

THE NORTH CAROLINA STATE BAR

# JOURNAL

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# We've Got the Magazines to Swing It

BY L. THOMAS LUNSFORD II

In the summer of 1977, after my second year of law school at Carolina, I got a job as a law clerk with the North Carolina State Bar. There was really nothing to recommend me for the position but, in the finest tradition of legal employment, I did have a friend whose father had a passing acquaintance with the man in charge, and that got me in the door. The job for which I applied didn't actually exist when I arrived for my interview. I just happened to show up at a propitious moment. Earlier that year, the State Bar had received a small federal grant for some purpose that was never explained to me, and it happened that a small residual sum was liable to be returned if unused. Rather than send the money back to Washington, which would have violated the Code of Financial Responsibility, a decision was made to hire me to do whatever it was that real law firms had law clerks do or, failing that, to go get coffee.

As it turned out, it was a great break for me. The United States Supreme Court decided the case of *Bates v. Arizona State Bar* that summer, extending the protection of the First Amendment to lawyer advertising and forever changing the world of professional regulation. Because the licensed attorneys on the staff were busy with disciplinary cases, it fell to me to analyze the *Bates* decision and to explain its implications for the agency going forward. Happily enough, the one skill I had acquired in two years of law school—briefing reported appellate cases—was sufficient, barely, for the task. Not long after the decision came down, the State Bar Council met, and I found myself reciting on the subject for the Ethics Committee, telling preeminent lawyers like Frank Spruill and Clifton Everett what it meant, and being taken seriously. That experience and an additional measure of good for-

tune ultimately led to an offer of permanent employment as a lawyer with the Bar, and I've been fooling them ever since. Ironically, what many lawyers would describe as the worst thing to ever happen to the profession—the *Bates* case—was the best thing that ever happened to me, professionally speaking.

While the details of my story are unique, the broad outline of the narrative would not be unfamiliar to most of my contemporaries. That's pretty much how lots of aspiring lawyers came to be employed in those days. They went to law school immediately after college. They scrounged some means of paying the modest costs of tuition and subsistence. They learned how to think, but not to do, as lawyers. They found legal work as summer clerks. They graduated and picked up enough North Carolina law from Robin Hinson to pass the bar exam. And then they lucked into readily available legal jobs that promised to complete their educations.

The world of work, legally speaking, has changed quite a lot since then, particularly for newly-minted attorneys. These days novices emerge from law school with much more debt and much less opportunity than we had four decades ago. The cost of legal education has skyrocketed, far outstripping the rate of inflation, and has been financed increasingly by debt that is easy to obtain but soul-crushingly difficult to discharge. The high-paying jobs that are necessary to service that kind of debt are increasingly rare. Indeed, since the recession began in 2007, legal employment of any sort has become much less available. In the current economic environment, which may represent the "new normal," it appears that only about half of the freshest lawyers can expect to be offered salaried employment that requires a law license in the year following admission to the Bar. The rest, including some

of the best and the brightest, must either go it alone or try another line of work. It's that last alternative that troubles me.

Although most of the "seasoned" lawyers I know are in sympathy with the struggling people being churned out by the law schools, they are also convinced that we already have more than enough lawyers to go around. This opinion is shared with me quite frequently as I travel around the state, typically in the context of semi-rhetorical statement/questions like, "We've got too many lawyers. When are you people in Raleigh going to do something about it?" At this point in such conversations, I generally mumble something about the Sherman Act, the Dental Board case and treble damages, and blame the Board of Law Examiners, but in reality market forces are the real determinants of how many lawyers we have. I do understand the frustration of those who believe we are overlawyered. As more and more suppliers of legal services compete to satisfy the existing demand, it gets harder and harder to make a decent living. Even worse, from the standpoint of those who regard the practice of law as more than a business, the unbridled competition engendered by multiplying lawyers (and the *Bates* case), seems to compromise professionalism. Many new lawyers without mentors or salaries are professionally isolated and can't be effectively acculturated. Many older lawyers, who might have once been mentors, know only each other, and wonder whether they might be the last of their kind.

I understand the concerns of those who worry about there being too many lawyers, but tend to subscribe to the view that the growth of the profession is, on balance, a good thing. To the extent that there is an oversupply of attorneys, the market ought ultimately to respond and naturally restore some sort of equilibrium. This may take a while since for many the decision to become a lawyer is always going to be somewhat irrational. I assume that for many people, law school is still the attractive path of least resistance—a nice



warm place between college and the real world that seems to guarantee something like an interesting and comfortable future. That fanciful notion was what animated me back in 1975 when I applied. Others, no doubt, continue to buy into the appealing fantasies that enliven courtroom dramas on television. One wonders how law school applications might have been affected over the years if Perry Mason, instead of flirting with Della Street and embarrassing Lt. Tragg on cross-examination, had spent more time on camera responding to electronic discovery, filling out time sheets, or attending CLE courses, like real lawyers do.

In any event, it seems to me that more lawyers are going to be needed during the next quarter century, not fewer. In order to provide access to justice for a citizenry that is chronically underserved, more lawyers, or lawyer equivalents, are going to be necessary. In order to fulfill the promise of the civil rights movement, we still need to expand minority participation in the profession significantly. And, in order to regulate commerce and relations among people and countries in our increasingly populous, interconnected and fractious world, we're going to have to have more and more attorneys like us—well-trained North Carolinians with good sense and good will.

My role and experience as the State Bar's executive director for the past 23 years has also inclined me to suppose that the population of licensed attorneys is likely to increase, and that that will be good for the profession—and self-regulation. After all, throughout my tenure, membership in the State Bar has grown inexorably and predictably. Over the past ten years, for instance, we have experienced an average annual net increase in the number of active, dues-paying members of around 2.8%. This is of great importance since more than 85% of the State Bar's operational revenue comes from dues. The profession's steady growth in recent years has enabled us to service the membership, protect the public, expand programmatically, and otherwise do our duty without excessive deficit spending, without exhausting our cash reserves, and without having to petition the General Assembly for authority to raise dues beyond the current statutory maximum of \$300—the amount at which dues have been set since 2010. It has also allowed and encouraged the council and its leadership to undertake the construction of our handsome new building—a structure intended to accommodate

the regulation of an expanding profession for many decades to come. Faith in this version of the future is what justified our borrowing \$12,000,000 to finance most of the cost and, presumably, what convinced the bank to make the loan.

As things stand now, our operational budget is essentially balanced. That's the outlook for 2015 as well. Looking forward, our projections tell us that even with the burden of dramatically increased debt service, the State Bar ought to be able to operate effectively in the current mode for at least the rest of the decade without a dues increase. As you can imagine, these projections are founded upon a variety of questionable assumptions. Even so, they have in the past proven to be fairly reliable, possibly because, unlike most people, I have special insights that allow me to forecast interest rates and a variety of other macroeconomic phenomena. Unfortunately, however, there are limits even to my clairvoyance. These days that is particularly evident in regard to such things as health insurance costs and the expenses associated with extraordinary litigation. Be that as it may, the cornerstone of my financial worldview here atop the northeast corner of the intersection of Edenton and Blount Streets is the notion that I will be sending dues notices to more lawyers this year than last—at least 2.5% more—and that I will be doing about that for many years to come.

There are many reasons why that particular figure—2.5%—appeals to me. Perhaps most significant is the fact that increases in the cost of living in this part of the country have, on average, been in that range for the past ten years. Since the lion's share of our budget—about 60%—is devoted to personnel cost, and since we strive to enable our employees to at least keep up with inflation, it's nice to have a cash cow that gives at least that much more milk each year. Because most of our other costs are increasing at or below the rate of inflation, the additional nourishment provided by about 684 new lawyers (2.5% of 27,375) in 2015 ought to be just enough for us to break even in the coming year. Of course, our economic equation is in reality a bit more complicated than that. As the population of lawyers grows, it costs more to keep up with them. For instance, the number of grievances rises as a function of the increasing number of lawyers, and so does the cost of running the disciplinary program. We also pay for more—and pay more for—paperclips, postage, and magazines like the one you are

currently devouring. Indeed, our experience over the past 23 years is that despite incremental increases in membership and membership fees, our revenues over time are gradually outstripped by our expenses. In the years immediately following a dues increase, we typically accumulate surpluses that we consume in later years. This inevitably leads to the next dues increase. The success of our financial management has been and probably will continue to be measured by how long we can extend these cycles.

Anyway, the law schools in North Carolina are still full and the pipeline of applicants to the North Carolina State Bar is still gushing. Moreover, I am advised that the number of folks who hold licenses in other states and seek to gain admission to our Bar by comity and examination is increasing every year. Despite this rosy picture, from my point of view, it is worth noting that the number of applicants to law schools here and elsewhere is trending down. Should this phenomenon persist, my cash projections may have to be revised. In that regard, one must also be cognizant of the legal profession's "senior tsunami." One of our biggest demographic cohorts looks frighteningly like me. Sixtyish, balding, and more than a little squidgy around the edges. Although many of us will no doubt continue to pay dues into our dotage, if only to keep receiving the Bar *Journal*, our ranks are already thinning. That kind of attrition really can't be good for my successor's budget.

There is one other interesting development that could affect the situation. At its meeting in October, the council approved for publication a new rule that would enable more people to qualify educationally to be admitted to the State Bar. For the past 20 years or so, our rule has provided that only those who have graduated from law schools approved by the American Bar Association can be admitted. That rule was predicated on the notion that only schools meeting the ABA's elaborate accreditation standards could be counted upon to assure the level of competence necessary to protect our state's consumers of legal services. In recent years, as new teaching modalities and technologies have evolved, this idea has come into question, and our leadership has come to admit the possibility that unconventional legal education may be sufficient legal education. The proposed rule, which is set forth elsewhere in the magazine, essentially approves the legal educations of graduates who have been licensed in other

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states for at least ten years and have remained in good standing. Persons meeting those criteria and demonstrating the requisite character and fitness to be a North Carolina lawyer would be allowed to sit for our bar examination, despite the ABA's refusal or inability to approve their law schools. Interestingly, since the ABA doesn't review foreign law schools at all, the proposed rule would for the first time also provide a means by which qualified lawyers from outside the United States, who have been admitted in other states, might gain admission in our state.

By extending "full faith and credit" to the accreditation decisions of other states, we would simply be substituting their judgments for those of the ABA. There may be some risk in doing that, but it's hard to say how much. We have a pretty good sense of the quality of the ABA's decisions, and are not nearly as familiar with the judgments of our counterparts in Kansas and Montana. Be that as it may, however, we ought to be able to assume their bona fides and, in any event, we can rest assured that our Board of Law Examiners will quite literally put all such applicants to the

test. Only those whose legal educations are demonstrably sufficient to pass our bar examination will be admitted. That filter, along with the satisfaction of all the other admissions requirements of two jurisdictions (ours and theirs), ought to ensure the minimum competence necessary to protect our citizens. And if the new rule helps sustain 2.5% growth, so much the better.

I realize that the 2.5% figure may not have the talismanic significance that I seem to be attributing to it. It's just that in my exceptionally complicated world, it's comforting to have a touchstone of some sort—a single unifying idea that explains, rationalizes, and justifies what we're doing, or want to do. In that connection, I'm reminded of one of my fictional heroes, Floyd Lawson, the proprietor of Floyd's Barbershop on the old *Andy Griffith Show*. Floyd's dream was to expand his business empire by a factor of two, doubling his productivity by taking on an associate and becoming a "two-chair shop." In contemplation of that momentous decision, he refused to be distracted or confused by niggling details and gave no thought whatsoever to the possi-

bility that his new hire might be more inclined to illegal bookmaking than to leveling sideburns. Rather than get lost in the weeds, he channeled his inner bar executive. He focused on the one thing that would make or break him in a two-chair environment. He looked at the table over in the corner, and declared with supreme confidence, "We've got the magazines to swing it." ■

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

Please note: in the Fall 2014 edition of the *Journal*, reprinting of the article, "Life After Meth—A Journey of Addiction and Recovery," by Wilson "Wil" Miller, was authorized by the Washington State Bar Association and originally appeared in the June 2014 issue of *NYLawyer*. Also, in the Paralegal Certification column, Patricia Clapper is an adjunct professor at Central Carolina Community College.

# Contracting for Indigent Defense: The Plan and the Reality

BY THOMAS K. MAHER AND TUCKER CHARNS

**B**y 2011, North Carolina had created an indigent defense system that consistently provided quality representation at a surprisingly modest cost. Even with counsel receiving \$75 per hour for noncapital cases, the average cost for an adult misdemeanor case was approximately \$240, the average cost for an adult low-level felony case was approximately \$435, and the average cost for an adult high-level felony case was approximately \$1,180.



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The success of indigent defense in North Carolina was due to the willingness of a large number of skilled lawyers to take appointed cases as part of their private practices, or to work full time in public defender offices.

The General Assembly, faced with the fallout from the financial meltdown, was determined to reduce the amount spent on providing counsel for those who are too poor to hire their own lawyer, and who are constitutionally or statutorily entitled to court-appointed counsel. First, IDS was required to reduce the

hourly rate paid to private counsel, putting significant stress on the private-assigned counsel system. Second, legislators grappled with large scale, systemic changes to how indigent representation was delivered. Neither the House nor the Senate supported the existing local roster system. The budget

passed by the House would have created a statewide system of public defenders, with the public defender districts consolidated so that offices would cover a larger number of counties. The Senate, however, favored contracts with private lawyers. Ultimately, the Senate view carried the day, and the final 2011 budg-



et required IDS to issue Requests for Proposals (RFPs) for contracts to cover all case types throughout the state.

Creating a statewide system under which IDS would issue RFPs for representation in all case types—and saving money in the process—presented significant challenges. Although IDS has used contracts with individual lawyers and a few nonprofits to provide representation in some areas and case types, those contracts were individually negotiated, covered a very small percentage of the cases, and were designed to be cost-neutral rather than to decrease spending. Contracts for indigent defense in other jurisdictions have often led to low-bid contracts with no support for quality representation, which IDS wanted to avoid. The truth is that all indigent defense systems rely on some form of contract with the lawyer; public defenders work pursuant to an employment contract under which they are paid an annual salary and agree to take all of the cases assigned to them by their office, private-assigned counsel implicitly contract to provide representation on individual cases and accept payment for the hours allowed by the judge at the end of the case, and other contracts pay counsel a set amount per case or to take a designated caseload. All of these systems present a potential conflict between the desire to control costs and the constitutional imperative to provide quality representation. Providing quality representation takes time, and reducing the cost involves paying defense counsel less money for the hours they work, forcing counsel to spend less time on each case, or identifying efficiencies in a nonefficient court system. In creating a contract system, IDS was painfully aware of the difficulty in balancing the pressure to reduce spending with the need to provide constitutionally effective representation. The difficulty of creating a viable system and generating savings was compounded by the recently reduced rates for private counsel. Those rates significantly cut into the actual earnings for lawyers who provide direct representation to clients, and are not sustainable for the long term. Any contract system that significantly reduced compensation beyond these rates would ultimately lead to long-term problems.

The first steps in creating a contract system were to survey the systems that were in place in other jurisdictions, and to determine the characteristics of systems that fostered quality representation and those that sacri-

ficed the quality of representation for cost savings. Not surprisingly, there are a variety of contract models used in various jurisdictions. Some models, such as Oregon's contracts with large nonprofit public defenders, stress the quality of representation, while RFPs issued by counties or municipalities seeking a law firm that is willing to take all of the available cases for the lowest cost do little to ensure that clients receive adequate representation, and actually drive up long-term costs. For example, one report described a flat-rate contract with a firm that provided no incentive to litigate cases, resulting in .5% of the cases going to trial. When an associate of the firm moved to continue a case because necessary investigation had not been done, she was fired and another lawyer pled the client guilty to all of the charges. Reviewing existing systems and a number of national reports on indigent defense system contracts revealed that well-designed contract systems share certain characteristics: the contracting lawyers have the experience and skills needed to handle the cases; and the system provides oversight of the quality of the work being done, limits caseloads to a manageable number, includes a case management or tracking component, and provides a mechanism for additional compensation for truly extraordinary cases.

When IDS began the process of creating a contract system, there were several basic goals that flowed from the General Assembly's directives and the characteristics described above. The system needed to work in North Carolina, where most private lawyers who accept appointed cases work either as solo practitioners or in small firms, and tend to focus their appointed work on cases in the county in which they have an office. The system needed to provide cost savings and allow IDS to accurately predict costs for future years. The system needed to allow IDS to set reasonable qualifications for the lawyers who would enter into contracts, and enable IDS to identify qualified lawyers when awarding contracts. The system needed to minimize the pressure to cut corners in providing representation, and to encourage counsel to spend the time needed on truly difficult cases. IDS needed to be able to track whether the lawyers were being appointed to the expected number of cases, and how and when those cases were being resolved. IDS also needed to provide support and oversight in the field, so that contract attorneys have the tools needed

to do the work, and so that IDS can identify and address situations in which adequate representation is not being provided.

