the lawyer suspected of impairment is a senior partner or an associate, the partner or supervising lawyer must investigate and, if it appears that the report is meritorious, take appropriate measures to ensure that the impaired lawyer's conduct conforms to the Rules of Professional Conduct. *See* Opinion #1 and Rule 5.1(a). It is never appropriate to protect the impaired lawyer by refusing to act upon or ignoring a report of impairment, or by attempting to cover up the lawyer's impairment.

Inquiry #6:

If an associate lawyer in the firm observes behavior by Attorney X that indicates that Attorney X is not competent to represent clients, what should the associate lawyer do?

Opinion #6:

The associate lawyer must report his or her observations to a supervising lawyer or the senior management of the firm as neces-

sary to bring the situation to the attention of lawyers in the firm who can take action.

Inquiry #7:

An associate lawyer in the firm reports to his supervising lawyer that he suspects that Attorney X is mentally impaired. He also describes to the supervising lawyer conduct by Attorney X that violated Rules 1.1 and 1.3. The supervising lawyer tells the associate to ignore the situation and to not say anything to anyone about his observations including clients, other lawyers in the firm, or staff members. The associate concludes that no action will be taken to investigate or address Attorney X's behavior. Does the associate lawyer have any further obligation?

Opinion #7:

A subordinate lawyer is bound by the Rules of Professional Conduct notwithstanding that the subordinate lawyer acts at the direction of another lawyer in the firm. Rule 5.2(a). The associate lawyer should bring the situation to the attention of lawyers with the highest authority to act on behalf of the firm. *See* Opinion #4. If these lawyers also refuse to take action, and Attorney X's known violations the Rules of Professional Conduct raise substantial questions as to Attorney X's competency or fitness to practice law, the associate lawyer has a duty to report the misconduct to the State Bar pursuant to Rule 8.3(a).

Inquiry #8:

Do the responses to any of the inquiries above change if the lawyer's impairment is due to some other reason such as substance abuse or mental illness?

Opinion #8:

No.

Endnotes

1. ABA Comm. On Ethics and Prof'l Responsibility, Formal Op. 03-429 (2003) (citing George Edward Baillly, *Impairment, the Profession, and Your Law Partner*, 11 No.1 Prof. Law. 2 (1999)) [hereinafter ABA Formal Op. 03-429].
2. This opinion does not address the issues that may arise under the American with Disabilities Act of 1990, 42 US C. §§12101 *et seq.* (2003) (the ADA) relative to an employer's legal responsibilities to an impaired lawyer. Lawyers are advised to consult the ADA and the Equal Employment Opportunity Commission's website, eeoc.gov, for guidance.
3. "Firm" as used in the Rules of Professional Conduct and this opinion denotes "a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship, or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation, government entity, or other organization." Rule 1.0(d).
4. "Partner" as used in the Rules of Professional Conduct and this opinion denotes "a member of a partnership, a shareholder in a law firm organized as a professional corporation, or a member of an association authorized to practice law." Rule 1.0(h).
5. It is improper for a firm to charge a client for additional supervision for an impaired lawyer if the supervision exceeds what is normally required to ensure competent representation unless the client is advised of the reason for the additional supervision and agrees to the charges. *See* Rule 1.5(a).
6. ABA Formal Op. 03-429 provides the following examples of accommodation:

   A lawyer who, because of his mental impairment is unable to perform tasks under strict deadlines or other pressures, might be able to function in compliance with the [Rules] if he can work in an unpressured environment. In addition, the type of work involved, as opposed to the circumstances under which the work occurs, might need to be examined when considering the effect that an impairment might have on a lawyer's performance. For example, an impairment may make it impossible for a lawyer to handle a jury trial or hostile takeover competently, but not interfere at all with his performing legal research or drafting transaction documents.
7. ABA Formal Op. 03-429 cautions that when reporting an impaired lawyer pursuant to Rule 8.3, disclosure of the impairment may be necessary; however, the reporting lawyer should be careful to avoid violating the ADA.
8. ABA Formal Op. 03-429 counsels that, when providing a client with information about the departed lawyer, a firm lawyer "must be careful to limit any statement to ones for which there is a reasonable factual foundation." This will avoid violating the prohibition on false and misleading communications in Rule 7.1 and the prohibition on deceit and misrepresentation in Rule 8.4(c).

Proposed 2013 Formal Ethics Opinion 9
Role of Lawyer for Public Interest Law Organization
July 18, 2013

Proposed opinion provides guidance to lawyers who work for a public interest law organization that provides legal and non-legal services to its clientele and that has an executive director who is not a lawyer.

Facts:

Attorney A is a staff lawyer for Immigrant Aid Corporation (IAC), a public interest, nonprofit corporation that provides services to immigrants with limited income. Public interest law firms are subject to the requirements of NC Gen. Stat. §84-5.1.

IAC is tax exempt under 26 U.S.C. §501(c)(3). A nonlawyer is the executive director of IAC. IAC has satellite offices that are managed by nonlawyers. The services provided by the organization to immigrants include legal assistance with immigration matters. These services are provided by staff lawyers and by Board of Immigration Appeals (BIA) representatives. BIA representatives are nonlawyers who are authorized by the federal government to handle certain immigration matters.

IAC charges its clients nominal fees for the legal services it provides. There is a separate, predetermined fee for each separate aspect of a case or task to be performed by a lawyer or a BIA representative. The organization does not have income qualification guidelines and does not use a sliding income scale to determine what a client will pay for a service.

A new client of the corporation is asked to sign a document entitled "Retainer Agreement" for the services to be provided by staff lawyers. The agreement states that "if the process to obtain the benefit I seek requires more than one step, each step will be a separate case with a separate fee and separate service plan." A schedule of the separate fees is not provided with the agreement. Instead, the agreement specifies a total fee, which is the aggregate of the fees for the various legal services that it is anticipated the client will need.

The Retainer Agreement states that the executive director or the office manager will determine the outcome of a client's request for a waiver of a legal fee, a client's complaint regarding legal services, and any dispute regarding legal fees. In the case of a fee dispute, a disgruntled client speaks first to a supervising staff lawyer, then, if the dispute is not resolved, to an office manager who is not a lawyer, and finally to the executive director.

When a client pays a fee by cash or check, the cash or check is locked in a staff member's desk until the funds can be deposited in IAC's operating account.

Inquiry #1:

Are North Carolina lawyers who work for IAC subject to the North Carolina Rules of Professional Conduct although they are not employed by a law firm?

Opinion #1:

Yes. The North Carolina Rules of Professional Conduct apply not only to lawyers working at law firms, but also to lawyers working in-house at public and private companies and for non-profit organizations. *See* Rule 1.0(d) ("'Firm' or 'law firm'

denotes a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship, or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation, government entity, or other organization.") *See also* Preamble, Rule 0.1 ("Every lawyer is responsible for observance of the Rules of Professional Conduct").

Inquiry #2:

Is a North Carolina lawyer allowed to work for a 501(c)(3) corporation in which a nonlawyer serves as the executive director or as the manager of the satellite office where the lawyer works?

Opinion #2:

Yes. Pursuant to NC Gen. Stat. §84-5.1, a nonprofit corporation, tax exempt under 26 U.S.C. §501(c)(3), organized or authorized under Chapter 55A of the General Statutes of North Carolina, and operating as a public interest law firm as defined by the applicable Internal Revenue Service guidelines, may render legal services provided by lawyers licensed to practice law in North Carolina for the purposes for which the nonprofit corporation was organized. "The nonprofit corporation must have a governing structure that does not permit an individual or group of individuals other than an attorney duly licensed to practice law in North Carolina to control the manner or course of the legal services rendered and must continually satisfy the criteria established by the Internal Revenue Service for 26 U.S.C. §501(c)(3) status, whether or not any action has been taken to revoke that status." NC Gen. Stat. §84-5.1(a). *See also* Rule 5.4, cmt. [3] (nonlawyer may serve as a director or officer of a professional corporation organized to practice law if permitted by law).

Inquiry #3:

If the answer to Inquiry #2 is "yes," to what extent may the executive director or office manager supervise or instruct the staff lawyers in the performance of legal services?

Opinion #3:

The nonlawyers associated with the IAC may not "direct or regulate" the staff lawyer's professional judgment in rendering legal services. Rule 5.4(c). As required by NC Gen. Stat. §84-5.1, the IAC "must have a governing structure that does not permit an individual or group of individuals other than an attorney duly licensed to practice law in North Carolina to control the manner or course of the legal services rendered."

Inquiry #4:

The fees to be charged for a legal service performed by a staff lawyer or by a BIA representative are finally approved by the executive director. May a staff lawyer permit a nonlawyer to have final approval authority for fees to be charged for the lawyer's work?

Opinion #4:

A nonlawyer may have final approval authority for fees to be charged for the lawyer's work only if the approval process does not interfere with the staff lawyer's exercise of professional judgment and there is a method for the lawyer to object if the fee is clearly excessive in violation of Rule 1.5(a).

Inquiry #5:

By allowing IAC to collect and retain legal fees, is a staff lawyer participating in fee-sharing with a nonlawyer which is prohibited by Rule 5.4?

Opinion #5:

No. As noted in comment [1] to the Rule 5.4, the traditional limitations on sharing fees prevent interference in the independent professional judgment of a lawyer by a nonlawyer. NC Gen. Stat. §84-5.1 prohibits a nonprofit public interest law corporation from having a governing structure that permits such interference. So long as IAC is complying with the statutory requirements, the fee-splitting prohibition is not triggered by this arrangement.

Inquiry #6:

If money is collected in advance from clients of IAC to pay for legal services to be provided by staff lawyers, does the staff lawyer have to insure that money is deposited into a trust account established and managed pursuant to Rule 1.15 of the Rules of Professional Conduct?

If money is collected for a consultation with an IAC client at the time of the consultation, does the staff lawyer have to insure that the money is deposited into a trust account or may it be deposited into the corporation's operating account?

Does the title "Retainer Agreement" allow the staff lawyer to consider the payment a true retainer, which is earned upon payment, and which may be deposited in IAC's operating account?

Opinion #6:

If money is collected for a staff lawyer's services, the lawyer must insure that IAC handles the money in a manner that is consistent with the lawyer's duty to safekeep client property. Rule 1.15. Comment [2] to Rule 1.15 provides that "[a]ny property belonging to a client or other person or entity that is received by or placed under the control of a lawyer in connection with the lawyer's furnishing of legal services or professional fiduciary services must be handled and maintained in accordance with this Rule 1.15." Pursuant to Rule 1.15-2(b), "[a]ll trust funds received by or placed under the control of a lawyer shall be promptly deposited in either a general trust account or a dedicated trust account of the lawyer." "Entrusted property" includes "trust funds, fiduciary funds, and other property belonging to someone other than the lawyer which is in the lawyer's possession or control in connection with the performance of legal services or professional fiduciary services." Rule 1.15-1(e).

The title of the representation agreement, in this case "Retainer Agreement," does not determine the actual nature of the agreement. Whether money paid in advance by a client is "entrusted property" that must be placed in a trust account will depend on the nature of the advance payment (advance fee, general retainer, flat fee, or minimum fee) and whether the fee is earned upon payment. The IAC must follow the guidelines set out in 2008 FEO 10 as to fees paid in advance and place any fees that are not earned immediately into a trust account.

Inquiry #7:

If money is collected for costs that may be incurred in conjunction with the provision of legal services, should the staff lawyer insure that the money is deposited into a trust account?

Opinion #7:

Yes. Any portion of a payment that is intended to cover costs must be deposited in a trust account. If IAC receives a check from a client that represents costs and fees, the check must be deposited in a trust account before IAC may withdraw that portion of the funds that constitutes immediately earned

legal fees. *See* RPC 158.

Inquiry #8:

Until the money is deposited in a bank account, may a client's cash or check be locked in a staff member's desk?

Opinion #8:

A lawyer has a duty to safekeep client funds and property. Rule 1.15-2. Rule 1.15-2(b) provides that"[a]ll trust funds received by or placed under the control of a lawyer shall be promptly deposited in either a general trust account or a dedicated trust account of the lawyer." Any check representing any portion of legal fees that are not earned immediately must be *promptly* deposited in a trust account. In the event that trust funds cannot be immediately deposited in a trust account, the funds should be securely maintained until they can be deposited.

Inquiry #9:

Should a staff lawyer require that a schedule of the fees for services be included in the Retainer Agreement or discussed with the client at the time of execution of the agreement?

Opinion #9:

Yes. Rule 1.4(b) provides that a lawyer shall "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." In this scenario, the client cannot make an informed decision about entering into the representation agreement without sufficient knowledge of the legal fees being charged for each specific service.

Inquiry #10:

May the agreement include the following statement: "If I decide not to continue a case with the agency and the service I requested has been performed or completed, I will not be entitled to a refund, full or partial, of the fee"?

Opinion #10:

The use of the term "nonrefundable fee" in fee agreements is prohibited because a fee is always subject to refund, in whole or in part, if the fee is clearly excessive under the circumstances. 2008 FEO 10. Therefore, a fee agreement may state that a client "will not be entitled to a refund of any portion of a fee unless it can be demonstrated that the total fee was clearly excessive under the circumstances." *See* "Model Fee Provisions" in 2008 FEO 10.

Inquiry #11:

May a staff lawyer ask a client to sign the "Retainer Agreement" if it states that IAC "is not obligated to continue representing me in all steps of the legal process, and may withdraw its representation and close my case upon written notification to the client and to the administrative law agency"?

Opinion #11:

No. The statement in the Retainer Agreement misrepresents the ethical duties owed by the staff lawyer to the client and the administrative law agency or tribunal by the staff lawyer.

Pursuant to Rule 1.2(c), "[a] lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances." When the scope of representation is limited, it is appropriate to define the scope of representation in the representation agreement. The agreement should set forth the "steps of the legal process" for which IAC will provide a lawyer to represent the client. The representation may be limited to those "steps" if reasonable under the circumstances.

If the staff lawyer withdraws from the matter before completing the "steps," the lawyer must comply with Rule 1.16(c) requiring notice to or permission of the tribunal, consistent with applicable law, when terminating a representation. In addition, Rule 1.16(d) requires a lawyer to "take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled, and refunding any advance payment of fee or expense that has not been earned or incurred."