IDS quickly recognized that a statewide contract system would need to be phased in, both in terms of geography and case type. Adult noncapital criminal cases at the trial level represent the vast majority of IDS' caseload and pose fewer challenges in converting to a contract system, primarily because IDS has good data on the hours needed to handle those cases, and the volume of cases in most counties is sufficiently high to support a contract system. In addition, rolling out the contracts in a few districts at a time would allow IDS to ensure that the contract system was working before it was implemented on a large-scale basis.

IDS resolved two major issues relating to compensation at an early stage of developing the new system. First, the system could not rely on hourly billing, because this would not work in a centralized system with more than 200,000 cases annually, and would in essence replicate the roster system that the General Assembly clearly wanted replaced. Second, price competition in the form of requiring lawyers to compete on how cheaply they would do the work would be limited to representation provided by the court session, such as drug treatment court, in which counsel could reasonably estimate the time required to do the work, and low bidders could not easily cut corners on representation. IDS spent a great deal of time analyzing data from fee applications to determine the amount of time spent on cases under the roster system, and decided to use a contract system under which lawyers would be paid a set amount to cover a caseload that included a range of dispositions. IDS set different caseloads for misdemeanors, low-level felonies, and high-level felonies, the latter of which are Class D felonies or higher. The disposition ranges are referred to as "caseload units."

IDS believed that having a guaranteed stream of cases, rather than being paid a flat fee per case with no guarantee of the volume of cases, would reduce the pressure to cut corners on the difficult cases that are mixed in with the more straightforward cases in each caseload unit. IDS set compensation levels at a rate that would require counsel to be somewhat more efficient than the average hours spent under the roster system, in large measure because IDS' research shows that attorneys with larger caseloads are more efficient

“I have been pleased with the availability of training and support for contractors from the regional defenders at IDS and the UNC School of Government. I was pleasantly surprised with a user-friendly online case reporting system that actually helps me stay on track with my record-keeping, and any help in that area of my practice is much appreciated.” — *Valerie E. Pearce, regional defender, Divisions II and IV, NC Indigent Defense Services*

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than those with smaller caseloads. “Efficiency,” of course, can sometimes just be a euphemism for “cutting corners due to low pay.” In order to reduce the pressure to cut corners, IDS also created an extraordinary case policy under which contractors can request additional compensation or a reduction in their caseload when they have a case that is significantly more complex and time consuming than the “average” case.

In order to provide the necessary oversight, both in terms of the business aspect of the contracts and the quality of representation, IDS began creating a modest infrastructure to support the system. Although the system will ultimately involve hundreds or thousands of lawyers and potentially several hundred thousand clients, IDS began by converting an existing half-time contracts administrator position to a full-time position that is responsible for ensuring that the business end of the contracts runs smoothly, and for monitoring the data reported by the contractors. IDS also created, and continues to improve, an online reporting system that allows contractors to report basic information about cases at the time of appointment and then at the time the case is disposed, and to print out recoupment forms for cases in which the court may order the client to repay attorney fees. This database also assists IDS in ensuring quality representation by allowing IDS to spot potential problems, such as situations in which the contract system may be leading lawyers not to try cases or not to advocate effectively for reasonable pleas. The most important quality assurance, however, comes from the regional defender positions. The regional defenders are experienced lawyers who are out in the field meeting with lawyers, judges, clients, and others to provide oversight, support, and resources. Ultimately, each regional defender will be expected to cover two judicial divisions, meaning that one lawyer will be responsible for about a quarter of the state. To date, IDS has hired two of the four regional defenders as contracts have been rolled out in their regions.

IDS has been fortunate that the few positions that are responsible for making the contract system work are filled with experienced, dedicated people. IDS hired Emily Portner, who previously worked administering indigent defense contracts in New York, as the contracts administrator. Tucker Charns and Valerie Pearce, both experienced attorneys who have been in court representing clients and responsible for providing oversight to other lawyers, have taken on the challenge of serving as the first two regional defenders.

Perhaps the most challenging aspect of a contract system is getting good lawyers to participate. IDS developed a fillable offer form that allows potential contractors to describe their experience and their ability to serve the clients in the county in which they are seeking a contract. IDS also seeks input from local judges and from references identified by potential contractors. The offers are reviewed by two or three attorneys, and decisions are then made about awarding contracts. IDS recognized early in the process the importance of including as many qualified attorneys who were already providing indigent representation in the county as was manageable, in part to ensure that there were a sufficient number of attorneys to handle conflicts and cover court schedules, but also to support a vibrant indigent defense bar that would provide representation in the future. IDS also quickly learned the importance of face-to-face meetings with local bar members to describe the system, answer questions, and urge qualified local lawyers to consider applying for contracts.

### The Reality

The contract system divides the adult criminal cases into three categories: misdemeanors (although it includes habitual assault and DWI, as well as non child support contempt in district court), low-level felonies (Class I through E, as well as probation violations and non child support contempt cases in superior court), and high-level felonies (Class D through A, not including potentially

capital cases). Based on data from three fiscal years, the local caseloads are divided into units, which represent a range of cases that one attorney is expected to handle during the term of the contract. The contracting attorneys are required to report their data by the seventh day of the month and then certify that their monthly reporting obligations are complete, which triggers their monthly payment by the 15th day of the month. In addition to the monthly payments, attorneys are able to request extraordinary pay to seek additional compensation for particularly complex cases.

Although contracts for these types of cases are a new system, there is more in common with the prior system than there is different. The IDS Rules, IDS Performance Guidelines, and the procedures for securing experts and investigators have remained the same. The local appointment plans have been adapted for the contracts. In recognition of the changes to the appointment plans, the regional defenders routinely meet with local actors (district and superior court judges, clerks, and assistant clerks) before and after the contracts are underway in their districts. The changes are chiefly due to the rotation of attorneys, the handling of cases in which clients have been charged prior to and after the start of the contracts, and with cases in more than one contract category. After the start of the contracts, the regional defenders continue to field questions and concerns, and to update the appointment plans as necessary.

If one could look at a noncontractor courtroom and a contractor courtroom in the same district, it would be difficult to see the difference. Due mostly to the new positions of regional defenders, however, there are at least three parties who are greatly affected by the contract system: the attorneys, the courts, and the indigent clients.

Regarding the attorneys, the regional defenders are able to listen to and help the contract attorneys in meaningful ways even before the contracts become effective. For example, in one district it was the culture that

attorneys on the indigent roster would take turns meeting with all the defendants seeking court-appointed counsel each day in court and helping them complete affidavits of indigency. This required hours of attorney time for which they could not be compensated. It also raised issues of confidentiality and conflicts of interest. The attorneys did not like this practice, but it was difficult to find a way to change it. The regional defender was able to speak to the judges, explain the concerns, and assure the clerks that the duty would not fall to them as clients in nearly every other county fill out their own affidavits. As a result, the lawyers in at least some of the counties in the district were relieved of this burden without having to confront the judges or clerks.

Now that the contracts have started, the regional defenders attend and observe many courts and are almost always in a courtroom somewhere to assist lawyers. They are also “on call” for any issues that may arise. The contracting attorneys generally receive as much or as little help as they request. Regional defenders have done practice cross-examinations of witnesses and clients, directed the attorneys to appropriate experts, assisted in motions drafting, conducted case consults with attorneys, and helped clients understand plea offers. There is also a contractors’ listserv that the attorneys use to pose questions and ask for assistance from other attorneys, and that the regional defenders and other IDS staff use to post announcements and offer support.

With assistance from the School of Government, there have been three local half-day trainings with CLE credit in the contract

districts, as well as a full-day contractor training in Chapel Hill. These were CLEs designed specifically for contractors. The emphasis was on real-life issues involving district court motions practice, client-centered advocacy, and DWI and superior court skills. Costs were kept to a minimum, and the programs were scheduled at times that recognized the needs of private attorneys.

Additionally, regional defenders have met with judges about issues on behalf of the attorneys, and to hear concerns about contract attorneys. In these meetings, the regional defenders have advocated for the attorneys. They have also been able to listen to the court’s concerns about a lawyer, and communicate with the attorney about the problem or perceived problem. The regional defenders are also able to remind judges that contract attorneys must be in different courts at the same times, that they have to balance a retained caseload, and that they do their best to remain good advocates and efficient business people. Regional defenders also meet with the public defenders, the district attorneys, and the clerks to discuss the system and work on ways to make court run better for the contract attorneys.

For clients and clients’ families, the contract system has also brought benefits. They now have someone other than the judge to speak to about their counsel. Every attorney has seen that client, the one in the jail jumpsuit, trying to ask the judge why his attorney has not met with him, while at the same time trying not to offend those who have so much power over him. Under the contract system, the clients and their families can speak with the applicable regional defender. During that

conversation, the client and family can freely ask questions about procedures and air any grievances. The regional defender can respond to the concerns and prevent any unnecessary time being spent in court on issues that are best addressed between the client and his counsel.

As the system has been implemented in the first few districts, IDS has learned that aspects of it need to be strengthened. The extraordinary pay provision was not sufficiently clear or concrete to provide assurance to lawyers working on high-level felonies that their work on a truly extraordinary case would be adequately compensated. As a result, IDS created a new system that provides additional hourly pay for contractors when they work more than 50 hours on one high-level felony case after consultation with and approval by the applicable regional defender. The contract system also potentially excludes newer lawyers, who are competing with more experienced lawyers for contracts. To address that concern, IDS created a mentor agreement that allows a less experienced lawyer to include with his or her offer an agreement with a more experienced lawyer to serve as a mentor.

Any new system can stand improvements, and IDS is open to input from those in the criminal justice system on how to strengthen the contract system. The best system is one that is staffed by committed, properly compensated attorneys who have the support and resources they need. ■

*Thomas K. Maher is the executive director of IDS, and Tucker Charns is an IDS regional defender for Divisions I and III.*

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“The implementation of the contracts system has been a challenging adjustment. Many lawyers who had practices that included indigent defense no longer have the opportunity to do so. We have a brand new large courthouse and almost every floor has three or four courtrooms with judges and clients who are anxiously awaiting the arrival of a limited number of lawyers. It can be a challenging and sometimes frustrating experience for all concerned. However, the reasons that initially compelled me to gravitate toward indigent defense have not changed, the need has not changed, and the constitutional rights of the accused have not changed either. There have been difficult days and challenging times, and I am certain there will be more in the future.” — *Lisa Williams, Durham County Contractor who has low- and high-level felony contracts.*

# As North Carolina's Needs Evolve, So Does its School of Government

BY GINI HAMILTON

When you look at the Knapp-Sanders Building, where the School of Government is housed on the edge of the UNC-Chapel Hill campus, you see a stately red brick building with a row of soaring white columns at its entrance. The building doubled in size when it was renovated in 2004, but if you know what to look for, you will see that the original building, constructed in 1957, still pro-

vides the essential “bones” for the newer one. The same is true of the work the School does today.

In the late 1920s, UNC Law Professor Albert Coates saw a gap between the law as it was taught in his classroom and as it was practiced in city halls and county courthouses. He left campus and traveled the state. He “crawled through the bloodstream” of the state’s judicial system—riding along in police cars, visiting jails, and accompanying officers into criminal court—all in an effort to first observe how the law was actually being applied “on the street,” and then to create training that would get everyone on the same page and in line with the law. He organized “schools” for groups of local officials—primarily police officers and sheriffs—to help fill the gap he perceived. Over the next ten years he added training for a wide range of



government officials. Thus, the Institute of Government was born. The Institute became the School of Government in 2001.

Coates’ original idea has expanded from

one determined man with a vision, to an institution of 55 faculty and 75 staff members that is the largest university-based local government training, advisory, and research

organization in the United States, offering up to 200 courses and webinars to more than 12,000 public officials each year.

In the early days, the then-Institute of Government offered courses on the laws that dictated the functions of local government; those courses, or modern versions of them, still provide the foundation of the school's work. Local government purchasing officers need to follow proper procedures to be sure their contracts are valid; county clerks must follow parliamentary procedure for public meetings; and registers of deeds must properly record real estate transactions and birth certificates.

### **A Broadened Focus on the Administration of Local Government**

Over time, the school's focus has expanded. For instance, the intensive seven-week Municipal and County Administration course includes sessions on local government law, the legal aspects of public finance, employment law, animal control law, and governmental accounting, among others. These topics have evolved to include case studies that explore the practical challenges to application of the law that participants can expect to face in their jurisdictions. And now the course also includes sessions on strategic leadership, decision-making, community engagement, and public communication, including social media.

Each year roughly 100 city and county employees from every area of local government attend this course. Since 1954, nearly 6,000 public officials have studied how their specific jobs relate to the work and needs of other departments, including the intersection of various legal and practical constraints.

On any given day, the School of Government's parking lot is filled with cars and trucks boasting colorful license plates and decals of towns and counties from all over North Carolina. Classrooms are filled with local government finance officers, purchasers, magistrates, mayors, economic development directors, county clerks, district court judges, and municipal attorneys.

### **Nonpartisan, Policy-Neutral, and Responsive**

School of Government faculty members have made notable contributions to North Carolina government, including serving on the North Carolina Constitutional Commission, the Local Government Study

Commission, the NC Sentencing and Policy Advisory Commission, and the Governor's Crime Commission on Juvenile Crime and Justice. True to its core values of being nonpartisan and policy-neutral, the school has built a legacy of trust with North Carolina's public officials, regardless of political affiliation. Whether responding to a research request from a county finance officer or a member of the General Assembly, faculty members see their role as helping North Carolina public servants figure out how to accomplish what they want to do for their community.

### **Training for Judicial Officials**

In the 1960s the Institute of Government began offering courses for district and superior court judges, magistrates, and prosecutors. In 2006 the North Carolina Judicial College was established at the school under the leadership of James C. Drennan, who served as its director until his retirement in 2013. The college was established to help groups within the courts work effectively as teams, understand each other's roles, develop interpersonal skills, and help court officials deal effectively with the changing world in which they work. It provides seminars and specialized education programs for judges, clerks of court, magistrates, and court administrators in the state.

In addition, the school collaborates with the Office of Indigent Defense Services to create training programs, manuals, and online resources. The school also produces a robust curriculum of live and on-demand webinars available for CLE credit on topics ranging from criminal and juvenile delinquency and substance abuse to ethics and electronic evidence.

### **Technology Allows for Expanded Resources**

The work of the school has evolved, as has the way that work is offered. Today, faculty members answer phone calls and emails every day from local government, courts, and law enforcement officials who have questions about specific local issues. They post information, including legislative updates, on blogs that focus on criminal and local government law, community and economic development, environmental finance, and human resources. They create online tools such as one that assists utility managers with analyzing residential utility rates in an effort

to improve efficiency. They develop mobile apps such as the ASSET: Arrest, Search, and Seizure Electronic Tool that law enforcement officials use in the field to access vital information about the legal issues officers confront every day, from search warrants to Terry stops to GPS tracking.

### **Graduate Education**

The school is also home to the UNC Master of Public Administration (MPA) program, offered in two formats. The full-time, two-year residential format serves up to 60 students annually. In 2013 the school launched MPA@UNC, an online format designed for working professionals and others seeking flexibility while advancing their careers in public service. The school's MPA program consistently ranks among the best public administration graduate programs in the country, particularly in city management. With courses ranging from public policy analysis to ethics and management, the program educates leaders for local, state, and federal governments and nonprofit organizations.

School of Government Dean Mike Smith is a lawyer, as have been the preceding three directors of the institute—Albert Coates, Henry Lewis, and John Sanders. Smith joined the faculty in 1978 and taught in two areas: civil liability of public officials and legal aspects of corrections. He was named director of the Institute of Government in 1992 (renamed dean when the institute became the School in 2001) and has led much of the expansion of the school's services.

"Our history is great, but I'm even more excited and optimistic about the school's future," Smith said. "As the work of local governments and public servants has become more complex and demanding, we have expanded our capacity to assist with emerging issues without reducing our traditional strength in public law. It is supposed to be that way. Mr. Coates was the ultimate change agent, and he would embrace the school's evolution. He would recognize the dedication of our current faculty and staff, who are just as committed as the pioneers who worked with him during the early days." ■

*Gini Hamilton is senior marketing and communications specialist for the School of Government at UNC-Chapel Hill.*

# Pro Bono Status: Staying Active in the Profession in Retirement

BY MARY IRVINE

**A**ttorney Thomas Siekman's career has taken him many places: he practiced intellectual property law, served as general counsel of

Compaq, and headed the board of Martha Stewart Living Omnimedia, Inc. An advocate for legal services, Tom was consistently involved in efforts to bridge the access to justice gap throughout his career by raising money with the Boston Bar Foundation and volunteering his legal services to nonprofits. After Tom decided to settle in Asheville in retirement, he inquired with a neighbor and fellow attorney about opportunities to vol-

unteer. Tom's neighbor sent him to Pisgah Legal Services where he has been volunteering since 2011 and currently serves as board president.