Inquiry #12:

May a staff lawyer agree to or participate in IAC's process for resolving fee disputes with clients? Should the agreement reference the fee dispute resolution program of the State Bar required by Rule 1.5(f) of the Rules of Professional Conduct?

Opinion #12:

The IAC may establish an internal mechanism for reviewing clients' complaints about legal fees. However, that mechanism will not replace the obligation of a North Carolina lawyer to participate in the North Carolina State Bar's fee dispute resolution program. Participation in the fee dispute resolution program of the North Carolina State Bar is mandatory for the lawyer when a client requests resolution of a disputed legal fee. Rule 1.5(f).

Inquiry #13:

If a client disputes a fee, should the amount of any fee previously paid by the client and converted to IAC's use be deposited in a trust account?

Opinion #13:

No. If fees have been deposited in IAC's operating account based on a contract providing that the fees were earned upon receipt, there is no requirement to deposit the funds into a trust account pending the resolution of a fee dispute.

Inquiry #14:

A lawyer who is not a director, officer, or manager of IAC is designated as the supervising lawyer for the other lawyers on the staff. Is the supervising lawyer responsible for IAC's compliance with the Rules of Professional Conduct?

Opinion #14:

Pursuant to Rule 5.1(a), "[a] lawyer who individually or together with other lawyers possesses comparable managerial authority, shall make reasonable efforts to ensure that the firm or the organization has in effect measures giving reasonable assurance that all lawyers in the firm or the organization conform to the Rules of Professional Conduct." Pursuant to Rule 5.1(b), "[a] lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct."

Inquiry #15:

What are the duties and responsibilities of the subordinate lawyers in the organization relative to compliance with the Rules of Professional Conduct?

Opinion #15:

Rule 5.2 sets out the responsibilities of subordinate lawyers regarding compliance

with the Rules of Professional Conduct. Rule 5.2(a) states that a lawyer "is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person." However, Rule 5.2(b) states that a subordinate lawyer does not violate the Rules of Professional Conduct "if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty."

Inquiry #16:

IAC maintains a referral list of private lawyers to use when it is necessary to refer a person elsewhere. At the request of management, may a staff lawyer refer an inquiring person to one or two specific lawyers on the list?

Opinion #16:

Yes, if the lawyers are qualified to handle the client's matter and nothing of value has been given by the lawyers for the referral. Rule 7.2(b).

Inquiry #17:

A BIA representative is designated by IAC as an "Immigration Specialist" on business cards, email, and other written communications to clients and prospective clients. Is a staff lawyer required to take any action to prevent or challenge such designation?

Opinion #17:

Rule 5.5(d) provides that a lawyer "shall not assist another person in the unauthorized practice of law." If, in the context of IAC's operations, the use of the term "Immigration Specialist" by a BIA representative is misleading as to the representative's authority to practice law in North Carolina, then a staff lawyer must take steps to remedy the misrepresentation.

Inquiry #18:

IAC advertises that its legal services are provided at "reasonable prices" without explanation or clarification. Does such a statement violate the advertising rules for lawyers?

Opinion #18:

The statement that legal services are provided at "reasonable prices" is permissible so long as it is truthful. Whether a fee is reasonable depends upon a number of factors, including the current rates in the particular community. *See also* Rule 1.5(a) (listing factors to be considered in determining whether a fee is clearly excessive).

Inquiry #19:

What duty does a staff lawyer or a supervising lawyer have to review notices that IAC places in newspapers and social media about its legal services for compliance with the advertising rules?

Opinion #19:

A lawyer employed by IAC has a duty to ensure that the content of any information IAC provides to prospective clients about the lawyer or the lawyer's services is truthful and not misleading. Rule 7.1; 2004 FEO 1.

Inquiry #20:

IAC posts the following announcement on Facebook: "IAC will be hosting a FREE citizenship workshop on [date] at [address]. We will help applicants fill out their applications for citizenship and a lawyer will review each application. If you or a friend are interested in getting help with your citizenship application at the workshop, please contact [lawyer]." Does this announcement violate the advertising rules for lawyers?

Opinion #20:

No. IAC may conduct educational workshops for non-clients and may offer to provide free legal services. *See* RPC 36. IAC may advertise the seminars so long as the advertisements comply with the Rules of Professional Conduct. 2007 FEO 4. To comply with the rules, it may be necessary for the announcement to include any limitations on the free services IAC will provide.

Inquiry #21:

If a staff lawyer concludes that IAC's current fee structure violates IRS and BIA regulations, what should the staff lawyer do?

Opinion #21:

Pursuant to Rule 1.13(b), if a lawyer for an organization knows that an officer, employee, or other person associated with the organization is engaged in action that:

> is a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances, to the highest authority that can act on behalf of the organization as determined by applicable law.

Rule 1.13(c) further states that:

> If, despite the lawyer's efforts in accordance with paragraph (b), the highest authority that can act on behalf of the organization insists upon action, or a refusal to act, that is clearly a violation of law and is likely to result in substantial injury to the organization, the lawyer may reveal such information outside the organization to the extent permitted by Rule 1.6 and may resign in accordance with Rule 1.16.

Proposed 2013 Formal Ethics Opinion 10
Participation in Online Group Legal Advertising Using Territorial Exclusivity
July 18, 2013

Proposed opinion rules that, with certain disclosures, a lawyer may participate in an online group legal advertising service that gives a participating lawyer exclusive rights to contacts arising from a particular territory.

Facts:

Total Attorneys is a for-profit company that provides group advertising services to lawyers. In exchange for an advertising fee, Total Attorneys provides participating lawyers with a license to use a Total Attorneys website (TotalBankruptcy.com or TotalDivorce.com, for example) to advertise the participating lawyer's legal services. The license is geographically exclusive and only one lawyer within a particular zip code is licensed to use the advertising site. Participating lawyers pay a specified fee per contact per month to cover the costs of advertising and marketing services, including the design and operation of the website, telephone support services, and customer management software.

Total Attorneys establishes and maintains a website that provides consumers with information on certain legal subjects such as bankruptcy law. Consumers who wish to contact the participating lawyer within the consumer's zip code may either call a toll free number provided by the website call center, or fill out an online contact form. Total Attorneys forwards the contact to the partic-

ipating lawyer. The interactions between the website call center and the consumer are limited to obtaining basic information and facilitating the first contact with the participating lawyer. The website call center does not engage in any screening or evaluation of the consumer, or the consumer's potential legal concern.

Each page on the website includes a disclaimer similar to the following:

> **PAID ATTORNEY ADVERTISEMENT: THIS WEB SITE IS A GROUP ADVERTISEMENT AND THE PARTICIPATING ATTORNEYS ARE INCLUDED BECAUSE THEY PAY AN ADVERTISING FEE.** It is not a lawyer referral service or prepaid legal services plan. Total Bankruptcy is not a law firm. Your request for contact will be forwarded to the local lawyer who has paid to advertise in the ZIP code you provide. Total Bankruptcy does not endorse or recommend any lawyer or law firm who participates in the network, nor does it analyze a person's legal situation when determining which participating lawyers receive a person's inquiry. It does not make any representation and has not made any judgment as to the qualifications, expertise, or credentials of any participating lawyer. No representation is made that the quality of the legal services to be performed is greater than the quality of legal services performed by other lawyers. The information contained herein is not legal advice. Any information you submit to Total Bankruptcy does not create an attorney-client relationship and may not be protected by attorney-client privilege. Do not use the form to submit confidential, time-sensitive, or privileged information. All photos are of models and do not depict clients. All case evaluations are performed by participating attorneys. An attorney responsible for the content of this site is Kevin W. Chern, Esq., licensed in Illinois with offices at 25 East Washington, Suite 400, Chicago, Illinois 60602. To see the attorney in your area who is responsible for this advertisement, please click here, or call 866-200-8052.