"I've been very fortunate in life, much of which has been due to being a lawyer. Others have not been as lucky. Through no fault of their own, many people find themselves facing homelessness, being disabled without income, growing up as a child in unsafe surroundings, or living in a situation where domestic violence is a reality. Volunteering with Pisgah Legal gives me the opportunity

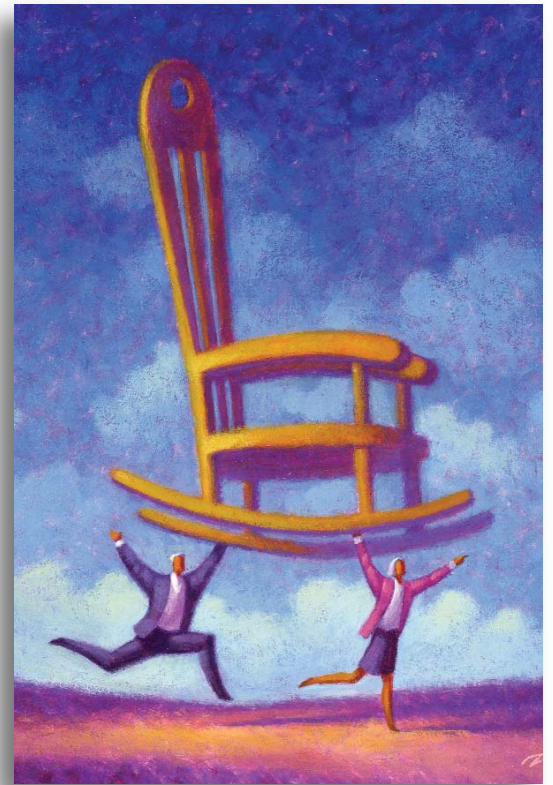
to use the lawyering that has been so good to me to help people receive their rightful access to the law's protections."

Licensed in Massachusetts, Texas, and the District of Columbia, Tom is not a member of the North Carolina State Bar. In the past, this would have prevented Tom and other attorneys who are retired in-state or licensed out-of-state from volunteering. However, Tom is

able to volunteer his time to assist low-income people in the mountains of North Carolina through the State Bar's *pro bono* status.

## The Roots of *Pro Bono* Status

In 1981, Florida was the first state to establish rules allowing inactive attorneys to continue a limited practice for the purpose of providing *pro bono* services. According to the



Rob Colvin/Illustration Source

American Bar Association, 36 jurisdictions have adopted some form of *pro bono* rule—also called emeritus rules—reflecting a more recent push nationwide to explore new volunteer pools and methods of increasing access to legal aid for low-income individuals despite budget cuts.

Designed for retired legal professionals as well as out-of-state attorneys, *pro bono* rules seek to encourage volunteerism by lessening the licensing burdens. Rules typically exempt persons with the status from certain licensing requirements including payment of membership dues and compliance with continuing education requirements.

The value of rules granting retired and out-of-state attorneys *pro bono* status is multidimensional. At the heart of such rules is the desire to bridge the justice gap and build additional capacity within legal aid organizations to meet the legal needs of poor, elderly, and underserved populations. Legal needs studies consistently indicate that our current system only meets a fraction of the legal needs of poor people. According to a 2009 study of the American Bar Association, only one in five legal problems faced by low-income individuals are addressed by an attorney. The ABA also found that for every client served, another is turned away.

The need for legal services is great, and *pro bono* rules recognize the unique position of seasoned attorneys in retirement to help meet the need. As a group, retired attorneys may have more free time to devote to volunteering. Such attorneys also have considerable expertise as legal professionals that benefits legal services organizations and needy clients.

Judge Craig Brown retired from the bench in 2008. “Frankly, I was bored to death in retirement,” he says, having retired young due to health issues. Well-versed in the circumstances of indigent parties after hearing domestic, landlord tenant, criminal, and other cases in Durham County District Court for 12 years, he appreciates the need for representation and decided he wanted to help in retirement. “For me, *pro bono* is important. I don’t have to work but I want to help.”

Judge Brown had no idea that *pro bono* status was available in North Carolina until he sought it in October of last year. Since his petition was approved, he has been volunteering with Legal Aid of North Carolina three days per week. Judge Brown feels he

can help most by training the next generation of lawyers, given his experience trying capital cases, his time on the bench, and his vast knowledge of the local community.

Gina Reyman, managing attorney of Legal Aid of North Carolina’s Durham office, echoes the value of retired and out-of-state *pro bono* attorneys. Gina can turn to Judge Brown as an experienced attorney and judge with court issues and criminal law questions, as Legal Aid’s practice is limited to civil cases. Gina also says, “Judge Brown is able to triage people that walk in,” providing brief advice to those who otherwise might be turned away. “When other attorneys are busy, he is able to really take time with people.”

### North Carolina’s *Pro Bono* Status Rule

In March 2008 the North Carolina Supreme Court approved a proposed rule amendment of the State Bar allowing inactive North Carolina attorneys and out-of-state attorneys to seek “emeritus *pro bono* status.” The amendment created a new membership class allowing both inactive in-state attorneys and out-of-state attorneys to provide *pro bono* legal aid through an established legal services program under the supervision of a practicing attorney.

Jeremy Browner was the first attorney to obtain *pro bono* status in North Carolina. Jeremy moved to the Tar Heel state from New York around the time the rule was approved. While waiting to obtain licensure by comity, Jeremy was reading through the rules pertaining to the State Bar and found out about the opportunity to volunteer as an attorney licensed out of state. “Helping those who cannot afford legal assistance is a professional duty that all attorneys should undertake. The fact that I was waiting for my application to the State Bar to process did not mean that those who needed *pro bono* legal assistance should wait.” With *pro bono* status, he volunteered with Legal Aid of North Carolina, assisting in foreclosure, bankruptcy, and estate cases.

For Jeremy, volunteering allowed him to help people while learning about his new community. While volunteering, Jeremy got to know the North Carolina court system after practicing in Ohio and New York, noting differences in the judicial management of cases and the role of clerks.

Now Jeremy is a solo practitioner in Chapel Hill with a general practice that also focuses on bankruptcy, aviation, crowdfund-

### Benefits of *Pro Bono* Status:

1. No annual membership dues
2. No mandatory continuing legal education
3. No minimum number of volunteer hours required
4. Malpractice insurance coverage usually provided by legal service organizations to volunteer attorneys

### Steps to Petition for Emeritus *Pro Bono* Status:

1. Read the rules pertaining to *pro bono* status. The emeritus rules for inactive North Carolina attorneys can be found at 27 NCAC 1A, Rule .0201(c), *Classes of Membership*, and 27 NCAC 1D, Rule 0901(b), *Conditions upon Transfer* (to inactive status). The *pro bono* status rule for out-of-state attorneys can be found at 27 NCAC 1D, Rule .0905, *Pro Bono Practice by Out-of-State Lawyers*.
2. Complete the petition for *pro bono* status. Note that the requirements and petitions for out-of-state lawyers and North Carolina inactive attorneys are different.
3. Identify a practicing attorney in good standing at a supporting nonprofit legal services corporation to serve as a supervisor and obtain a Statement Regarding Supervision.
4. Submit all forms and supporting documents to the North Carolina State Bar, Membership Department, PO Box 26088, Raleigh, NC 27611. Materials should be submitted at least 30 days prior to the council meeting when you want your petition to be considered. Council meetings are held annually in January, April, July, and October.

*Instructions, petitions, and template supervisory statement can be found at [ncqualaccesstojustice.com/pro-bono-status](http://ncqualaccesstojustice.com/pro-bono-status).*

ing, and other issues. Gina Reyman, who also supervised Jeremy Browner, reiterates that “even if emeritus and out-of-state attorneys only do temporary work before obtaining full licensure, their experience contributes to their long-term knowledge of what legal aid does,” and that is critical given

the great need for *pro bono* attorneys.

In Jeremy's case, he continues to support legal services by participating in NC LEAP and Lawyer on the Line programs of the North Carolina Bar Association and Legal Aid of North Carolina. He also started Monday Night Law, a program of the Orange County Bar Association that offers free 30-minute consultations to individuals in the community one evening per month.

### Benefits of *Pro Bono* Status for Attorneys

In North Carolina, emeritus and out-of-state *pro bono* attorneys are not required to pay membership dues or maintain continuing legal education hours, though attorneys may choose to attend CLE courses if they are interested in learning about a topic or need training in a particular area in order to be a productive volunteer.

Many legal aid organizations offer periodic free or low-cost trainings for volunteers on particular substantive areas of law. Trainings orient attorneys who have spent their careers practicing in an unrelated setting to issues of poverty law that low-income clients fre-

quently experience. Though he doesn't need the credits, Tom Siekman has taken multiple CLEs, including those offered by Pisgah Legal Services, to get further training on issues like benefits, domestic violence, and housing law. Judge Brown has also taken advantage of CLE opportunities. He recently attended a CLE offered by the North Carolina Bar Association and Legal Aid of North Carolina on removing barriers to employment through expungements and certificates of relief.

While the *pro bono* status rule does not require malpractice insurance be secured in order to volunteer, most legal services organizations carry policies that cover volunteer attorneys. Volunteers who want to ensure an organization carries malpractice that will cover their work should ask the supervising attorney for more information.

For out-of-state attorneys in good standing in licensed jurisdictions, the *pro bono* status rules remove the barrier of having to sit for the North Carolina bar exam or pursue comity if desiring to provide volunteer legal services. For volunteers like Jeremy who are new to the state and awaiting licensure, *pro*

*bono* status allows attorneys to stay engaged in practice and meet the local legal community.

Leaving the practice of law after years can prove challenging for attorneys who have been consumed by full caseloads and countless professional responsibilities. *Pro bono* offers an outlet for retired and out-of-state attorneys to continue to use their unique skills, mentor less experienced attorneys, and help others in need of counsel. "Retired lawyers still want to dabble," says Judge Brown, which is why some opt to keep their license active even after they have practically retired. "When you do something for a long time, it's hard to park it." *Pro bono* status benefits attorneys who wish to continue their profession on a *pro bono* basis while furthering the goal of making our system of justice available to all. ■

*Mary Irvine is IOLTA's access to justice coordinator.*

*For more information about the process of petitioning for emeritus pro bono status or pro bono opportunities in your area, contact Mary Irvine at [mirvine@ncbar.gov](mailto:mirvine@ncbar.gov) or 919-706-4435.*



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# Legal Ethics Lessons from the Penn State Scandal

BY CHRIS McLAUGHLIN

Most headlines about the Pennsylvania State University (PSU) child abuse scandal focused on the connections between convicted child molester Jerry Sandusky and the PSU football program.<sup>1</sup> The scandal cost legendary coach Joe Paterno his job and tarnished his otherwise sterling reputation as a coach who was unwilling to sacrifice his values for victories.<sup>2</sup>

But the repercussions went far beyond the football program. Graham Spanier, PSU's former president, Gary Shultz, a former vice president, and Tim Curley, former athletic director, are currently facing a variety of criminal charges including perjury, obstruction of justice, and failure to report child abuse.<sup>3</sup>

The university's general counsel at the time, Cynthia Baldwin, has also garnered unwanted attention due to her role in the scandal. Former PSU colleagues, outside investigators, and a state court judge have suggested that Baldwin confused her representational roles and her professional loyalties.

Few attorneys will face situations as dreadful as that faced by Cynthia Baldwin. But confusion about the role of an organiza-



tion's attorney can arise in more common scenarios. Any time an organization's attorney investigates alleged misconduct by that organization's employees, potential conflicts may arise between the organization and its employees. Those conflicts present an even greater risk if the organization's attorney has close professional and personal relationships with those employees, as is often the case with attorneys who have represented organizations for long periods of time.

In recognition of this risk, state bars and courts require proactive measures by organi-

zational attorneys to protect their clients' interests and to insulate themselves from allegations of unethical conduct. The saga at PSU demonstrates how important these legal safeguards can be. While the specifics of Cynthia Baldwin's predicament may be unique, the ethical issues involved offer lessons for any attorney who represents any type of organization.<sup>4</sup>

## Baldwin's Role in the Penn State Scandal

Baldwin had worked closely with PSU's

senior executives for years, first while serving as president of the university's alumni association and later as chair of PSU's Board of Trustees. She was appointed PSU's general counsel in January 2010 just as the Sandusky criminal investigation was heating up.

A report on the scandal commissioned by PSU and conducted by Louis Freeh, former director of the Federal Bureau of Investigation, concluded that PSU's board was not kept adequately informed of the growing scandal and its implications for the university.<sup>5</sup> According to the report, Spanier repeatedly downplayed the importance of the Sandusky investigation throughout 2010 and 2011.

This obfuscation apparently occurred with Baldwin's assistance or acquiescence even after she learned that criminal charges were likely to be leveled against high ranking PSU officials. Freeh's report suggests that Baldwin consistently allowed Spanier to make the final decisions as to when and how the trustees would be updated about the crisis.

Potentially even more problematic was Baldwin's conduct while accompanying Schultz, Curley, and Spanier when they testified before the Sandusky grand jury in early 2011.

When asked if he was represented by counsel, Schultz, Curley, and Spanier each indicated that Baldwin was his attorney. Baldwin was present for these questions and never took advantage of the opportunity to clarify her legal role. When asked directly by the supervising judge if she was representing the witnesses, Baldwin made no distinction between her role as PSU's general counsel and her possible role as counsel to the individuals.<sup>6</sup>

The following year Baldwin herself testified before the grand jury against Schultz, Curley, and Spanier. Her testimony laid the foundation for the state's decision in November 2012 to indict Spanier and to levy additional charges against Schultz and Curley.<sup>7</sup>

Baldwin says that when the grand jury subpoenas first arrived she told each witness, "You know, I represent the university. You can get your own lawyer." The three witnesses strenuously deny this assertion. But even if Baldwin did offer this half-hearted warning to the witnesses, it apparently was not sufficient to eliminate confusion over her

representational role.

The only time Baldwin clarified her role as PSU attorney was when she spoke with the grand jury judge privately in his chambers. None of the PSU witnesses was present for this conversation, meaning they did not hear and could not benefit from Baldwin's explanation to the judge that she was representing PSU and only PSU in the Sandusky matter.

Schultz, Curley, and Spanier say that Baldwin's actions during the Sandusky investigation led them to assume that she was representing them individually in addition to representing PSU. "I think this was a crashing failure of due process," Spanier's current attorney Elizabeth Ainslie told the *Philadelphia Inquirer*. "No one explained to Graham Spanier that the person he thought was his lawyer was not his lawyer."

The three ex-PSU officials argue that they, not PSU, controlled the attorney-client privilege that applied to their confidential conversations with Baldwin. If that is true, then Baldwin breached her duty of confidentiality to Schultz, Curley, and Spanier when she testified before the grand jury about her private conversations with those men.

All three witnesses-turned-defendants have asked the Pennsylvania courts to dismiss the charges based on Baldwin's (alleged) misconduct and the prosecutor's knowledge of that misconduct. Spanier also filed a similar motion in federal court, seeking the rare remedy of federal intervention in a state criminal prosecution.

In April 2014 a Pennsylvania state court judge rejected the motion to dismiss on jurisdictional grounds. But in doing so the judge raised substantial questions about Baldwin's actions and inactions during the grand jury proceedings.<sup>8</sup> According to the judge, Baldwin arguably demonstrated "poor judgment and/or improper ethical conduct in her handling of the investigation."

Quoting a law review article written by Duke Law School's Deborah DeMott on the roles of general counsel, the judge commented, "A contemporary general counsel often occupies other roles as well [besides advising the board and senior management], each complex and additionally interlinked in many ways...[A] general counsel's position has often been characterized as ambiguous... [N]ot all occupants of the position

succeed in balancing its multiple roles in either a professional or socially satisfactory manner."<sup>9</sup>

Baldwin resigned as PSU's counsel in 2012, but the ethical controversy surrounding her conduct in that position has not dissipated.

## The Legal Ethics Rules for Organizational Attorneys

Before examining the legal ethics rules most relevant to organizational attorneys like Baldwin, a caveat is needed: neither this author nor any other commentator knows for certain whether Cynthia Baldwin acted inappropriately while serving as PSU's general counsel. No state bar ethics charges have been filed against her. The Freeh report—one source of troubling allegations about Baldwin—has come under heavy criticism for alleged errors and omissions.<sup>10</sup> That said, if the allegations made by Spanier and his co-defendants are true, then Baldwin clearly failed to satisfy her ethical obligations several times over.

Pennsylvania's rules of professional conduct are similar to those that apply to attorneys practicing in North Carolina. Rule 1.13 governs the obligations of organizational attorneys and demands ultimate loyalty to the organization's governing board. If the attorney knows of misconduct by employees that could be imputed to the organization and could cause substantial injury to the organization, the attorney is obligated to report the issue to the governing board unless the issue is resolved satisfactorily by other organizational officials. And when dealing with the organization's employees, the attorney must explain the true identity of her client when the attorney has reason to believe that the interests of the organization may be adverse to the interests of individual employees.