Inquiry:

May a lawyer participate in the online legal service described above?

Opinion:

Yes, provided each Total Attorneys website fully, accurately, and prominently discloses the following: it provides paid group advertising services to lawyers; it is not a law firm and cannot provide legal advice; it is not a referral service; it does not recommend or endorse a particular lawyer; it does not vouch for the qualifications of participating lawyers; and each participating lawyer is licensed to use the advertising site and has paid to be the sole lawyer listed for a particular zip code.

The Arizona State Bar issued an ethics opinion that holds that a lawyer may ethically participate in an Internet-based group advertising program that limits participation to a single lawyer for each zip code from which prospective clients may come, provided the service fully and accurately discloses its advertising nature and, specifically, that each lawyer has paid to be the sole lawyer listed for a particular zip code. Ariz. State Bar Comm. on the Rules of Prof'l Conduct, Op. 2011-02 (2011).

The New Jersey Advisory Committee on Advertising similarly concluded that territorial exclusivity is permissible when such exclusivity is disclosed, the methodology for the selection of the attorney based on zip code is made clear, and the website does not assess consumers' legal needs or vouch for the qualifications of the participating attorney. NJ Advisory Comm. on Prof'l Ethics, Op. 43 (2011).

2012 FEO 10 examined numerous issues relative to a web-based company that provides litigation and administrative support services to "network" lawyers who represent clients with a particular type of legal matter (e.g., landlord's eviction) while simultaneously providing non-legal services to the same clients. In response to the exclusive arrangement with each lawyer whereby no other network lawyer may provide legal services to a participating client in a designated territory, the opinion concludes that the service is a for-profit referral service prohibited by Rule 7.2(d).

Nevertheless, the reasoning of the Arizona State Bar and the New Jersey Committee on Advertising is persuasive. With sufficient disclosure that the purpose of the website is to provide advertising and not referrals, and with disclosure of the exclusive territorial arrangement with participating lawyers, any concerns about misleading members of the public are alleviated. Provided the disclosures are truthful and there is no sharing of legal fees with the service, Total Attorneys is merely group advertising and not a for-profit lawyer referral service. *See* 2004 FEO 1 (holding that a lawyer may participate in an online service that is similar to both a lawyer referral service and a legal directory provided there is no fee sharing with the service and all communications about the lawyer and the service are truthful).

To the extent 2012 FEO 10 is inconsistent with this opinion, it is overruled.

Proposed 2013 Formal Ethics Opinion 11
Obtaining In-Court Foreign Language Interpreters for Client with Limited English Proficiency
July 18, 2013

Proposed opinion rules that lawyer has a duty to ensure a spoken foreign language interpreter is provided in court for a client with limited English proficiency and must inform the client of the availability of a free, court-provided interpreter before hiring an independent private interpreter.

Introduction:

The North Carolina Administrative Office of the Courts (NCAOC) is working to expand foreign language interpreting and translation services available to limited English proficient (LEP) persons with legal matters in the North Carolina state court system. Pursuant to NC Gen. Stat. §7A-343(9c) (2012), the director of the NCAOC is authorized to provide LEP persons with foreign language interpreters for court proceedings in accordance with policies set forth by the NCAOC.

Pursuant to these policies, spoken foreign language court interpreting services are now available through the Office of Language Access Services, free of charge to the parties in all criminal, juvenile, civil commitment, incompetency, Chapters 50B and 50C proceedings, child custody mediations, and specified child custody proceedings. However, interpreters are not available full time or on demand. Therefore, a lawyer whose client requires a court interpreter for a court proceeding must submit a request for services or, if a court interpreter is scheduled for a session of court, the lawyer must schedule court appearances consistent with the interpreter's availability.

Inquiry #1:

Does a lawyer have a duty to ensure a spoken foreign language interpreter is provided for a LEP client for court proceedings?

Opinion #1:

Yes. A lawyer's obligations to provide competent representation pursuant to Rule 1.1 and to communicate with the client pursuant to Rule 1.4 require that the lawyer and client be able to exchange information, particularly in court.

Pursuant to Rule 1.4, a lawyer has a duty to "keep the client reasonably informed about the status of the matter" and to "explain a matter [to the client] to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." A lawyer who cannot communicate with a client in a mutually understood language must secure the services of a qualified court interpreter to ensure adequate communication in court.

Rules 3.4 and 8.4 also require the lawyer to utilize the services of a spoken foreign language interpreter in court for an LEP client to linguistically place the LEP client in the same position as an English speaker. Moreover, the services provided by a court interpreter are not solely for the benefit of the LEP client. Rather, the services contribute to the overall effective operation of the tribunal. The Preamble to the Rules of Professional Conduct provides that as a member of the legal profession, a lawyer is an "officer of the legal system." Rule 0.1.

Rule 3.4(a) states that a lawyer shall not "unlawfully obstruct another party's access to evidence." Rule 8.4(d) provides that it is professional misconduct for a lawyer to "engage in conduct that is prejudicial to the administration of justice." When a party has LEP, a foreign language court interpreter is necessary to allow the LEP party to testify. The services of the spoken foreign language court interpreter ensure that the LEP party is linguistically present throughout the proceedings and facilitates communication between the tribunal and the LEP party to effectuate the administration of justice and the equal access.

Inquiry #2:

To use a NCAOC-provided interpreter for a client, the lawyer must submit a request for services, or, if an NCAOC court interpreter is scheduled for a session of court, the lawyer must schedule court appearances consistent with the interpreter's availability. It is often more convenient for the lawyer to hire a private, independent court interpreter who will charge the client for services.

If a party requires the services of a spoken foreign language interpreter in court, is the party's lawyer required to use the services provided by AOC or may the lawyer secure the services of an independent court interpreter?

Opinion #2:

If, for the lawyer's convenience, the lawyer wishes to hire an independent court interpreter for the client's court appearance, the lawyer must inform the client of the availability of and access to a certified court interpreter free of charge provided by the AOC and must obtain the client's consent before incurring the expense of hiring an independent court interpreter. *See* Rule 1.5(a) (lawyer shall not charge clearly excessive amount for expenses) and Rule 1.4 (lawyer shall explain matter to client to the extent reasonably necessary to permit client to make informed decisions regarding the representation).

If the lawyer obtains the services of an independent court interpreter, the court interpreter must meet the registration and testing requirements established by the AOC pertaining to foreign language court interpreters. ■

Proposed Amendments (cont.)

the largest and widest of the fonts. Nothing in the electronic communication shall be more conspicuous than the advertising notice.