Baldwin's alleged failure to keep the PSU trustees appropriately informed about the Sandusky investigation would have violated Rule 1.13 as well as Rule 1.4, which sets the standards for adequate attorney-client communication. Baldwin would have violated another section of Rule 1.13 if she did not take appropriate steps to make clear to Schultz, Curley, and Spanier that she did not represent them as individuals. That failure might also have violated Rule 4.3, which prohibits giving legal advice to unrepresented parties that are likely to be in conflict

with the attorney's client—in this case, PSU. Finally, Baldwin's failure to clarify her representational role to the grand jury judge may have violated Rule 3.3, which requires candor to the court.

Again, it is not clear that Baldwin violated any ethical rules. But even if her version of events is taken as fact, it is apparent that Baldwin did not do as much as she could have to protect her client, position individual employees to protect their interests, and defuse allegations of misconduct.

### Upjohn Warnings

One crucial ethical safeguard available to organizational attorneys is known as the *Upjohn* warning. *Upjohn* is the 1981 US Supreme Court case that is most famous

for its (somewhat convoluted) test for determining the scope of the attorney-client privilege for organizational clients in federal court.<sup>11</sup> More relevant to Baldwin's predicament is *Upjohn's* discussion of situations that might require an organization's attorney to warn employees about the attorney's role, and the fact that the organization rather than the employee controls any privilege that may attach to their conversations.

These warnings are sometimes known as "corporate *Miranda*" warnings after the lines uttered by every television and movie cop making an arrest since 1966.<sup>12</sup> While organizational attorneys are not expected to tell employees that "anything you say can and will be used against you by your employer," the required warning is intended to send a very similar message.<sup>13</sup>

Failure to provide an *Upjohn* warning can have a very detrimental result for the organization: the employee and not the organization may control disclosure of statements made by the employee to the organizational attorney.<sup>14</sup> As mentioned above, the failure to offer an adequate warning to employees also can violate the organizational attorney's ethical obligations under Rule 1.13.

Baldwin claims that she employed an *Upjohn* warning when she told Schultz, Curley, and Spanier, "I represent the university. You can get your own lawyer." But that brief statement may not have been sufficient to put the three PSU officials on notice that conversations between them and Baldwin could be disclosed by Baldwin at the direction of PSU. And the potential effectiveness of her lukewarm warning was undercut by Baldwin's subsequent failure to clarify her role when those witnesses indicated that she was representing them individually.

In the words of the Fourth Circuit Court of Appeals, watered-down *Upjohn* warnings such as the ones Baldwin claims to have offered are "potential legal and ethical minefield[s]."<sup>15</sup> In addition to risking control of the attorney-client privilege, an organizational attorney such as Baldwin who failed to clarify her role would almost certainly be disqualified from representing the organization in any subsequent dispute between it and the employee who was misled.<sup>16</sup>

### Lessons for All Organizational Attorneys

The PSU legal saga is an extreme example

of what can go wrong in organizational representations. Cynthia Baldwin's predicament nevertheless offers helpful lessons to organizational attorneys who face more mundane concerns.

First, an organizational attorney cannot abdicate the roles as legal advisor to the organization's governing board no matter how much the attorney trusts the organization's senior management. The attorney must control the flow of information to the board about legal risks. This responsibility cannot be delegated to the president, the CEO, the executive director, or (for local governments) the manager or mayor.

Second, attorneys representing organizations must constantly be wary of situations in which the interests of individual employees—even very senior employees—might conflict with the interests of their organizations. When such a situation arises, the attorney must provide adequate warnings to the employees about the attorney's role and the attorney's loyalty to the organization over the individual. To offer maximum protection for both the organization and the attorney, the *Upjohn* warnings should be documented in writing.

These ethical lessons are challenging to implement, especially when the organization's attorney has close relationships with senior management. But as an attorney in Cynthia Baldwin's shoes would likely admit, that challenge is minor compared to those that can arise when the lessons are ignored and the attorney's roles are muddled. ■

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### Endnotes

1. Sandusky was convicted in 2012 of 45 counts of sexual crimes against children and sentenced to a minimum of 30 years in prison.
2. Paterno coached at PSU for 45 years. The university fired him in the middle of the 2011 football season as the scandal broke. Paterno died from lung cancer only a few months later.
3. The *New York Times Magazine* recently published a lengthy cover story on Spanier's career, involvement with the Sandusky case, and the criminal charges lodged against him. [nytimes.com/2014/07/20/magazine/the-trials-of-graham-spanier-penn-states-ousted-president.html](http://nytimes.com/2014/07/20/magazine/the-trials-of-graham-spanier-penn-states-ousted-president.html).
4. For a more detailed look at some of the legal ethics issues raised in the Penn State scandal, see this 2013

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# An Interview with New President Ronald L. Gibson

**Q: What can you tell us about your upbringing?**

I grew up in Columbia, South Carolina. My family is from rural Fairfield County. My mother had the foresight to move from the country to the city before my second birthday. I am the youngest of eight children—four boys and four girls. We were raised by our single mother. Her system was to assign an older child to be responsible for a younger child. My oldest brother is more like a father to me than a brother. He looked after me as a kid, taught me to drive and how to take care of a car. My saddest memory as a child was seeing my oldest brother leave for military service when I was ten.

I did not like being the “little brother” of my older siblings. When it was time to go to high school, I saw the opportunity to be in the group of kids who integrated what was regarded as the best high school in the state. I think that decision, made for the wrong reason, resulted in many opportunities for me.

My mother taught us many things, including self-reliance. All of the children worked and were required to make good grades. We were responsible for buying our own school clothes and earning our own spending money. My mother bought me a lawn mower and I cut grass throughout the neighborhood. In high school, I worked 30-35 hours per week in a Winn Dixie grocery store. After work, I would go the USC library to study. I was surprised that students went to the library to hang out.

**Q: Tell us a little about your family.**

I have three adult children. The youngest is a recent UNC-Chapel Hill graduate. She is spending a year working in Spain before graduate school. My middle child is an honors grad from UNC-Greensboro. She is in graduate school in occupational therapy in Connecticut. My son is the oldest and works in Charlotte. He



*Ronald L. Gibson is sworn in as president by Supreme Court Justice Mark Martin, with Felicia Washington holding the bible.*

is a Davidson College graduate.

**Q: When and how did you decide to become a lawyer?**

I made the early decision to become a lawyer when I was in high school, but considered a career in banking after working in New York for two summers while in college. During my senior year of high school, I regularly “played hooky” from school to attend the “coffee house” trial at the county courthouse. During the Viet Nam War, anti-war protesters established coffee houses across the country as meeting places. Local governments, including the Columbia City Council, declared their local coffee house a public nuisance and sought to close it. I went to the trial instead of going to school. I didn’t understand much of what I saw, but some memories stayed with me. The “hippies”

were represented by Thomas Broadwater, a young African-American lawyer. Mr. Broadwater was cool and calm. He responded to the judge respectfully, but forcefully, and made quite an impression on me.

In college I had the opportunity to meet some real lawyers and judges, including Julius Chambers and Judge James B. McMillan. I decided on law instead of banking.

**Q: What’s your practice like now, and how did it evolve?**

Most of my law practice today is for two clients, Mecklenburg County and Livingstone College. I am involved in a variety of litigation matters for the county and provide the full range of legal services for the college. I have had the opportunity to do many different things as a lawyer. I started

out doing employment and civil rights law with the Chambers firm, then moved to Duke Power where I worked on licensing a nuclear power plant, utility rate cases, and lobbying, and finally moved to management and became an officer of the company. I also spent some time as a management consultant to utilities and as a business owner. I gained some valuable experience doing these other things, but I missed practicing law.

**Q: How and why did you become involved in State Bar work?**

In 1985 the State Bar Council was all-male and all-white. The leadership, including Jim Preston from Charlotte, decided to encourage black and women lawyers to run in local elections. I was elected from Mecklenburg County for two terms and served for six years. Serving as a Bar councilor was such a rewarding experience that I served three more terms.

**Q: What has your experience on the State Bar Council been like and how has it differed from what you anticipated?**

I don't recall my expectations before joining the council. I distinctly remember what I was told by Bob Baynes and other coun-

cilors; that I would work hard, meet some really nice people who are terrific lawyers, and that it would be a very rewarding experience. They were right on all counts. Serving on the various committees of the State Bar with dedicated lawyers from around the state continues to be a very rewarding experience.

**Q: You're one of the few people who has served more than three terms on the council, having served a couple of three-year terms back in the 80s and then three more since the turn of the century. Was the council different when you returned?**

When I first joined the State Bar Council in 1986, there was clear tension between the small town, small firm lawyers and the big firm lawyers from the urban areas. There was much less tension when I returned to the council.

**Q: You were on the State Bar's Grievance Committee for many years. What was that like?**

I believe that the work of the Grievance Committee is at the heart of our duty to protect the public. While the vast majority of lawyers act honestly and ethically for the

benefit of their clients, some lawyers do things that harm clients and violate the standards in the Rules of Professional Conduct. When that happens, the State Bar, through the Grievance Committee, has a duty to investigate the facts and make decisions to protect the public. The dedication of the Grievance Committee members is inspiring.

**Q: Is there anything that you think we ought to be doing differently or better in regard to the investigation or prosecution of disciplinary cases?**

Several years ago we conducted a comprehensive review of the grievance process. While I am not aware of any significant current problems, I think it would be a good idea to examine the process again to see where we might make improvements. The officers periodically receive feedback from Disciplinary Hearing Commission members on the performance of counsel staff. We should consider developing a more systematic approach to gathering feedback from everyone involved in the grievance process. We should continuously work on balancing the need to be fast, but to conduct thorough investigations. ■

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## Remarks from the President

*Following are the remarks made by new State Bar President Ron Gibson on the night of his inauguration.*

Good evening.

To the justices of our Supreme Court, to other judges and special guests, to the past-presidents of the State Bar, family, and friends, thank you for being here tonight.

To the councilors, thank you for the honor of serving as the 81st president of the North Carolina State Bar.

Ron Baker recognized the 20 or so past-presidents with us tonight. It's a diverse group in many respects, but all are superb lawyers and leaders in their communities. Ron Baker joins the fraternity of past-presidents with all the necessary credentials, including more litigation "battle scars" than any of us would like to have. For a while we didn't see his trademark smile and good humor very often. The good news is that the smile is back.

Ron, thank you, not only for your service as a councilor and officer, but also for your friendship over the years.

Tom and Susan Ross, thank you for being here and for your remarks tonight. Tom Ross is responsible in part for my attending Davidson College. Tom was among the students at Davidson who were dissatisfied with the lack of progress by the college integrating the student body. The students organized a recruitment weekend that more than doubled the number of black students at Davidson. I have not figured out how Tom could have known in 1970 that he was preparing to deal with both impatient, know-it-all college students, and intransigent college administrators.

I want to talk tonight about pride in our profession. But first, a few important detours. I have attended at least 15 Annual Dinners. I have always found two things interesting in the remarks by the newly-elected presidents: their backgrounds and fami-

lies, and how they were drawn to the practice of law.

I hope that you too will find these things interesting because, guess what I plan to talk about, and I have a very big family to introduce.

I am the youngest of eight children—four boys and four girls. We were raised by our single mother. She died four years ago this month at the age of 93. Alzheimer's robbed us of her company during the last 12 or so years of her life.

She was a single mother in the 1950s and 60s, first in rural Fairfield County, South Carolina, then in Columbia. She raised eight children while working in the kitchen of the state mental hospital. Her efforts as a parent resulted in: no unwed mothers, no sons in jail, most of us went to college—all of us had the opportunity.

Today, all of her children have families to be very proud of.

She was in Charlotte for my swearing-in

as an attorney. As the ceremony ended, I brought my law license over to her. I recall saying something smug like, "Are you happy?" She smiled, I think laughed; clearly she was proud and happy, but she quickly said, "I will be happy when you shave that beard and start going to church more often."

In college I wondered what I missed by not having a father. I finally realized that I had strong father-figures in my life—my uncle Bud and my three older brothers. My brothers made it very clear to me that certain behavior would get my butt kicked, but they used much more graphic language.

They also led by example; they went to school and did well, and they have always been strong men, dedicated to their families. I have always wanted to be a good father like each of them.

Harrison, John, and Thomas are here with their wives, Shirley, Marian, and Jennifer. Thank you for leading by positive example, and for promising to kick my butt.

I have four sisters—actually, I had five mothers. I still have four mothers today. For some reason, when I was growing up my sisters thought that I needed constant supervision and direction. They still try to actively supervise me.

As a child, I was always annoyed with them. As a man, I realize that it's just the way they show they care about me. I am still their baby brother, and I am better for it. Louise, Edna, Thelma, and Mary are here. Thank you for being here tonight and for your constant supervision and direction.

Several of their children—my nieces and nephews—are here, including two members of the South Carolina Bar, Kyndal Price and Charles Brooks.

Those of you who know me know that I am very proud of my three children.

Kelli, the youngest, is a recent UNC grad. Kelli is in Spain working for a year before graduate school. Her first act was to steal my 40th birthday, Thanksgiving night, 1991. I have only seen Kelli at a loss for words once, but only for a moment. Upon hearing about lawyers giving advice as part of what we do, she was speechless for a moment then said she said to me, "People pay YOU for what YOU think?"

Allysen, my middle child, is here tonight. She is an honors graduate from UNC-Greensboro. She is in graduate school in occupational therapy in a foreign country, a place called Connecticut. She

just spent her fall break in Guatemala, volunteering with other students in her program working with disabled kids to fit them for wheelchairs and train the kids to use them.

Ward, my son, is the oldest and is also here. He works in Charlotte for an HR consulting firm. Ward is the strong, silent type. He ignores my not-so-subtle comments about wanting to be a grandfather. Ward went to Davidson, and played football there. I have had many proud moments at athletic events since he was a little kid. I was especially proud during the football dinner for seniors at Davidson when the coach told the audience how captains were elected by secret ballot of the players. The coach said that there was one name on every ballot, Ward Gibson.

Ward, Allysen, and Kelli make me a very proud father.

Many of you know another very special person in my life, Felicia Washington. She is an accomplished lawyer, a former partner at K&L Gates in Charlotte, and now is a vice-chancellor at UNC. I am very fortunate to have Felicia's companionship, her advice, and counsel.

But I do contribute something to the relationship. She has this ... issue... that I am helping her with. She often says to me, out of the blue sometimes, "Now that's an unfiltered comment," or she will sometimes ask a question like, "Did you consider trying to be diplomatic?"

I don't understand what's causing these ...random...comments.

I will work with her to help figure it out.

Each new State Bar president has recognized and thanked their law firms. I did not until recently appreciate the importance of having the support of the firm. I practice law with four other lawyers; four of us are Davidson grads; one is from the Citadel. The members of the firm are here. To my law partners, I am very fortunate to practice law with you. Thank you for being here.

The lawyers of North Carolina are very fortunate to have the North Carolina Bar Association and Allan Head. Allan Head needs no introduction to most of you. Allan has a serious health challenge now. Let's keep Allan and Patty in our prayers.

Let us also keep in mind the contributions to our profession by the Bar Association. The list of their programs and initiatives over the years would fill many

pages. The constant presence over the years has been Allan Head.

To Allan, thank you for what you mean to the legal profession in North Carolina.

In the late 1970s there was a looming crisis in North Carolina—the loss of professional liability insurance. The leadership of the Bar Association set out to organize a mutual liability insurance company, the first such company for lawyers in the country. Lawyers Mutual was chartered in 1977. Lawyers were asked to invest in the company to ensure that they would have liability insurance. Lawyers Mutual now provides coverage to more than 7,500 lawyers throughout the state.

What began as a vision has now endured for over 35 years—a liability insurance company owned and controlled by the lawyers of North Carolina, whose mission is to provide service to the legal community. That service extends beyond providing insurance. Lawyers Mutual offers a broad program of claims prevention education at no cost to its members, and at nominal cost to nonmembers. Their website has numerous practice guides on a wide range of topics, including law office management. This resource is available to all attorneys in North Carolina.

I have the honor of serving on the Board of LML. Board Chair Ken McAllister of High Point and president & CEO Dan Zureich are here, along with many other board members, the company's officers, and attorneys. Thank you for what you do for our profession.

Tom Lunsford is the secretary and executive director of the State Bar. Having heard his name, he is now the most uncomfortable person in the room. Tom never seeks credit or attention. He avoids the limelight, except during the annual roast of the outgoing president.

In 1981, Tom was hired as the State Bar's 13th employee. Today there are 85 on the staff, including 23 lawyers. The number of licensed attorneys has grown from about 7,000 to more than 27,000 today, with a corresponding increase in regulatory activity at the State Bar.

Tom has assembled a superb staff dedicated to serving the people of North Carolina. Although Tom will quickly tell you that he had a lot of help with construction of the new State Bar building, he was a constant presence making sure it all got done. Tom, we are fortunate to have you at



the State Bar. Thank you for your service to our profession.

In Spring 1970 I was bored with high school and I had too much free time. I can now freely confess that I regularly “played hooky” from school to attend the “coffee house” trial at the county courthouse.

For those of you too young to remember, during the Viet Nam War, anti-war protesters established coffee houses across the country as meeting places. Local governments, including the Columbia City Council, declared their local coffee house a public nuisance and sought to close it.

I went to the trial instead of going to school. The “hippies” were represented by Thomas Broadwater, a young African-American lawyer. The judge was mean and belittling toward Mr. Broadwater. In fairness to the judge, I later inquired about his reputation and was told that he was always mean and belittling to all lawyers.

I remember that the city’s attorney was arrogant and condescending, always interrupting with an objection or comment. Mr. Broadwater was cool and calm and never took the bait. He seemed to respond to the judge respectfully, but forcefully.

One exchange was quite memorable; the city’s attorney interrupted Mr. Broadwater’s examination of a witness to “correct” his pronunciation of a word. The judge agreed with the “correction.” Mr. Broadwater paused for a moment, then said respectfully, “Your honor, that’s how I was taught to pronounce the word throughout my education. I guess it’s just one more vestige of our separate, but equal schools.” Mr. Broadwater resumed examination of the witness before

anyone responded.

Looking back on it, Mr. Broadwater’s courtroom demeanor was the epitome of a professional lawyer—the kind of lawyer Mel Wright urges us all to be. I have had the privilege of working with and being mentored by some of North Carolina’s most respected attorneys, including Judge McMillan, Robin Hinson, Julius Chambers, and Ham Wade. While they have all reinforced professionalism, none of them have supplanted the impression made by Mr. Broadwater on the truant high school senior sitting in the back of the courtroom.

I said at the beginning that I would talk about pride in our profession. I am finally getting there. Thank you for indulging me.

As Ron Baker reminded us last year, the State Bar is a regulatory body, charged by statute to regulate the practice of law to protect the public interest. As the president of the State Bar, I pledge to continue vigorous enforcement of the statutory mandate given to us by the legislature.

As your president, I will also at every opportunity remind lawyers and the public that lawyers do good things that touch people’s lives. We are engaged meaningfully in practically every aspect of our society, in business, in government, and in all facets of the administration of justice.

The vast majority of lawyers—99% of us—act honestly and ethically each day for the benefit of our clients. Yet, we let our noble profession be denigrated by caricatures of ourselves as sharks, bulldogs, and bears, and by often repeated misquotes of Shakespeare.

Shakespeare’s oft repeated line, “The first

thing we do, let’s kill all the lawyers,” was stated by Dick the Butcher in *Henry the VI*. Dick the Butcher was a follower of the rebel Jack Cade, who thought that if he disturbed law and order, he could become king. Scholars have written that Shakespeare meant the line as a compliment to lawyers and judges who instill justice in society.

Even Justice Stevens wrote in a footnote to a dissenting opinion in a 1985 case:

As a careful reading of that text will reveal, Shakespeare insightfully realized that disposing of lawyers is a step in the direction of a totalitarian form of government.

I ask you, have we forgotten that the role of lawyers in our civilization is embodied in the Bill of Rights? Who is at the forefront protecting our Constitutional rights? Who protects freedom of religion, freedom of speech and a free press? Who protects the right to bear arms and the right to be secure from unreasonable searches and seizures? Who protects the right to due process and against self-incrimination, and the right to trial by jury and the right to counsel? It’s us, lawyers and judges!

It’s time for us to fight back to reverse the image of our profession that we helped create. We should take pride in who we are and what we do. As I travel the state, I will talk to every lawyer who will listen to me about the need for lawyers take pride in and defend our profession.

As your president, I will tell anyone who will listen why I am damn proud to be a lawyer; and I urge you to do the same.

Thank you again for the honor of serving as your 81st president. ■

## Penn State Scandal (cont.)

- American Health Lawyer Association seminar paper: William W. Horton and Jeff Sconyers, *Legal Ethics: What Penn State and Lehman Brothers Can Teach Lawyers About Conflicts of Interest*, Westlaw citation 20130214 AHLA-SEM 12.
5. The Freeh report is available at [progress.psu.edu/the-freeh-report](http://progress.psu.edu/the-freeh-report).
  6. A good summary of Baldwin’s interaction with the three witnesses and the grand jury is found in this article from the (Harrisburg, PA) *Patriot-News*: [pennlive.com/midstate/index.ssf/2012/02/penn\\_state\\_legal\\_counsel\\_cynth.html](http://pennlive.com/midstate/index.ssf/2012/02/penn_state_legal_counsel_cynth.html).
  7. This *Philadelphia Inquirer* article describes how Baldwin went from “adviser to witness against Spanier.” [articles.philly.com/2013-12-21/news/45419893\\_1\\_](http://articles.philly.com/2013-12-21/news/45419893_1_)

[spanier-graham-b-elizabeth-ainslie](http://spanier-graham-b-elizabeth-ainslie).

8. The opinion is available online at [dauphincounty.org/government/Court-Departments/Curley-Schultz-Spanier/Documents/April%209,%202013%20Opinion%20of%20Grand%20Jury%20Judge%20-%20Judge%20Feudale.pdf](http://dauphincounty.org/government/Court-Departments/Curley-Schultz-Spanier/Documents/April%209,%202013%20Opinion%20of%20Grand%20Jury%20Judge%20-%20Judge%20Feudale.pdf).
9. Deborah A. DeMott, *The Discrete Roles of General Counsel*, 74 *Fordham Law Review*, 955-981 (2005). Available at: [scholarship.law.duke.edu/faculty\\_scholarship/1239](http://scholarship.law.duke.edu/faculty_scholarship/1239).
10. Criticizing Freeh’s investigation and report has become a cottage industry in Pennsylvania. See, for example, this website: [ps4rs.org/freeh.html](http://ps4rs.org/freeh.html).
11. *Upjohn v. US*, 449 US 383, 101 S. Ct. 677 (1981).
12. *Miranda v. Arizona*, 384 US 436 (1966).
13. In 2009 the American Bar Association issued an excellent summary of the history, purpose, and best practices concerning *Upjohn* warnings in this white paper: [meetings.abanet.org/webupload/commupload/CR301000/newsletterpubs/ABAUpjohnTaskForceReport.pdf](http://meetings.abanet.org/webupload/commupload/CR301000/newsletterpubs/ABAUpjohnTaskForceReport.pdf).

14. See *Wylie v. Marley Co.*, 891 F.2d 1463 (10th Cir. 1989)(conversation between corporation’s general counsel and corporation’s former vice-president were covered by that former employee’s attorney-client privilege).
15. See *In re: Grand Jury Subpoena: Under Seal*, 415 F.3d 333 (4th Cir. 2005)(describing potential conflicts when corporation’s attorneys investigate alleged wrongdoing by corporation’s employees without providing those employees appropriate *Upjohn* warnings).
16. See *Home Care Indus., Inc. v. Murray*, 154 F.Supp. 861 (D.N.J. 2001)(corporation’s law firm disqualified from representing it in dispute over severance agreement with corporation’s former CEO due to failure to clarify its loyalty to the corporation rather than the individual employee).

# A Carolina Blue Bikini and a Court-Martial

BY CHRISTOPHER GEIS

IT WAS CAROLINA BLUE. A deep, rich Carolina blue—darker than the color of the cloudless sky draped over the horizon, but lighter than the color of the ocean below it.

He noticed the color as soon as she popped above the waves.

He watched her stand and slowly walk out of the chest-deep water. She walked up the beach dripping wet, but was drying quickly from the warmth of the late afternoon sun. Her blonde, shoulder-length hair was pulled back from her face. Her body was toned and athletic, and her skin was golden and glistened in the sunshine.

But it was the Carolina blue bikini that had his attention. It was a new one in the rotation. It was, of course, masterfully filled in, a vessel holding a piece of art. But it was the color that caught his eye.

Soon it would be off, thrown in a corner of the lifeguard stand. But even when he was against her, he peeked over at it. Carolina blue was the color of his happiness, and she knew it.

“Nice color,” he said a few minutes later.

“I guess you liked it,” she said, cracking a hint of a smile. “I thought it might remind you of good times.”

He had played four successful football seasons at the University of North Carolina, slinging passes around Kenan Stadium like nobody’s business on sunny Saturday afternoons in the fall, wearing a jersey that same shade of blue.

“Yes,” he said. “And later today it will provide a fine memory, I’m sure.”

She threw the Carolina blue bikini back on, kissed him, climbed down from the tower, and walked down to the water for another swim.

He told her he would be down in a few



*Image courtesy of Sarah Williams*

minutes. He reached into the cooler, popped the top on a chilled beer, and watched her jump back into the waves. He fished around in the canvas bag she had brought him, found some swim trunks, and put them on.

He carefully picked up his khaki marine uniform shirt and olive-green trousers, and placed them on a hanger in a corner. The uniform was crisply pressed and creased, and the ribbons over the left chest pocket of the shirt were a colorful fruit salad. There were two rows, and the one that stood out was the Combat Action Ribbon—blue on one side, gold in the middle, scarlet on the other side, with thin scarlet, white, and blue stripes down the middle. The ribbon was instantly recognizable to any member of the naval service. It verified that he had been in combat—that he had received and returned fire—and had served satisfactorily while doing so. A gold star signified a second award for another period of combat service.

He had a few other colorful gimme ribbons that filled two full rows, but the combat-action ribbon was the cornerstone, cherished by marines and sailors as a badge of legitimacy.

Aside from that ribbon, he had no personal combat decorations. He should have, but that was another story.

He had a shiny gold naval parachutist device—or jump wings—above his ribbons. It was a nice decoration, but he had never jumped except in training. It was really just for show.

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A HALF-HOUR LATER she was at the edge of the water and waving her arms at him. “Come on down!” she yelled.

But he waved her off. He watched the water lap up around her calves and grabbed another beer. He knew the water would make his body feel good, but the beer made

him feel better.

He was damaged now, and while he could still see and hear and walk, still had all his limbs, and still could function enough to remain a marine officer, he would never throw a football 70 yards again. The wear and tear on his body from two combat deployments had taken care of that. A pro career was out of the question.

Now his pleasures were Carolina blue bikinis, cold beers, and warm, sunny beach afternoons with his wife.

Once the court-martial was over, he might spend a lot of time at the beach with her. But not the officers' beach. That would probably be off-limits once it was all over.

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MOST PEOPLE HATED THE summers at Camp LeJeune. The base sat in a swamp bordered by the Atlantic Ocean and the New River, and summers were steamy and tropical. But, after two deployments to Iraq, he loved them.

Iraq was brutally hot—130 degrees on some days, and a lot like living in a pizza oven. A 95-degree day at Camp LeJeune with humidity out of the swamps could be bad, but there was always Onslow Beach and the coastal breezes. And Camp LeJeune was green. It had grass and trees, mostly skinny pines, but some with leaves too, and plenty of palmettos. All that lush greenery deflected and diffused the sunlight.

The desert was not like that. It was bleak and open and white, an endless moonscape broken only by the occasional palm grove by a canal or river or some place in the middle of a city where palm trees had been planted. There was no relief from the heat or the sunlight, unless there was a dust storm, and that was a whole other matter. The sky would turn brown or black and you could not see five feet in front of you, but you could taste the sand and grit that hammered your skin like pellets and lodged in your eyes, ears, and everywhere else. He would take a tropical summer rain squall at LeJeune any day over a dust storm in Iraq.

Each afternoon during the trial, he would leave the courtroom and tell his lawyers he would see them after dinner because first he would need to go to the beach and find his wife. The officers' beach was their escape, from the trial and from the heat of the swamp. They lived in a nice home on base and in 15

minutes they could be at a beautiful, undeveloped beach, with no one around them. Most of the officers were deployed, training while in between deployments, or spending precious time at home with family they rarely saw. People would come out on weekends, but the weekdays and nights were solitary and they liked that. They took advantage as much as they could, especially during the trial. Most days it was sunny, but even when the occasional afternoon thunderstorm rolled in, they could huddle in the large enclosed lifeguard tower and sip cold drinks.

The beach was their love. The salt air, the open sky, the clouds, and the blue water made them feel alive each day.

They had tried other beaches. Early on they would zip out the back gate of Camp LeJeune and over the bridge of the New River until they got down to Topsail Beach or Wrightsville Beach to the south. Both became too crowded, though. So they went even further south, through downtown Wilmington and past the World War II battleship USS North Carolina anchored on the Cape Fear River, and over the bridge to Brunswick County.

They went 30 or so miles before they found Holden Beach, and they liked that for a while on the weekends. But once the press attention started, Holden became too difficult, because he would be recognized frequently and he did not want to talk to anyone about it. At the convenience store just over the bridge at Holden, there were racks of daily newspapers from Charlotte, Raleigh, Fayetteville, Wilmington, and Myrtle Beach, not to mention the *New York Times* and *USA Today*, all catering to the summer vacationers who had time to pay attention to the news. It was not uncommon for a story or photo of him to be in five or more papers on the same day, sometimes on the front page staring back at him as he walked out of the store with a six-pack or a cup of live bait. He had been, of course, the quarterback at Carolina, not just a war hero.

So they had returned to Onslow Beach. There were no civilians, and at least the military folks let them be.

Some afternoons she just could not watch the trial and would leave the courtroom and head out there early, swimming in the ocean while she waited for him. She would have cold drinks stashed in the lifeguard stand ready to go. He would drive his Jeep Wrangler out there wearing his short-sleeved khaki dress

## The Results Are In!

This year the Publications Committee of the State Bar sponsored its 11th Annual Fiction Writing Competition. Fifteen submissions were received and judged by the committee members. The submission that earned second prize is published in this edition of the *Journal*.

shirt, olive-green dress trousers, and olive-green garrison cap. He was 6' 2" and muscular, and, with tanned arms and black sunglasses, looked like a marine officer.

He would carefully survey the scene around him and look at the beach, then walk down to that lifeguard tower that was never used. It was a spacious wooden hut built on stilts above the sand, and he could change in it and do other things with privacy.

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THE WHOLE thing had started with the best of intentions.

In the summer of 2001, as he entered his senior season, he was one of the top quarterbacks in college football. His team was coming off an ACC championship, and he was touted as an All-America candidate. He glowed in the adulation and gushing praise of tanned, blonde cheerleaders, bloated fans, and out-of-shape sportswriters and broadcasters.

Then September 11 came, and everything changed.

The week after the towers fell, his brother called him to tell him that he would miss his next game in Chapel Hill because his unit would be training. His brother was an infantry officer and stationed just down the road at Camp LeJeune. He said he probably would deploy earlier than expected, and instead of six months of hitting cool liberty spots around the world they would be going into Afghanistan or somewhere else the terrorists could be found.

He wanted to be with his brother. More than that, he wanted a part of it all. Football games and cheerleaders did not seem that important anymore.

His father had served in the navy in Vietnam, and his grandfather in the army in World War II. Now the country had been attacked and his brother would be going off

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to battle. Responsibility, honor, courage, integrity, commitment—his father had drilled those things into him since he was young, but they didn't really resonate with him until now. They were fine concepts for a sports field, but they meant something when your country was at war. He had no choice but to join the fight.

The season ended without another ACC title, but was still a success. The team finished the season in a bowl game in Charlotte a few days after Christmas. More than 60,000 people pulled themselves from the shopping malls to attend the affair, which was sponsored by and named after a tire company.

The same week, while Americans celebrated the holy season of shopping and holiday football, American warplanes were dropping bombs over Afghanistan, and ground troops were slugging it out in the snowy mountains trying to find Osama and Omar and routing the remnants of al-Qaeda. Just before the game, navy fighter jets flew over the stadium and a marine honor guard presented the colors. The fans in the stands and tailgaters outside roared their approval, and then went back to gorging themselves.

He had other matters on his mind besides football, but he threw a pair of touchdown passes and led Carolina to victory in his last game anyway.

When it was over and he had had answered every question from the reporters, he went out a side door of the locker room, snuck out of the stadium, and started the six-hour trip to Norfolk, Virginia, where his brother was sitting on a warship tied up at the pier and waiting to deploy. The next morning he stood on the pier and watched his brother man the rails of the giant warship as sailors and marines went off to war with their dress blue uniforms blowing in the chilly harbor breeze.

The pier was filled with family members of the departing warriors. Tears flooded their faces, but not his. The scene gave him a knot

in his stomach, but he was focused on what he had to do and was not going to let emotion distract him.

Soon the ship was out of the harbor and out of sight, and he was off to Chapel Hill to pack his things. The football season was over, and he had graduated a few weeks earlier. When he got back he took his diploma and went to see the recruiter to sign the final paperwork. He knew what he had to do. His dreams of playing professional football would be on hold while he served in the Marine Corps. He would trade a Carolina blue football jersey for marine dress blues and some sand-colored desert fatigues.