(3) Recorded Communications. The advertising notice shall be clearly articulated at the beginning and ending of the recorded communication.

(d) ….

Comment

[1]….

[7] Paragraph (c) of this rule requires that all targeted mail solicitations of potential clients must be mailed in an envelope on which the statement, "This is an advertisement for legal services," appears in capital letters **in a font at least as large as any other printing on the front or the back of the envelope**. The statement must appear on the front of the envelope with no other distracting extraneous written statements other than the name and address of the recipient and the name and return address of the lawyer or firm. Postcards may not be used for targeted mail solicitations. No embarrassing personal information about the recipient may appear on the back of the envelope. The advertising notice must also appear **in the "in reference" or subject box of an electronic communication (email) and** at the beginning of ~~an enclosed letter~~ **any paper** or electronic communication in a font that is at least as large as the font used for any other printing in the ~~letter~~ **paper** or electronic communication. **On any paper or electronic communication required by this rule to contain the advertising notice, the notice must be conspicuous and should not be obscured by other objects or printing or by manipulating fonts. For example, inclusion of a large photograph or graphic image on the communication may diminish the prominence of the advertising notice. Similarly, a font that is narrow or faint may render the advertising notice inconspicuous if the fonts used elsewhere in the communication are chubby or flamboyant.** The font size requirement does not apply to a brochure enclosed with the ~~letter~~ **written communication** if the ~~letter~~ **written communication** contains the required notice. As explained in 2007 Formal Ethics Opinion 15, the font size requirement does not apply to an insignia or border used in connection with a law firm's name if the insignia or border is used consistently by the firm in official communications on behalf of the firm. **Nevertheless, any such insignia or border cannot be so large that it detracts from the conspicuousness of the advertising notice**. ~~The advertising notice must also appear in the "in reference to" section of an email communication.~~ The requirement that certain communications be marked, "This is an advertisement for legal services," does not apply to communications sent in response to requests of potential clients or their spokespersons or sponsors. General announcements by lawyers, including changes in personnel or office location, do not constitute communications soliciting professional employment from a client known to be in need of legal services within the meaning of this Rule.

[8]…. ■

Client Security Fund Reimburses Victims

At its July 18, 2013, meeting, the North Carolina State Bar Client Security Fund Board of Trustees approved payments of $277,812.39 to 26 applicants who suffered financial losses due to the misconduct of North Carolina lawyers.

The payments authorized were:

1. An award of $5,294 to a former client of Tracy Barley of Durham. The board found that Barley was retained to handle a client's personal injury matter. A judge approved the settlement of the matter with specific instructions in the order as to whom to disburse the funds. Barley failed to make any of the disbursements set out in the court order other than taking her fee. Due to misappropriation, Barley's trust account balance is insufficient to pay all of her clients' obligations. Barley was disbarred on November 5, 2010.

2. An award of $3,435 to a former client of Willis Harper Jr. of Whiteville. The board found that Harper was retained to handle a client's personal injury matter. Harper settled the matter and retained funds to pay medical providers, but failed to pay any of the medical providers. Due to misappropriation, Harper's trust account balance is insufficient to pay all of his clients' obligations. Harper was disbarred on February 26, 2012. The board previously reimbursed four other Harper clients a total of $24,673.84.

3. An award of $228 to a former client of Willis Harper Jr. The board found that Harper was retained to handle a client's traffic ticket. Harper failed to pay the client's court costs and fine from the funds the client had provided for that purpose.

4. An award of $2,150 to a former client of Willis Harper Jr. The board found that Harper was retained to handle a client's personal injury matter. Harper settled the matter and retained funds to pay medical providers. The client's medical bills were paid through another source, but Harper never disbursed the funds held to the client.

5. An award of $400 to a former client of Willis Harper Jr. The board found that Harper was retained to handle a client's criminal charge. Harper provided no valuable legal services for the fee paid.

6. An award of $500 to a former client of W. Rickert Hinnant of Winston-Salem. The board found that Hinnant was retained to negotiate a settlement with a neighbor after the client's son was injured at the neighbor's house. Hinnant provided no valuable legal services for the fee paid. Hinnant was disbarred on July 15, 2011. The board previously reimbursed four other Hinnant clients a total of $13,000.

7. An award of $1,500 to a former client of Albert Neal Jr. of Candler. The board found that Neal was retained to represent a client on criminal charges. The client deposited funds into Neal's account to handle the matters while Neal was administratively suspended from practicing law for failure to complete his CLE requirements. Neal provided no evidence of providing any valuable legal services for the fee paid. Neal was transferred to disability inactive status on April 7, 2011. The board previously reimbursed one other Neal client a total of $100,000.

8. An award of $1,406 to a former client of R. Dannette Underwood of Clayton. The board found that Underwood was retained to file a client's petition for bankruptcy. Underwood failed to provide any valuable legal services for the fee paid. Underwood was disbarred on May 18, 2013.

9. An award of $27,994.86 to former clients of Alexander H. Veazey III of Hendersonville. The board found that Veazey handled a refinance closing for his clients. Veazey failed to pay off the client's loan on their rental property with the closing proceeds. Due to misappropriation, Veazey's trust account balance is insufficient to pay all of his clients' obligations. Veazey was transferred to disability inactive status on January 18, 2013.

10. An award of $22,500 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 and retained funds to settle a Medicare lien, but never did. Due to misappropriation, Whitley's trust account balance is insufficient to pay all of his clients' obligations. Counsel was directed to resolve liens prior to disbursement. Whitley died on December 6, 2011. The board previously reimbursed 30 other Whitley clients a total of $578,833.20.

11. An award of $1,311.60 to a former client of W. Darrell Whitley. The board found that Whitley was retained to handle a clients' personal injury claim. Whitley settled the matter and retained funds to pay specific medical providers, but never paid them. Since the statute of limitations has run on the medical providers' liens, the funds will be disbursed to the client.

12. An award of $73,070.07 to a former client of W. Darrell Whitley. The board found that Whitley was retained to represent a client in the administration of her son's estate and to file a wrongful death action. Whitley misappropriated funds from the estate and misappropriated a portion of the wrongful death proceeds.

13. An award of $3,790.72 to a former client of W. Darrell Whitley. The board found that Whitley was retained to handle a client's personal injury claim. Whitley settled the matter and retained funds to pay medical liens, but failed to do so. Counsel was directed to resolve medical liens prior to disbursement.

14. An award of $9,000 to a former client of W. Darrell Whitley. The board found that Whitley was retained to handle a client's personal injury claim. Whitley settled the matter for a larger amount than the settlement statement he presented to the client and retained funds to pay a Medicare lien. Whitley embezzled the additional funds from the settlement and failed to settle the Medicare lien. Counsel was directed to resolve the Medicare lien prior to disbursement.

15. An award of $10,000 to a former client of W. Darrell Whitley. The board found that Whitley was retained to handle a client's personal injury claim. Whitley settled

the matter and retained funds to pay a Medicaid lien. but he failed to pay Medicaid. Counsel was directed to resolve the Medicaid lien prior to disbursement.

16. An award of $7,515.31 to a former client of W. Darrell Whitley. The board found that Whitley was retained to handle a client's personal injury claim. Whitley settled the client's matter and paid some of the client's medical providers, but failed to pay Medicaid. Counsel was directed to resolve the Medicaid lien prior to disbursement.