The recruiter loved him. He was an all-conference quarterback who played football on national TV. They would find a nice desk job for him somewhere and trot him out in his dress blues for the cameras every once in a while. The Marine Corps' reputation would be enhanced.

But he had other ideas. When he was asked to fill out his dream sheet, listing his three top desired jobs, he listed infantry, infantry, and infantry. After much wrangling and numerous phone calls and emails to and from the Pentagon, he was granted his wish. The Marine Corps got a nice little PR bump out of it, but he declined all interviews.

Off he went that January for ten weeks of officer candidate school in Quantico, Virginia. There was much yelling, running, pullups, pushups, and situps, and a blur of shaved heads in tight-fitting green shorts and t-shirts. Then it was six months, again in Quantico, of The Basic School, or TBS, learning how to be a marine officer. Days and sometimes weeks in the field. Harsh, howling winds off the Potomac when it was cold, and humid, jungle-like days when summer came. There was a lot of mud, and he was usually damp and bone tired. Then, finally, came the infantry officer's course, another grueling ten-week marathon of yet more training, obstacles courses, weapons, maps, and such.

Finally, early in the new year he was sent to the fleet, the most well-known second lieutenant in the Marine Corps. He arrived at Camp LeJeune just in time to pack his sea bag, get on a plane, and stand by for the invasion of Iraq.

He would never see Afghanistan—that always bothered him, as if his purpose had been thwarted or misdirected by a cruel fate. But he would make the best of it.

He spent St. Patrick's Day night shivering

in a tent in the desert in Kuwait, not far from sand berms that marked the border with Iraq. Camp Virginia, it was called, but it looked like the moon might. While his friends back home drank Guinness and watched the developing drama on TV, he ate MREs and shared a tent with a horde of smelly marines amped for war. Then, the night of the invasion, all hell broke loose and they raced across the border and off to Baghdad.

The invasion was relatively easy and casualty-free for his unit. But the destruction, death, and other unpleasantnesses of war were more than made up for on the other side. Crying women and children, smoke, fire, destroyed bridges and buildings, the smell of spent rounds, and burned corpses were his landscape. The chemical weapons suits proved hot, uncomfortable, and unnecessary.

After Saddam's statue was pulled down, the Marines stayed a few more weeks and watched as chaos slowly ensued in the cities. Then they quickly headed back south and flew home, mission accomplished.

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THE SECOND deployment had been to Iraq again. On the third day of the Second Battle of Fallujah, he killed two insurgents and carried a wounded comrade to safety amid the nearby explosions from badly aimed rocket-propelled grenades, or RPGs. His unit wrote him up for the Silver Star. The citation sailed through the chop chain, with an endorsement from the forward deployed commanding general of all marine forces in Iraq.

When spring came, as Fallujah was emptied out and gutted, his unit was redirected to Ramadi. That's where the trouble began.

Entering Fallujah had been like tearing open the gates of hell all at once. Ramadi, on its worst days, was no better, but it was a slow burn. Local armed gangs ran the city, and a few foreign fighters joined in occasionally. But unlike Fallujah, the fight there was more uneven, less predictable. Booby traps, improvised explosive devices on the road and in cars, snipers, and the occasional straight-up ambush were all part of the mix. They would hole up in an abandoned house or school, or the local police station, and try to pacify the neighborhood, but the price was high in casualties and morale.

One night he was leading a clearing operation through a bad side of town when a

squad of his marines walked through a booby-trapped door near his position. The explosion shook the block. Two were killed, three badly wounded. Body parts flew in all directions.

He directed another squad to the scene, and they began asking questions and rounding up anyone they could find. Before dawn, two women, an old man, and a teenage boy were dead from rounds fired at close range from M-4 rifles.

When he came upon the scene, he questioned the marines and the navy corpsman in the squad. He accepted their explanations for what had happened, took some photos, wrote a short report, and sent everything up the chain a few days later. He grieved for his lost men and wrote letters to their families. Then he went back to the fight.

A few weeks after the shooting of the civilians, he was questioned by some staff officers from the forward headquarters, then by agents from the Naval Criminal Investigative Service. He was read his Article 31(b) rights, and he did not have to talk, but he answered their questions anyway.

Months later, two of his marines and the corpsman were charged with killing the civilians and then trying to cover it up. The newspapers and television broadcasts were reporting the deaths as war crimes and raised the specter of Vietnam atrocities all over again.

The writing was on the wall. Not long after he returned from deployment, he was served with a charge sheet. Not for the killing, of course, which he knew nothing about, but for not promptly reporting it and not investigating it thoroughly. He had been derelict in his duties and not followed orders to properly report and investigate the killings, or so the Marine Corps said.

A family was dead, the Iraqis were livid, and news stories about the horrors of war and civilian deaths were splashed across television broadcasts and the covers of news magazines. Reporters risked their lives and went into Ramadi to interview relatives of the victims. Women and children cried on TV, and angry men, though translators, asked why the Americans who had come to help them were killing their people. No mention was made of the marines killed and maimed by the booby trap.

Once the media storm began, people would have to be held accountable, and he was placed in the accountability line along with many others. A skipper is ultimately

responsible for everything that occurs on board his ship, and these killings occurred under his watch.

In Washington, a hold was put on the Silver Star citation. There would be an Article 32 investigation and then a general court-martial. But there would be no Silver Star Medal ceremony, that was certain.

\* \* \*

THE MILITARY judge walked in a side door of the courtroom and everyone rose, with those in uniform coming to parade-deck attention. Marines and their family members, along with the victims' relatives and news reporters, were packed in tightly side-by-side. Outside the red-brick, one-story building, several television news trucks were parked next to a set of pull-up bars.

"This general court-martial is convened by the commanding general, II Marine Expeditionary Force, Camp LeJeune, North Carolina, by general court-martial convening order 1-07 dated 22 May 2007," the trial counsel, or prosecutor, read aloud for the record. He continued on with a few other jurisdictional details, then said: "The general nature of the charges in this case are violation of the Uniform Code of Military Justice, Article 92, two specifications: dereliction of duty and failure to follow a lawful general order."

The trial counsel then noted, again for the record, that the accused and his counsel had been furnished a copy of the charge sheet and were present in the courtroom, and that the five-day waiting period between service of charges and start of the trial had expired.

The lieutenant was asked how he pleaded to the charges, and the answer was not guilty.

The court-martial was set to begin. Twelve officers, the members, would be empaneled over the next two days and sit as a jury to judge one of their own and, if necessary, prescribe an appropriate sentence.

They were clean-shaven, hard-looking men, with short haircuts, strong jaws, and weathered faces chiseled by years of service to the corps. Anyone would want them in his foxhole. And anyone who was not guilty would want them on his jury. They had sat through many incoming rounds and suffered the hardships and calamities of not just war, but training for war, and they had gifts for cutting through the chaff and getting to the wheat with efficiency. They were senior to

him, but they had served where he had served, and they would judge him as he should be judged. No truer panel of peers existed in the criminal justice system.

He was not sure how he had ended up here, and over and over again he searched his mind and heart to figure out why. This despite the protestations of his wife and his lawyers, who told him he had done nothing wrong and should have been handed the Silver Star instead of a charge sheet.

He had three good lawyers, one from the Marine Corps, one from the navy, and a civilian who had fought years ago in another war. The civilian lawyer had longer hair and a more brusque manner. He wore Italian suits and cowboy boots. He was expensive, but some boosters from college had rounded up the cash to retain him just before the trial. His military counsel were just as smart, and they had served in Iraq, but the civilian lawyer had more freedom to get in the news media and push back against the establishment. The civilian could say things his military lawyers could not.

The trial would turn out to be fairly short, but with the pre-trial motions and selection of the members, the whole affair dragged out for weeks.

Once the members were selected, the government started presenting its evidence. But after only a few days, its case was short-circuited as public opinion turned strongly in his favor. Night after night of television news reports, followed by day after day of stories in morning newspapers, and of course a constant stream of 24-hour shouting on the internet, all helped turn the corner.

Early each morning the media would take pictures of them walking hand-in-hand down the sunny sidewalk and into the courtroom. The attorneys made sure to stand a few feet behind the quarterback-turned-warrior and his beautiful blonde wife.

The realization slowly sunk in with the public that he was being tried for crimes that he did not commit, in a war that should not have been fought, but in which he had served bravely. Calls were made and letters sent to members of Congress. The politicians called the Pentagon and the White House. Word was soon handed down that he was the wrong one to punish.

The secretary of the navy quietly directed the two-star general who was the convening authority at Camp LeJeune to dismiss all charges and let him be honorably discharged

upon the expiration of his service obligation. There would be no Silver Star, but there would be no dismissal from the naval service and no public humiliation, either. And he would qualify for VA benefits if he needed them, and he probably would.

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“LIEUTENANT,” THE military judge said, and he and his counsel rose and stood at attention. He should have been a captain by now, but the automatic promotion had been put on hold because of the charges and so he was still a first lieutenant.

“The convening authority has indicated a desire to dismiss the charges against you with prejudice. That means the charges can never be brought back again for any reason. I am dismissing the members, and there will be no trial in this matter. I am sorry that you have been put through this. Do you have any questions?”

He looked at the judge, but he could not muster anything to say. Behind the judge were two large flags, one American and the other the scarlet-and-gold Marine Corps flag. The courtroom was packed, but it was as if he was in a dream and everything around him was in a slow-motion, silent movie. He had experienced this kind of clarity only a few times before, in combat and on the football field. His attention was strong and focused.

“No, sir,” he said, and then his attorneys, on each side of him, put his arms around him and hugged him slightly. He turned around and looked over the railing at her and smiled. Her eyes were moist and her hands trembled. He was happy that she had not left for the beach yet.

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IT WAS COLD this morning, and he knew he would need a sweater under his suit jacket. He was getting older, and his bones ached on mornings like this, so he needed a little extra warmth. He grabbed his favorite navy blue pullover out of the closet and walked to the mirror in the bathroom.

He stood in front of the mirror and tightened his tie. Then he took both hands and pulled the sweater over his head, rolled it over his torso, and stuck his arms through the sleeves. He flattened it out across his chest and fixed the cuffs, then looked up at himself, satisfied. A colorful hint of silk tie poked out of the top at the neckline. It fit and he was now presentable to the public.

He had done this before under different circumstances, and his mind instantly flashed back over two decades to similar scenes. In his mind’s eye he rolled over them:

On deployment, when he put on a green fire-retardant long-sleeved shirt under his body armor and camouflage blouse just before going outside the wire on a chilly winter day in the desert. He could hear explosions in the distance, and who knows, this might not be his lucky day and he might need it. He would look in the mirror before he left to make sure everything fit properly and he looked like a marine was supposed to.

In the locker room before football games, when he rolled his beautiful blue football jersey over his shoulder pads just before heading out on to the field, and checked himself out in the mirror to make sure he was presentable for the cheerleaders and the crowd.

As a boy, on Sunday mornings before going to church, when his mother would make him wear a sweater because he refused to wear a jacket with his shirt and tie. She would stand over him and help him get

squared away in front of the mirror while he fussed and fidgeted like he was sucking on lemons.

The same repetitive, reflexive, almost involuntary motion, done hundreds of times, played over and over in his head through 20 years. Lift the arms, roll it over the torso, straighten, and flatten. Then look in the mirror and pass judgment on the picture in front of him until he was satisfied that he was presentable and appropriate.

There was a common thread. This was his armor, his protection against the outside world, both physical and psychological. A fire-retardant shirt might keep him from being horribly burned and disfigured in an explosion. A wool sweater would make him presentable as a ten-year-old in church or ward off the chill on a cold morning before he went to court. And, by God, a football jersey, in his team colors and on display for all of his small world to see, just made him look good, and would remind him that he was a member of a team and a tradition.

His court-martial process was long over. He was out of the Marine Corps now.

But there was still the matter of the men he had led being tried for their alleged crimes. Two marines and one sailor, the corpsman who had belatedly tried to save the victims and then tried to hide the fact that any of it had ever happened. They were on trial in a general court-martial at Camp LeJeune, and he would be testifying. He would help them if he could, but he really knew little about what had happened that night. After he finished testifying, he would stay if he could because he wanted them to know he was there.

She was with him, and she would again watch from the gallery. It would not be pleasant, but they knew it would be over quickly, at least for them.

There would be the beach when he was done. Winter was coming, and it would be lonely, windy, and cold out there. But they would go, and see what was in store for them. ■

*Chris Geis is an attorney for Womble Carlyle Sandridge & Rice in Winston-Salem, and holds the rank of commander in the US Navy Reserve, Judge Advocate General’s (JAG) Corps. His story “Race in Carolina” was published in the Fall 2010 Journal. This story is dedicated to his late father, John Francis Geis, who taught him how to write.*

## 2015 Meeting Schedule

Below are the 2015 dates of the quarterly State Bar Council meetings.

January 20-23	NC State Bar Headquarters, Raleigh
April 14-17	NC State Bar Headquarters, Raleigh
July - 14-17	Hilton Center City Hotel, Charlotte
October 20-23	NC State Bar Headquarters, Raleigh <i>(Election of officers on October 22, 2015, at 11:45 am)</i>

# We want your fiction!

*Historical Fiction*

*Romance*

*International Espionage*

*Poetry*

*Humor*

*Science Fiction*

## 12th Annual Fiction Writing Competition



The Publications Committee of the *Journal* is pleased to announce that it will sponsor the 12th Annual Fiction Writing Competition in accordance with the rules set forth below. The purposes of the competition are to enhance interest in the *Journal*, to encourage writing excellence by members of the bar, and to provide an innovative vehicle for the illustration of the life and work of lawyers. If you have any questions about the contest, please contact Jennifer Duncan, Director of Communications, North Carolina State Bar, [ncbar@bellsouth.net](mailto:ncbar@bellsouth.net), 910-397-0353.

### Rules for Annual Fiction Writing Competition

The following rules will govern the writing competition sponsored by the Publications Committee of the *Journal*:

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

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

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

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

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

6. **All submissions must be received in proper form prior to the close of business on May 29, 2015.** Submissions received after that time will not be considered. Please direct all questions and submissions to: Jennifer Duncan, [ncbar@bellsouth.net](mailto:ncbar@bellsouth.net), 910-397-0353.

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

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

**Deadline is May 29, 2015**

# IOLTA Income Declines; Grantee Recognized

## Income

Unfortunately, we must report that the income from IOLTA accounts continues to decrease as many banks are recertifying their comparability rates at lower levels. We do not expect this situation to change until interest rates increase. In 2013, income from IOLTA accounts declined by 9% and was under \$2 million for the second year in a row. However, our total income, which received a boost from two cy pres awards during 2013 totaling over \$650,000, was \$2.4 million. Income from participant accounts through the second quarter of 2014 decreased by another 9%. Though indications from Federal Reserve officials are that interest rates could begin to rise in 2015, we do not know how long it will take for rates on accounts to be affected.

**Future National Settlement Income**—Funding for IOLTA programs nationwide was included in the settlement with Bank of America announced by the Department of Justice in August. Of the \$7 billion allocated to consumer relief, IOLTA programs will receive some funding for the provision of foreclosure prevention and community redevelopment legal services. Though Bank of America benefits if it distributes the funds within a year of the settlement (by July 31, 2015), it is not yet known when the funds will be distributed or what amount each program will receive.

In addition, when the settlement is complete (December 31, 2018), there are two potential sources of residual funds for the same purposes from the consumer relief funds and from a fund set aside for tax relief for those borrowers who have added tax liability due to their mortgage debt being eliminated (75% of these funds to go to IOLTA programs).

## Grants

Beginning with 2010 grants, we have limited our grant-making to a core group of (mainly) legal aid providers. Even with that restriction and using over \$2.5 million in reserve funds, grants have dramatically

decreased (by over 40%). For 2012, 2013, and 2014 we were able to keep grants steady at \$2.3 million because we received additional funds from cy pres awards. We anticipate having to decrease grants again in 2015.

## State Funds

In addition to its own funds, NC IOLTA administers the state funding for legal aid on behalf of the NC State Bar. Total state funding distributed for the 2013 calendar year was \$3.5 million. The state budget adjustments for 2014-15 eliminated the appropriation for legal aid work (currently \$671,250). Though the proposed Senate budget had also eliminated the Access to Civil Justice funding from court fees (~\$1.8 million), that funding was continued in the final budget, with significant additional reporting requirements for Legal Aid of NC. The Equal Access to Justice Commission and the NCBA continue to work to sustain and improve the funding for legal aid.

## Grantee Spotlight: Legal Services of Southern Piedmont Receives Nonprofit Award

Legal Services of Southern Piedmont (LSSP), based in Charlotte, received the state's highest honor for nonprofits from the NC Center for Nonprofits. The Nonprofit Sector Stewardship Awards recognize organizations that use exemplary nonprofit practices to be good stewards of the community's trust and funds. The center presented this award to LSSP at its statewide conference in September, attended by 800 nonprofit, business, and government leaders. The center gives each recipient \$500 for professional development of its board and staff, and a commemorative work by Durham artist Galia Goodman.