17. An award of $7,004.78 to a former client of W. Darrell Whitley. The board found that Whitley was retained to handle a client's fire insurance claim. Whitley settled the matter. After making disbursements on the client's behalf from the settlement proceeds, Whitley should have had some of the client's funds remaining in his trust account.

18. An award of $4,950 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 paid one of the client's medical providers, but failed to pay the other lien holders, including Medicare and Medicaid. Counsel was directed to resolve the Medicare and Medicaid liens prior to disbursement.

19. An award of $24,193 to former clients of W. Darrell Whitley. The board found that Whitley was retained to handle the personal injury claims of a client and her two minor children. Whitley settled the matters, but failed to disburse the minors' designated funds to the clerk of superior court to be held in interest bearing trusts for the two minor children involved in the accident.

20. An award of $15,500 to an applicant who suffered a loss because of W. Darrell Whitley. The board found that Whitley was retained to handle a wrongful death claim. Whitley settled the matter without the client's consent and received a settlement check along with a med pay check. Whitley failed to disburse any of the settlement proceeds to the applicant as one of the named beneficiaries.

21. An award of $15,500 to an applicant who suffered a loss because of W. Darrell Whitley. The board found that Whitley was retained to handle a wrongful death claim. Whitley settled the matter without the client's consent and received a settlement check along with a med pay check. Whitley failed to disburse any of the settlement proceeds to the applicant as another of the named beneficiaries.

22. An award of $2,666.65 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 pay medical providers. Whitley failed to settle any of the medical liens. Counsel was directed to resolve any medical liens prior to disbursement.

23. An award of $4,500 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 without the client's consent and failed to disburse any of the settlement proceeds to the client or to anyone on the client's behalf. Counsel was directed to resolve medical liens prior to disbursement.

24. An award of $14,714.45 to a former client of W. Darrell Whitley. The board found that Whitley was retained to handle a client's interpleader action for his deceased father's life insurance and a separate claim for his profit sharing benefits. Whitley settled the matters and failed to disburse a portion of the settlement funds to the client.

25. An award of $3,333.33 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 pay medical providers. Whitley failed to settle any of the medical liens. Counsel was directed to disburse the funds to the client's current attorney who is helping to resolve the client's medical liens.

26. An award of $15,354.62 to a former client of Nancy L. Wooten of Winston-Salem. The board found that Wooten was retained to handle a client's domestic matter. Wooten received the proceeds from the sale of the marital home. Wooten failed to make the disbursements from the sale proceeds to her client and her client's former spouse as directed by a consent order. Due to misappropriation, Wooten's trust account balance is insufficient to pay all of her clients' obligations. Wooten died on April 19, 2012. The board previously reimbursed one other Wooten client a total of $4,500. ■

Hunt Nominated as Vice-President

Brevard attorney Margaret McDermott Hunt was selected by the State Bar's Nominating Committee to stand for election to the office of vice-president of the North Carolina State Bar. The election will take place in October at the State Bar's annual meeting.

Hunt is a graduate of the University of Maryland. She earned her law degree in 1975 from Wake Forest Law School. Since being admitted to the Bar that same year she has practiced law continuously in Brevard.

Her professional activities include service as president of the Transylvania County Bar, member of the State Bar's Continuing Legal Education Board, and member of the Chief Justice's Commission on Professionalism. While a councilor she has served as a member of the Grievance, Issues, Facilities, Legislative, Administrative and Executive Committees and chaired the Administrative Committee, co-chaired the Program Evaluation Committee, served as vice-chair of the Grievance Committee for two years, and chaired the Grievance Committee in 2012-2013.

She was a founding member and served as secretary for the Transylvania Endowment, served as chair of the Transylvania County Chamber of Commerce, and was a member of the board of directors of Heart of Brevard and the Transylvania County Boys and Girls Club.

She is married to Jeff Hunt, former district attorney for Prosecutorial District 29B, who currently serves as a special superior court judge. Their son and daughter-in-law are attorneys in Charlotte, and their daughter is an attorney in New York City. ■

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.

Charlotte School of Law

Don Lively Appointed New Dean—Charlotte School of Law welcomed Donald E. Lively as its new president on May 7. Lively was the founding dean of both Florida Coastal and Phoenix School of Law and was the chief architect of the schools' original mission and values. More recently, Lively has served as senior vice-president for academic affairs at InfiLaw.

Dual JD and Master's Degree Programs Offered—Charlotte School of Law has partnered with the University of North Carolina at Charlotte to offer several unique dual degree programs. Students now have the opportunity to earn both a Juris Doctor and a Master's Degree in real estate, accountancy, business administration, or public administration in less time than if the degrees were pursued independently. Prospective dual-degree program students must apply separately to both Charlotte School of Law and UNC Charlotte. Once enrolled in the dual degree programs, students pay tuition to the respective institution for each course taken at that institution.

Student Opportunities in Lithuania—Charlotte School of Law is excited to announce a cooperative agreement with the University of Vilnius Faculty of Law in Lithuania to develop a summer study abroad program, beginning in summer 2014. The summer study abroad program is expected to be 4-7 weeks in duration and will aim to develop a comparative perspective on the laws of the United States and the European Union.

One of the Most Diverse Law School Faculties—Charlotte School of Law was recently recognized in a special issue of *Lawyers of Color* as having one of the most diverse law school faculties.

Commencement 2013—on May 11 commencement exercises were held for the 288 members of the Charlotte School of Law Class of 2013. The Honorable Frank D. Whitney, United States District Court judge, gave the keynote address.

Duke Law School

Judicial Studies Center Receives $5 Million Grant from The Duke Endowment—The Duke Endowment has committed $5 million to support the operations of Duke Law School's Center for Judicial Studies. The center was established in late 2011 with dual complementary goals: to enhance judicial education and the quality of the judiciary, and to improve the legal system and our understanding of judicial institutions. Its core components include supporting scholarly research and conferences on judicial decision-making and institutions, and a master's level program in judicial studies.

Fifteen judges from US federal and state courts and two international jurists returned to Duke Law in mid-May for their second session of studies in the master's program. Their curriculum over four weeks included a master class on judicial writing taught by U.S. Supreme Court Associate Justice Antonin Scalia.

Announced in early June, The Duke Endowment gift will fund an endowment to support the center's operations, and advances Duke Law School's efforts to raise $85 million as part of the $3.25 billion Duke Forward fundraising campaign.

Ward Takes Helm of Start-Up Ventures Clinic—After three successful years providing legal assistance to start-up entrepreneurial ventures, Duke Law's Start-Up Ventures Clinic is moving forward under the leadership of Jeff Ward. Ward, a former supervising attorney in the school's Community Enterprise Clinic, has advised small businesses, start-up entities, and corporate clients over the course of his career.

The clinic offers students an experience that combines the law school's commitment to entrepreneurial education with a chance to gain practical training while advising seed and early stage ventures.

Kip Johnson, who directed the clinic through its launch phase, will continue to teach courses in the law and entrepreneurship curriculum, mentor students, and advise on enriching the business law offerings at Duke Law.