NC IOLTA has made grants to LSSP since our first grant cycle in 1985. "We were so pleased—but not surprised—to learn that they had received this honor," said NC IOLTA Executive Director Evelyn Pursley. "We are proud to see our grantees recog-



nized as exemplary by the Center for Nonprofits—those most knowledgeable about best practices for nonprofits and most familiar with nonprofit organizations throughout North Carolina." Other long-time IOLTA grantees who have received this award are: Pisgah Legal Services in Asheville, Mediation Network, and Disability Rights NC.

For 46 years, LSSP has provided advice and legal representation for eligible individuals and groups in the Charlotte area and west-central North Carolina. Its programs range from assistance with taxes and unemployment insurance to consumer protection for clients facing foreclosure, bankruptcy, or unfair trade practices. It also educates the community about legal barriers that low-income residents face, and it helps its clients to use self-help solutions and find economic opportunities whenever possible.

"Our mission is to provide a 'full meas-



ure of justice for those in need,' not a fraction of justice, not part or half," says Ken Schorr, LSSP executive director. "We use our skills as lawyers, through the legal system, to protect basic human rights and meet basic human needs such as safety, shelter, and access to health care."

"We selected LSSP for being a masterful 'first responder' when low-income North Carolinians face new problems in the legal system, and for working creatively with other nonprofits to find solutions," said Jane Kendall, president of the NC Center for Nonprofits. "LSSP sees the problem and then springs into action to work with nonprofits, government agencies, and for-profit businesses to address it."

### Innovation and Collaboration

True to its mission, LSSP pays constant attention to the ever-changing needs of their client community to ensure their services address current challenges. One example of such responsiveness can be found in LSSP's Veterans Services Project. While LSSP has provided legal aid to veterans throughout their history, in 2012 LSSP noted a pressing legal need facing veterans seeking benefits, exacerbated by administrative backlogs at the Department of Veterans Affairs, and they responded. Research that year through Charlotte Bridge Home identified the many challenges facing veterans, noting that approximately 20% of veterans in Mecklenburg County were homeless. Launched in July 2012, the Veterans Services Project provides dedicated attention and resources to assist veterans in accessing disability benefits and other benefits related to their military service.

The project continues to gain momentum, serving 151 veterans in fiscal year 2013, obtaining \$169,753 in benefits. LSSP's outreach to the veteran community has included partnership with W.G. Hefner VA Medical Center in Salisbury to offer legal clinics, Community Link to provide wrap-around services to homeless veterans, and the NC Veterans *Pro Bono* Network. In February 2013, LSSP hosted Introductions to Representing Veterans, a continuing legal education (CLE) event. The event trained more than 70 attorneys to represent veterans on a *pro bono* basis.

### Leveraging Resources

"Each year, LSSP serves 2,400 families

facing a crisis of safety, shelter, health, or income," says Schorr. "However, we are nowhere near having the resources to meet the needs of the more than 300,000 people eligible and in need of legal assistance, but unable to afford private lawyers." LSSP supplements its staff of 13 attorneys and seven paralegals with a *pro bono* program that taps the expertise of 100 attorneys that contributed 1,514 hours last year alone.

"Figuring out how to get the most impact for the community from limited dollars is the hallmark of an effective nonprofit," says Emily Zimmern, chair of the NC Center for Nonprofits' Board of Directors and the president and CEO of the Levine Museum of the New South in Charlotte. "LSSP is extremely adept at getting attorneys to provide top-quality legal assistance for its clients at no charge. These are attorneys in law firms and corporations that are usually paid hundreds of dollars per hour."

### Community Support

LSSP has built a broad and strong foundation of community members who are dedicated cheerleaders for the organization. This year, LSSP hosted their 8th annual Justice for All luncheon on March 25. The record-breaking event, attended by 640 guests, raised nearly \$90,000 for the Access to Justice campaign, a fundraising initiative undertaken by LSSP and Legal Aid of North Carolina. The luncheon celebrated the contributions of the community and highlighted the importance of legal aid.

"Nonprofit leaders have to continue to earn the community's trust every day. Sound

practices in their governance and management help them maintain this public trust," said Zimmern.

LSSP's board takes an active role in this event and other efforts of LSSP including resource and *pro bono* development. Board committees play a key role in operation of the organization. LSSP's board members regularly assess their collective performance, as well as the performance of individual board members and the executive director.

Attorney Bill Farthing is president of LSSP's Board of Directors and a partner at Parker Poe Adams & Bernstein LLP in Charlotte. He says, "The keys to LSSP's success are an absolute focus on the mission, mutual trust and respect among the board and the executive staff, and a board that holds itself accountable for fulfilling its responsibilities."

"These are the kinds of sound practices that effective nonprofits use," says CPA Walter Davenport of Raleigh, who serves as treasurer of the NC Center.

Civil legal aid helps ensure fairness for all in America's justice system, regardless of how much money one has. As noted in the award nomination by the Equal Access to Justice Commission, "With unique attention to program collaboration, community responsiveness, and the development of strong community support, Legal Services of Southern Piedmont is a model provider of civil legal aid across the state, and deserving of recognition for their longstanding excellence with a 2014 Sector Stewardship Award from the NC Center for Nonprofits." ■



# Top Tips on Trust Accounting: Safeguarding Funds from Embezzlement

BY PETER BOLAC

The State Bar is seeing an alarming increase in the number of reported cases of employee embezzlement from law firms. Just this month, I received three calls from lawyers who had trust account funds embezzled by employees. According to the State Bar investigators, there were ten reported thefts through October of this year (an average of one a month). This is both horrifying and unacceptable. I fear that the self-reported cases are merely the tip of the iceberg in comparison to the number of thefts that have gone either unnoticed or unreported. The amounts reported stolen from trust accounts range from petty cash to hundreds of thousands of dollars, all of which the lawyer is professionally responsible for replacing in order to protect clients from harm. Perhaps the most disconcerting fact is that the thefts are perpetrated by both new and long-term employees with about the same frequency. The culprit is often the last person you would suspect, and the problem will often present itself when you least expect it. Before you dismiss these thefts as something that only happens to bad lawyers or overstretched solo practitioners, note that many fine lawyers and large reputable firms have fallen prey to these crimes.

Types of employee theft range in sophistication from the obvious to the complex. On one end, there are employees who simply write themselves checks from the trust account, and on the other end, there are employees who develop shell companies and manipulate bank documents to cover up systematic fraud. The State Bar sees more of the former than the latter. This is concerning because simple good management of the trust account would deter and prevent this type of blatant, unsophisticated theft. The more difficult-to-catch thefts include: employees stealing cash brought into the

office by clients before the cash is recorded on a ledger or deposited into an account; employees making payments to shell companies or bank accounts in real estate closings or settlements; and employees scanning bank statements into Photoshop and doctoring numbers to hide illicit activities.

## Something Doesn't Feel Right

If you suspect that an employee is embezzling from your trust account,<sup>1</sup> the first thing you should do is obtain physical control of the trust account records. Too often we hear that an employee, upon getting word that the lawyer may be on to him, made up an excuse to take the trust account records home with him where they were ultimately "lost" or destroyed.

After securing your records, contact an independent CPA or forensic accountant to audit your trust account and look for discrepancies. Have the CPA perform a proper three-way reconciliation of the account, examine check images, and look at checkbook receipts and deposit slips.

Once you have retained an outside consultant to examine your records and confirmed a discrepancy, confront the employee. Often, the employee is weighed down by his crime and is ready to confess. While confrontation may be uncomfortable and the employee may become combative, defiant, or insulted by your accusations, it is your responsibility to ensure that client funds are properly safeguarded by asking difficult questions. If you cannot be sure that an employee has stolen funds, but remain suspicious, you may elect to suspend the employee with pay and have him temporarily removed from the office.

## Worst Fears Realized

When embezzlement is discovered, the lawyer *must immediately* do the following:

- **Replenish any known deficit in the trust account** by depositing firm funds or personal funds into the trust account and documenting the deposit on the appropriate client ledgers. If the lawyer suspects that more funds may have been embezzled, the lawyer may deposit funds into the account to cover estimated deficiencies. The lawyer should create a ledger for this additional deposit and title it "firm funds to cover estimated deficiencies."

- **Report the embezzlement to the North Carolina State Bar.** While a report in writing will at some point be required, calling our office right away will allow us to help you with any questions and concerns you may have—(919) 828-4620.

The lawyer is strongly encouraged to also immediately take the following actions:

- **Terminate the employee.** Do not allow the employee to take any documents from a workstation, or to access email or other computer files.

- **Call the police.** Pressing charges on a long-trusted employee may be difficult, but it is important to show that you are taking your responsibilities seriously. It is also important that the employee ends up with a record that is informative to other lawyers if the employee attempts to gain employment in the legal field again.

- **Question other employees** as to their knowledge of and/or complicity in the scheme. It may be that there was more than one employee involved in the embezzlement, or that an employee violated your trust by not revealing potentially incriminating information when it became known.

- **Consider opening a new trust account.** If you are not 100% certain of the amount that has been stolen from your trust account, consider opening a new account for all entrusted funds going forward. This way, you can operate your practice through the

new trust account with fresh records and processes while simultaneously investigating the old account for deficiencies.

### How Did I Get Here? What Should I Have Done Differently?

The NC State Bar *Lawyer's Trust Account Handbook*, available on the State Bar website ([ncbar.gov/menu/publications.asp](http://ncbar.gov/menu/publications.asp)), has a chapter dedicated to safeguarding funds from embezzlement (Section IX). Some of the tips listed in that section include:

- Do not act in haste when signing checks (make sure you know what you're signing).
- Examine trust account check images for forged signatures.
- Reconcile your trust account promptly after receiving a bank statement. A lawyer should be reviewing and signing off on all reconciliations monthly and quarterly.
- Review all trust account activity regularly. Random spot checks on all trust account records and correspondence helps deter theft.
- Legal fees paid in cash are difficult to control. Office policy should require that a receipt must be given to any client who pays in cash, and the lawyer should regularly ask clients who pay in cash if they received a receipt. The numbers for receipts in the receipt book should also be examined periodically to determine if any receipts were removed or voided.

odically to determine if any receipts were removed or voided.

- Check with the post office to determine if anyone other than designated personnel has attempted to pick up your mail. A good thief may intercept mail that would reveal incriminating information.

- Consider having your bank statements sent to your home address.
- Question lifestyle changes (new cars, jewelry, travel, etc.) of individuals with access to your account. Also, personal and family problems, health issues, or depression may be a cause of embezzlement.
- Beware of an employee who is overly possessive of the trust account. Implement internal controls to divide certain trust account responsibilities between multiple employees.

### Conclusion

Often, trust account embezzlement is a crime of opportunity. If an employee knows that nobody is looking at the records, reviewing reconciliations, or performing random spot checks, then the employee will be much more likely to attempt to steal. A firm that has strong trust accounting practices will rarely have to deal with simple and obvious theft. Even with adequate supervision, how-

ever, there is often little a lawyer can do to stop an extremely motivated and diabolical employee. While acknowledging this depressing truth, a lawyer should be able to discover the theft quickly and mitigate potential harm to his or her clients with sufficient safeguards, internal controls, and personal oversight of the trust account.

If you have any questions about employee embezzlement or any other trust accounting issue, please contact Peter Bolac at (919) 828-4620 or [Pbolac@ncbar.gov](mailto:pbolac@ncbar.gov). Follow Peter on Twitter @TrustAccountNC for alerts on trust account scams.

### Endnote

1. It would be useful to follow this procedure for any account, but the State Bar is mostly concerned with theft of entrusted funds.

### Random Audits

Lawyers randomly selected for audit are drawn from a list generated from the State Bar's database based upon judicial district membership designations in the database. The randomly selected judicial districts used to generate the list for the 4th quarter of 2014 were District 19C (Rowan County) and District 25 (Burke, Caldwell, and Catawba Counties). ■

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PS Form 3526, August 2012 (Page 2 of 3)

# Positive Psychology for Lawyers—The Benefits of Positive Emotions

BY HALLIE N. LOVE

The emerging scientific field known as positive psychology helps us understand how the brain can change, and that we can purposefully change it to create more positive emotions. Positive emotions, in turn, broaden our cognitive capacity, allowing flexible, open-minded thinking for creative problem solving and building of personal resources such as skills, knowledge, and relationships.

Positive psychology matters a lot in the field of law because, while many lawyers are actually happy, there are perhaps just as many who are not happy. It is well documented that lawyers are more likely to suffer from depression than any other occupational group. In a Johns Hopkins University study of more than 100 occupations, researchers found that lawyers led the country with the highest incidence of depression.<sup>1</sup>

What makes so many lawyers unhappy?

It appears the world view that makes lawyers effective in their profession can pollute other parts of their life. In other words, many of the qualities that help lawyers succeed in practice such as prudence, aggression, and critical and judgmental thinking are traits that can have disastrous consequences when applied in one's personal life.

Take "prudence," for example. Martin Seligman, Ph.D., former president of the American Psychological Association, and the "father" of positive psychology notes in his

book, *Learned Optimism: How to Change Your Mind and Your Life*,<sup>2</sup> that a prudent lawyer strives to uncover every conceivable trap or disaster that might occur in a legal situation. This skill of anticipating a range of problems is highly adaptive for lawyers who then foresee even implausible outcomes and defend against them.

Seligman stresses that the trait of prudence makes a good lawyer, but does not make a happy person. This is because lawyers cannot readily turn it off. What operates in the legal world as "prudence" often determines your thinking in the nonlegal world because the brain is wired to think that way. In the nonlegal world, prudence is called "pessimism."

Pessimistic thinking is a way of interpreting the world in which the worst is routinely expected. It affects how we interpret failure and events that don't go well. For example, a pessimist experiencing failure often interprets the event globally: "I'm no good; I'll always fail." Sadness is interpreted as everlasting,



ing, with one believing that everything is going to be ruined. The pessimist experiences negative events as pervasive, permanent, and uncontrollable, which can create an all-encompassing unhappiness.

In contrast, an optimistic interpretation style, which can be learned, views negative events as specific, temporary and changeable. For example, when an optimist fails, he or she experiences the hurt as specific to the event, and asks, "What can I learn from the failure and how can I do better the next time?" The optimist is not immune to sadness, but thinks and experiences it as specific to the event and knows it will pass.

Pessimism in one's personal life creates a high risk for depression. The challenge then is to remain prudent in the practice of law and contain this tendency outside of one's practice. This is where positive psychology comes in. There are exercises that can help lawyers who see the worst-case scenario in every setting become more discriminating in their personal life. Seligman has termed this adaptation as "flexible optimism."

Another common thinking style lawyers have is "perfectionism," which similarly can be corrosive in one's personal life. According to Dave Shearon, who has a master's degree

in positive psychology and is former director of Continuing Legal Education in Tennessee, “lawyers tend to be highly ambitious and overachieving, with a tendency toward perfectionism not just in their legal pursuits, but also in nearly every aspect of their life.”

When rigidly applied, the propensity to be a perfectionist can impede happiness. Tal Ben-Shahar, Ph.D., provides another model that offers a more balanced perspective as an alternative to perfectionism. He calls it “optimalism” and describes it in detail in his book *Being Happy - You Don't Have to Be Perfect to Lead a Richer, Happier Life*.<sup>3</sup>

The “optimalist” believes that, when appropriate, “good enough” is the best option, given the demands and constraints of life, Ben-Shahar writes. The optimalist also appreciates life as a whole and regards successes and even failures as opportunities to learn and grow.

In addition to the influence of thinking styles and traits, the heavily charged negative emotions inherent in the legal environment also play a part in lawyer unhappiness.

Take litigation, for example. Litigators are paid to resolve conflict, often between two hostile and irrational sides. In most conflicts that necessitate obtaining a lawyer, the lawyer usually is brought in after things have already gone horribly wrong. In the courtroom, tensions mount and anger, self-righteousness, and combative behavior may dominate.

Another source of pessimistic emotions—handling clients’ negative situations and hearing their depressing stories on a regular basis—can cause secondary trauma. Counselors and therapists are trained how to handle this to keep it from tearing them down. In the legal world there is little precedent for recognizing the trauma, much less addressing it.

Negative emotions also occur with the high pressures, expectations and stress of the profession. These are exacerbated by many lawyers’ tendencies to focus on the implications of past decisions or events, and anxiousness about possible future events.

Fortunately, positive psychology provides realistic solutions to the predicament of negativity in legal practice by offering interventions and exercises that generate positive emotions. One such exercise has us consistently noticing and genuinely appreciating simple pleasures. The word “appreciate” means “to be thankful or grateful,” which is the opposite of

taking something for granted. Research on gratitude has repeatedly proven that when we appreciate the good in our lives, we enjoy higher levels of well-being and positive emotions, feel happier and more determined, and are more energetic and optimistic.