Elon University School of Law

Leadership Program Selected for National Award—Elon's Leadership Program will be recognized with an ABA E. Smythe Gambrell Professionalism Award in August. "In honoring your program with the leading national award recognizing excellence in legal professionalism programming, the committee has found the Elon Leadership Program to be worthy of emulation by law schools across the nation," said Frederic Ury, chair, ABA Standing Committee on Professionalism.

Antonette Barilla Joins Faculty as Director of Academic and Bar Support & Assistant Professor of Law—Born in Italy and fluent in English, Italian, and Spanish, Barilla graduated *magna cum laude* from California Polytechnic University, Pomona, with a degree in Political Science, where she was the recipient of the President's Scholar Award. She graduated with honors from Western State College of Law, as well as the University of London where she obtained her Postgraduate Certificate and Diploma and her LLM. She is an alumnus of The Hague Academy of International Law with an extensive teaching background.

Marc Bishop and Ronny Lancaster Elected to Law School Advisory Board—Marc Bishop, a partner with Brooks, Pierce, McLendon, Humphrey & Leonard, LLP, and Ronny Lancaster, senior vice-president for government relations at Assurant Inc., have joined Elon Law's Advisory Board. "The depth of experience in law and the scope of contributions to society that Marc Bishop and Ronny Lancaster bring to the advisory board will be tremendous resources

in support of the academic and service missions of the law school," said Dean George R. Johnson Jr.

New Business Fellows Program—This program will provide students with the knowledge and experience needed to become exceptional business attorneys. The program includes scholarships, a core curriculum of business courses, an externship in a business setting, roundtables with business executives, and opportunities to counsel businesses through partnerships with small business incubators.

North Carolina Central University School of Law

NCCU's Virtual Justice Project Fulfills its Mission—In the two years since its establishment, North Carolina Central University School of Law's Virtual Justice Project (VJP) has widely expanded its reach and statewide impact. An initial collaboration with four UNC historically black colleges—Elizabeth City State University, North Carolina A&T State University, Fayetteville State University, and Winston-Salem State University—the VJP now offers its fully immersive videoconferencing capability to 20 Legal Aid offices across North Carolina. So far, school of law attorneys have served nearly 15,000 North Carolina citizens, students, and Legal Aid staff using this technology.

NCCU's intention was to bring law school preparation to undergraduate students at the other colleges, as well as *pro bono* legal services to under-served communities. In part, the project was a response to the 2008 report of the North Carolina Equal Access to Justice Commission, which found 80% of low-income citizens could not afford legal services in civil matters. Routine civil cases such as separation and divorce can have a profound effect on the course of people's lives and that of their children. Another critical need was for information on foreclosure prevention.

NCCU faculty have provided explanations of government programs and offered individual case review to those participants who brought their foreclosure and loan documents with them. Through high-resolution, wall-to-wall video screens, NCCU's clinical attorneys conduct face-to-face educational sessions, offering guidance that enables low-income individuals to represent themselves or seek appropriate counsel. Nearly 8,500 people have attended clinics, empowerment sessions, and community meetings. More than 4,500 students and nearly 1,800 Legal Aid workers have engaged in educational seminars.

"By leveraging technology, the Virtual Justice Project allows us to advance the cause of fairness and equity in the justice system, which is critical to the mission of service at the NCCU School of Law," said NCCU Law School Dean Phyllis Craig-Taylor.

University of North Carolina School of Law

Two New Faculty Members Join UNC—The law school welcomes Kathleen Delaney Thomas and Dana Remus to its faculty ranks starting fall semester 2013.

Faculty Trademark Study in the News—Professors Deborah Gerhardt and Jon McClanahan published a study in April, "Do Trademark Lawyers Matter," which analyzed 25 years' worth of US Patent and Trademark Office data. The study shows that applicants who retained an attorney were 50% more likely to get their trademarks approved than were those who applied without legal representation. The study was cited in *Bloomberg Businessweek* among other media outlets.

Director Diversity Initiative—The diversity of corporate boards in North Carolina has stagnated since 2009 and significantly lags behind the diversity of Fortune 100 boardrooms, according to data recently released by the UNC School of Law Director Diversity Initiative (DDI). As of September 30, 2012, only 12.02% of board members of the largest 50 corporations headquartered in North Carolina were female. Minorities constituted 7.08% in the 2012 study of board members. Visit ddi.law.unc.edu/boarddiversity.

Center for Civil Rights—On July 22, the UNC Center for Civil Rights represented African American parents and community members in a trial over the issue of racial segregation of students in Pitt County Schools (PCS) at the Eastern District Federal Courthouse in Greenville, NC. Subsequent to a 2012 appeals court decision against the school system, PCS has moved to be declared "unitary," seeking an end to all further judicial oversight of the school system. That motion, along with the plaintiffs' motion challenging a 2011 student reassignment plan, are the basis for the trial, which is expected to last up to two weeks. Visit law.unc.edu/centers/civilrights.

CLE Programs—Upcoming CLE programs include the Dan K. Moore Program in Ethics, October 4. Visit law.unc.edu/cle.

Wake Forest University School of Law

Beginning this fall, Wake Forest Law will offer a Professional Development course for credit in its first-year curriculum. The course, which is a partnership between the faculty and the Office of Career and Professional Development, will be taught over 15 weeks, spread throughout the first year. It will be taught by Associate Professor Tanya Marsh and Associate Director of Career and Professional Services Francie Scott ('07). The law school is engaged in an ongoing dialogue with alumni, potential employers, and other members of the legal community regarding how best to prepare its graduates for the practice of law. "Through these conversations we have identified the key characteristics and strategies that help graduates launch successful and satisfying careers," Marsh explains. "The Professional Development course will acclimate students to the professional world they are entering." Specifically, the course will focus on topics including: expectations of new attorneys, developing professional relationships, how the law functions as a business, and vital communication and strategic skills. The course will also introduce students to career opportunities in law firms, government agencies, non-profit organizations, and non-traditional settings. "Throughout the year, students will have the opportunity to examine their strengths and interests to determine what career path will be most promising for them," Scott added.

In addition, Alison Ashe-Card has joined Wake Forest Law's Office of Career and Professional Development as assistant director. Prior to joining the law school, Ashe-Card worked with Womble Carlyle where her practice focused on high-profile product liability cases in federal and state courts nationwide. She also has extensive experience in utilizing technological innovations to formulate efficient and cost-effective approaches to case/matter management in complex litigation and transactional matters. Ashe-Card began her career as a staff attorney with The Legal Assistance Foundation of Chicago, where she practiced for five years before relocating to North Carolina in 1997. ■

John B. McMillan Distinguished Service Award

Wright T. Dixon Jr. is a recipient of the John B. McMillan Distinguished Service Award. Mr. Dixon received his bachelor's degree from Duke University, served in the marine corps in World War II, and then earned his law degree in 1951 from the University of North Carolina. Upon graduation, Mr. Dixon practiced with what is now known as Moore and Van Allen, then as a solo practitioner. Around 1954, Mr. Dixon entered into a partnership with Ruffin Bailey, starting the firm Bailey and Dixon, which continues today. Mr. Dixon ran the Wake County trial calendar before the creation of trial court administrators. Mr. Dixon taught the next generation of lawyers the importance of service to the community as chair of the Raleigh Board of Adjustment, and president of the Kiwanis Club, Wake County Bar, and the North Carolina State Bar. Mr. Dixon is a recipient of the Joseph Branch Professionalism Award and is an inductee in the NCBA General Practice Hall of Fame. Over more than 60 years since beginning law practice in 1951, Wright Dixon has served as a role model for many, demonstrating a sharp tongue the equal of any, but an unfailing integrity in zealous advocacy and unrivaled service to the people of Wake County.

Roger W. Smith Sr. is a recipient of the John B. McMillan Distinguished Service Award. A Morehead scholar and UNC football captain, Mr. Smith graduated from UNC Law School in 1967, serving as the first chief justice of the Holderness Moot Court. He served as law clerk for Supreme Court Justice Carlisle Higgins, and then joined Tharrington Smith, which had been co-founded by his brother, Wade. During his more than 35-year career, Mr. Smith has served as president of the Wake County Bar Association and Wake County Academy of Trial Lawyers, and as a member of the NC State Bar Council and the NC Sentencing and Policy Advisory Commission, among numerous other organizations. Mr. Smith currently sits on the Board of Directors of the American Judicature Society, is a delegate to the American Bar Association, and is president of the NC Supreme Court Historical Society. Mr. Smith focused his practice on trials and appeals and is a fellow in both the American College of Trial Lawyers and the American Academy of Appellate Lawyers. He has also been listed in *Best Lawyers in America* since its inception in 1983. An accomplished lawyer, writer, poet, and public servant, Roger Smith is a renaissance man who is selfless, has a flair for the dramatic, and has a commitment to serving both the lawyers and the citizens of North Carolina.

Wade M. Smith is a recipient of the John B. McMillan Distinguished Service award. A Morehead scholar and UNC football captain, Mr. Smith graduated UNC law school in 1963. He clerked for Supreme Court Justice Carlisle Higgins, and then joined fellow law clerk Harold Tharrington to found the law firm Tharrington Smith. For two years Mr. Smith was a prosecutor in Wake County Superior Court, and afterwards he focused his career on trial work. Mr. Smith served two terms in the NC House of Representatives, and one term as chair of the North Carolina Democratic Party. He is a fellow of the American College of Trial Lawyers, a Fellow of the American Board of Criminal Lawyers, and a Fellow of the International Society of Barristers. Wade Smith was the president of the Wake County Bar Association in 1988, and in 1998 was awarded the Joseph Branch Professionalism Award by the Wake County Bar. He has been listed in *Best Lawyers in America* since its inception and has been named the number one criminal lawyer in North Carolina. Mr. Smith was appointed to serve as one of eight commissioners on the North Carolina Innocence Inquiry Commission in 2006. In 2008 the North Carolina Bar Association established the annual Wade M. Smith award "for a criminal defense attorney who exemplifies the highest ideals of the profession." ■

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. ■

The North Carolina State Bar and Affiliated Entities

Selected Financial Data

The North Carolina State Bar

	2012	2011
Assets		
Cash and cash equivalents	$7,156,681	$7,536,631
Property and equipment, net	13,791,676	3,101,798
Other assets	300,252	296,108
	$21,248,609	$10,934,537
Liabilities and Fund Equity		
Current liabilities	$4,754,581	$4,721,125
Long-term debt	8,613,737	157,227
	13,368,318	4,878,352
Fund equity-retained earnings	7,880,291	6,056,185
	$21,248,609	$10,934,537
Revenues and Expenses		
Dues	$7,399,734	$7,192,845
Other operating revenues	753,104	797,606
Total operating revenues	8,152,838	7,990,451
Operating expenses	(7,166,301)	(6,812,250)
Non-operating revenues	837,569	9,930
Net income	$1,824,106	$1,188,131

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

	2012	2011
Assets		
Cash and cash equivalents	$3,191,810	$2,613,654
Interest receivable	234,406	247,122
Other assets	199,541	232,041
	$3,625,757	$3,092,817
Liabilities and Fund Equity		
Grants approved but unpaid	$2,345,755	$2,353,755
Other liabilities	226,949	261,180
	2,572,704	2,614,935
Fund equity-retained earnings	1,053,053	477,882
	$3,625,757	$3,092,817
Revenues and Expenses		
Interest from IOLTA participants, net	$1,990,393	$2,299,475
Other operating revenues	1,286,473	-
Total operating revenues	3,276,866	2,299,475
Operating expenses	(2,711,263)	(2,747,177)
Non-operating revenues	9,568	119,921
Net income (loss)	$575,171	$(327,781)

Board of Client Security Fund

	2012	2011
Assets		
Cash and cash equivalents	$1,668,369	$1,700,526
Other assets	(446)	3,114
	$1,666,923	$1,703,640
Liabilities and Fund Equity		
Current liabilities	$17,662	$14,151
Fund equity-retained earnings	1,650,261	1,689,489
	$1,667,923	$1,703,640
Revenues and Expenses		
Operating revenues	$741,424	$662,609
Operating expenses	(783,750)	(726,742)
Non-operating revenues	3,098	8,353
Net loss	$(39,228)	$(55,780)

Board of Continuing Legal Education

	2012	2011
Assets		
Cash and cash equivalents	$243,708	$181,533
Other assets	191,853	216,329
	$435,561	$397,862
Liabilities and Fund Equity		
Current liabilities	69,520	24,617
Fund equity-retained earnings	366,041	373,245
	$435,561	$397,862
Revenues and Expenses		
Operating revenues	$646,041	$640,320
Operating expenses	(652,845)	(731,271)
Non-operating revenues	(400)	966
Net loss	$(7,204)	$(89,985)

Board of Legal Specialization

	2012	2011
Assets		
Cash and cash equivalents	$180,394	$167,522
Other assets	728	3,832
	$181,122	$171,354
Liabilities and Fund Equity		
Current liabilities	8,162	3,257
Fund equity-retained earnings	172,960	168,097
	$181,122	$171,354
Revenues and Expenses		
Operating revenues-specialization fees	$134,018	$124,752
Operating expenses	(129,244)	(102,925)
Non-operating revenues	89	585
Net income	$4,863	$22,412

The Chief Justice's Commission on Professionalism

	2012	2011
Assets		
Cash and cash equivalents	$296,580	$259,193
Other assets	-	1,627
	$296,580	$260,820
Liabilities and Fund Equity		
Current liabilities	90	448
Fund equity-retained earnings	296,490	260,372
	$296,580	$260,820
Revenues and Expenses		
Operating revenues-fees	$328,321	$319,750
Operating expenses	(292,266)	(294,002)
Non-operating revenues	63	564
Net income	$36,118	$26,312

Board of Paralegal Certification

	2012	2011
Assets		
Cash and cash equivalents	$348,099	$297,776
Other assets	-	1,733
	$348,099	$299,509
Liabilities and Fund Equity		
Current liabilities - accounts payable	7,193	10,200
Fund equity-retained earnings	340,906	289,309
	$348,099	$299,509
Revenues and Expenses		
Operating revenues-fees	$257,130	$260,760
Operating expenses	(205,688)	(193,632)
Non-operating revenues	155	(98,729)
Net income (loss)	$51,597	$(31,601)

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