An exercise in appreciation: On a regular basis, choose three everyday things you’ve encountered in the past few days or that are around you right now (e.g., warm sunshine on your face, the smell of fresh coffee, trees or flowers, your laptop or mobile device, a person dear to you) and write a few words or sentences addressing what you genuinely appreciate, enjoy, or find amazing about each one. To “genuinely appreciate,” it’s important to allow enough time for the enjoyment and amazement to sink in and the good feelings to linger. Research has proven that regularly experiencing moments of genuine appreciation changes our brains and helps us overcome our negativity bias.

The therapeutic yoga exercises and other techniques, including yoga nidra, described in my book *Yoga for Lawyers - Mind-Body Techniques to Feel Better All the Time*,<sup>4</sup> also help to destress and positively boost overall levels of well-being.

Positive psychology introduces ways to change the brain. We can rewire our brains to affect:

- the way we interpret and experience the world, helping us feel more upbeat and optimistic more of the time;
- the way we bounce back from hardships and setbacks, helping us become more resilient; and
- the way we behave, helping us feel more balanced and levelheaded more of the time.

Further, positive people experience enhanced work productivity and are more successful. They typically enjoy a better work-life balance, and greater overall well-being and happiness.

We already changed in law school. Neuroscience proves and the experts agree that if we want to, we can change again. Positive psychology offers the empirical research, proven interventions, and exercises to create and deepen the neural pathways that lead to reduced stress. Incorporating these practices can boost your positivity and provide you with many professional and personal benefits including the broadening and building effects of positive emotions. ■

*Attorney Hallie N. Love, fitmindbodybrain.*

*com, cum laude law school graduate, is nationally certified in positive psychology with Tal Ben-Shahar, Ph.D. Love uses positive psychology exercises as well as therapeutic yoga exercises and other techniques from her book, Yoga for Lawyers - Mind-Body Techniques to Feel Better All the Time, to help lawyers de-stress, develop greater positivity, and elevate their overall wellbeing.*

*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](http://nclap.org) or call: Cathy Killian (for Charlotte and areas west) at 704-910-2310, Towanda Garner (in the Piedmont area) at 919-719-9290, or Nicole Ellington (for Raleigh and down east) at 919-719-9267.*

*This article is courtesy of the State Bar of New Mexico Bar Bulletin.*

## Endnotes

- 1 Eaton, W.W. (1990), “Occupations and the Prevalence of Major Depressive Disorder,” *Journal of Occupational Medicine*, 32 (11), 1079-1087.
- 2 Martin Seligman, *Learned Optimism: How to Change Your Mind and Your Life*, Australia: William Heinemann, 2011.
- 3 Tal Ben-Shahar, *Being Happy - You Don't Have to Be Perfect to Lead a Richer, Happier Life*, New York: McGraw Hill, 2011.
- 4 Hallie N. Love and Nathalie D Martin, *Yoga for Lawyers - Mind-Body Techniques to Feel Better All the Time*, Chicago: ABA Publishing, 2014.

## Professionalism Sayings

**NEVER FILE A MOTION FOR SANCTIONS OR RULE 11 VIOLATIONS AGAINST ANOTHER LAWYER UNTIL YOU HAVE TAKEN THE LAWYER TO LUNCH TO DISCUSS THE MATTER!**

Under the guise of being a zealous advocate, some lawyers will overstep the bounds of civility and engage in conduct that is offensive and unprofessional. Try the above suggestion before you approach the court.

—Ed Gaskins

# Either a Lawyer for a Borrower or a Lender Be?

BY SUZANNE LEVER

**M**ay a single lawyer represent both the borrower and the lender for the closing of a commercial loan secured by real property? That is the question currently being considered by the Ethics Committee.

## What Do the Ethics Rules Say?

Rule 1.7 prohibits the representation of a client if the representation involves a concurrent conflict of interest unless certain conditions are met. A concurrent conflict of interest exists if the representation of one client will be directly adverse to another client or the representation of one client may be materially limited by the lawyer's responsibilities to another client. Comment [8] to Rule 1.7 provides:

[A] conflict of interest exists if a lawyer's ability to consider, recommend, or carry out an appropriate course of action for the client may be materially limited as a result of the lawyer's other responsibilities or interests. For example, a lawyer asked to represent a seller of commercial real estate, a real estate developer, and a commercial lender is likely to be materially limited in the lawyer's ability to recommend or advocate all possible positions that each might take because of the lawyer's duty of loyalty to the others.

Rule 1.7(b) allows a lawyer to proceed with a representation burdened with a concurrent conflict of interest but only if the lawyer determines that the representation of all of the affected clients will be competent and diligent and each affected client gives informed consent. In other words, the lawyer must decide whether the conflict is "consentable." Rule 1.7, cmt. [2]. If the lawyer's exercise of independent professional judgment on behalf of any client will be compromised, the conflict is not consentable. As noted in the comments to Rule 1.7:

[S]ome conflicts are nonconsentable, meaning that the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's

consent...Consentability is typically determined by considering whether the interests of the clients will be adequately protected if the clients are permitted to give their informed consent to representation burdened by a conflict of interest...[R]epresentation is prohibited if in the circumstances the lawyer cannot reasonably conclude that the lawyer will be able to provide competent and diligent representation.

Rule 1.7, cmts. [14] and [15].

Is common representation of the borrower and the lender for the closing of a commercial loan secured by real property a "consentable conflict"?

## What Do the Ethics Opinions Say?

In RPC 210, the Ethics Committee held that a lawyer may represent the seller, borrower/buyer, and lender in a residential real estate closing with the informed consent of all of the parties. Even so, the opinion includes the following cautionary language:

A lawyer may reasonably believe that the common representation of multiple parties to a residential real estate closing will not be adverse to the interests of any one client if the parties have already agreed to the basic terms of the transaction and the lawyer's role is limited to rendering an opinion on title, memorializing the transaction, and disbursing the proceeds. Before reaching this conclusion, however, the lawyer must determine whether there is any obstacle to the loyal representation of both parties. The lawyer should proceed with the common representation only if the lawyer is able to reach the following conclusions: he or she will be able to act impartially; there is little likelihood that an actual conflict will arise out of the common representation; and, should a conflict arise, the potential prejudice to the parties will be minimal.

As to commercial real estate closings, the *Restatement of the Law Governing Lawyers* takes the position that, notwithstanding the informed consent of each client, a lawyer would be unable to provide adequate represen-

tation to both a buyer and a seller where the parties are in sharp disagreement on several important terms of the transaction or where the parties should receive extensive counseling concerning their rights in the transaction and possible optional arrangements. *Restatement of the Law Governing Lawyers* §122 cmt. g(iv) (2000) (Illustrations 10, 11). The *Restatement* cites *Baldasarre v. Butler*, 625 A. 2d 458 (N.J. 1993), in which the court held that a lawyer may not represent both the buyer and seller in a complex commercial real estate transaction even if both clients give their informed consent. The Supreme Court of New Jersey observed:

This case graphically demonstrates the conflicts that arise when an attorney, even with both clients' consent, undertakes the representation of the buyer and the seller in a complex commercial real estate transaction. The disastrous consequences of [the lawyer's] dual representation convinces us that a new bright-line rule prohibiting dual representation is necessary in commercial real estate transactions where large sums of money are at stake, where contracts contain complex contingencies, or where options are numerous. The potential for conflict in that type of complex real estate transaction is too great to permit even consensual dual representation of buyer and seller.

635 A. 2d at 467. Other cases allow dual representation in commercial closings if the requirements of Rule 1.7 are satisfied.

## What Does the Ethics Committee Say?

### On one hand:

Approximately 50% of the committee members believe that common representation in a commercial real estate loan closing is a nonconsentable conflict under all circumstances. This group argues that the closing of a commercial loan secured by real estate is an "arm's length" business transaction that may involve large sums of money, complex documentation, and numerous opportunities to negotiate on behalf of each party.

As expressed by some of these committee

members:

- Even when consent to dual representation is given, the borrower rightly expects representation from the attorney. While the attorney may believe that her role is merely to execute the tasks necessary to close the transaction, the client expects the attorney to inform her if there are ways that the documents could be made more favorable to the client. This disconnect may lead to grievances and dissatisfaction with North Carolina attorneys.

- There is an inherent imbalance of power in these cases where the borrower receives form documents that were prepared for the lender by attorneys for the lender. The borrower may not understand that there is room for negotiation in the form documents, so there may not truly be an informed consent on the part of the borrower.

- The eight-step process proposed by those wishing to allow dual representation (see below) is complicated and prone to abuse. For example, the first condition requires the terms to have been “finally negotiated” prior to commencement of the representation. If the attorney reviews the terms and knows from her experience that better terms have been obtained in other similar transactions, does the attorney have a duty to inquire about the negotiations that took place previously, or can the attorney remain silent and move forward with closing the loan?

- If dual representation is disallowed, either the lender or the borrower still has the option of remaining unrepresented if it is more efficient and economical to only have one attorney involved.

In light of these concerns, a proposed opinion has been drafted that states that common representation in a real estate commercial loan closing is a nonconsentable conflict meaning that a lawyer may not ask the borrower and the lender to consent to common representation. See Ethics Opinions, page 45.

#### On the other hand:

The remaining 50% of the committee contend that there are scenarios where it is more efficient and economical to allow one lawyer to represent both the borrower and the lender.

As expressed by some of these committee members:

- One lawyer should be permitted to close noncomplex transactions.

- One lawyer should be permitted to close standardized transactions that are not negotiable.

- The cost of multiple lawyers may be

prohibitive to clients in some cases.

- If the lawyer concludes that she can fulfill her duties to both clients and the clients consent, the clients should be entitled to the counsel of their choice.

In light of these concerns, a second proposed opinion under consideration provides that dual representation of the borrower and the lender for the closing of a commercial real estate loan is a nonconsentable conflict of interest unless the following conditions can be satisfied: (1) the contractual terms have been finally negotiated prior to the commencement of the representation; (2) the loan is secured only by the real property and any collateral identified in the contract; (3) the lender reserves no remedies other than the right of foreclosure under the deed of trust or repossession under the UCC; (4) there are no material contingencies to be resolved; (5) the lawyer reasonably concludes that he will be able to act impartially in the representation of both parties; (6) the lawyer explains to both parties that his role is limited to executing the tasks necessary to close the loan and that this limitation prohibits him from advocating for the specific interests of either party; (7) the lawyer discloses that he must withdraw from the representation

of both parties if a conflict arises; and (8) both parties give informed consent confirmed in writing. However, this alternative proposed opinion provides that consent may never be sought to represent the lender, the borrower, and the seller of real property if the seller will provide secondary financing for the transaction and accept a secondary deed of trust, because the risks to the interests of the seller are too great to permit common representation. See Ethics Opinions, page 48.

#### What Do You Say?

Should there be a bright-line prohibition on common representation in closing commercial real estate loans? Should commercial and residential real estate transactions be treated the same for conflict purposes? Should common representation in commercial real estate transactions be permissible in certain delineated scenarios?

We want to hear from you. Really. The comments we receive will be considered at the January 2015 ethics meeting. Comments may be emailed to [slever@ncbar.gov](mailto:slever@ncbar.gov). ■

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

### In Memoriam

**R. Lewis Alexander**  
Elkin, NC

**Harry Randall Bivens**  
Charlotte, NC

**James H. Burwell Jr.**  
Rutherfordton, NC

**Harding Kent Crowe**  
Conover, NC

**David Sidney Crump**  
Raleigh, NC

**Robert Donald Davidson Jr.**  
High Point, NC

**Paul Anthony deMontesquiou**  
Marvin, NC

**James Carlton Fleming**  
Charlotte, NC

**Martha Erwin Fox**  
Claremont, NC

**Anthony Wayne Harrison Sr.**  
Greensboro, NC

**Ann L. Majestic**  
Raleigh, NC

**James Donald Myers**  
Beaufort, SC

**Charles Alvin Oswald**  
Hickory, NC

**John Arthur Richardson III**  
Winston-Salem, NC

**Stanley Leigh Rodenbough III**  
Highlands, NC

**Franklin Delano Smith**  
Elkin, NC

**Robert H. Stevens Jr.**  
Greensboro, NC

**J. Hunter Stovall**  
Southern Pines, NC

**John Richard Surratt**  
Winston-Salem, NC

**Stanley M. Todd**  
Lumberton, NC

# Profiles in Specialization—Buxton S. Copeland

BY DENISE MULLEN, ASSISTANT DIRECTOR OF LEGAL SPECIALIZATION

I recently had an opportunity to talk with Buxton (Buck) S. Copeland, a board certified specialist in workers' compensation law, practicing in Raleigh. Buck attended the University of North Carolina at Chapel Hill, earning an undergraduate degree in 1981, and subsequently received his law degree *cum laude* from the Campbell University's Norman A. Wiggins School of Law. Following graduation he served as a law clerk to a United States magistrate judge for two years before joining Cranfill Sumner & Hartzog in 1987. Buck worked in both general liability litigation and workers' compensation before limiting his practice to the representation of employers, third-party administrators, and carriers in workers' compensation hearings before the Industrial Commission and in appeals to the full commission, the court of appeals, and the Supreme Court. He became a board certified specialist in workers' compensation law in 2000, the first year the certification was available. His comments about the specialization program and its impact on his career follow.

**Q: Why did you pursue certification?**

As a defense attorney, I recognized that becoming a board certified specialist was likely more important for plaintiffs' attorneys, as I work with more sophisticated clients who typically know what they're looking for in a lawyer. I pursued certification because it provided a way to distinguish myself from other lawyers who were not board certified. I also wanted to validate, for myself, my knowledge and experience in workers' compensation law. I thought I was knowledgeable enough to pass the exam but wanted to be certain. I saw the benefits in maximizing a lawyer's potential in their practice area.

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

There were several lawyers in my firm who

applied at the same time, so we studied together on weekends for a couple of months. We got together on Saturday mornings or Sunday afternoons, and we each prepared a summary of part of the Workers' Compensation Act. We researched and presented the information to the others in the group and then led a discussion. I also read through the entire act, which was not something I had done previously. I found it to be tremendously helpful in preparing, and contributed to my overall knowledge of workers' compensation law.

**Q: Has certification been helpful to your practice?**

Yes, I became much more knowledgeable after studying for the exam. There were several times while studying that I found out I had assumed something incorrectly. It was really good for me to find those inaccuracies and correct my assumptions.

**Q: Has certification been helpful to your practice?**

Yes, though I feel like I have seen an even greater benefit to myself personally. The process of preparing for, taking, and passing the exam was really beneficial. Prior to obtaining the certification, I would take some workers' compensation courses for my continuing legal education (CLE) requirements, but I would often take courses in other topics as well. Now I take all of my CLE in workers' compensation, and I appreciate the content on a deeper level. I do see myself as a specialist now. I often get calls from other attorneys throughout the state asking my opinion, so I know that colleagues view me as a specialist as well.

**Q: Who are your best referral sources?**

I tend to get most of my new client referrals from individual adjusters who work with my existing clients. They are from large insurance companies or are third-party administrators for self-insured clients who feel that I have handled similar matters well.

**Q: How does certification benefit the profession?**

Board certification gives lawyers credibility and that benefits the profession. It's important in any of the practice areas that offer a specialty certification.

**Q: How does certification benefit the public?**

For claimants' attorneys, I think certification is a very important tool that helps members of the public to select an attorney who can provide competent legal services. The certification shows them that an independent third party has looked at this attorney and approved the quality of their work. Similar to the certification that distinguishes a board certified orthopedic surgeon from a non-board certified orthopedic surgeon, it provides clients with the comfort that they are in the good hands of a lawyer who can handle their issues.

**Q: What opportunities have you had to provide leadership to the program?**

I served on the workers' compensation specialty committee from April 2006 to April 2014, serving as chair for the last two years of my term. I enjoyed the opportunity to work with the other committee members very much. The committee is typically split with half defense counsel and half plaintiffs' counsel. The lawyers involved on the committee are truly dedicated to the practice area, intelligent, and willing to share knowledge. The experience of being a committee member was an honor and a real opportunity to learn as well as to lead.

**Q: How do you see the future of specialization?**

I think that the program will continue to grow and provide a service to the public. I could see additional practice areas being added. Employment law or civil litigation might be a good fit for the program. ■

*For more information on the State Bar's specialization programs, visit us online at [nclawspecialists.gov](http://nclawspecialists.gov).*



Copeland



# Lawyers Receive Professional Discipline

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## Disbarments

The DHC disbarred **Sybil Barrett** of Charlotte. The DHC concluded that Barrett misappropriated funds she held in trust for payment of taxes in two real estate closings.

**L. Pendleton Hayes** of Pinehurst tendered her affidavit of surrender and was disbarred by the State Bar Council at its October 2014 meeting. Hayes acknowledged that she misappropriated over \$400,000 in entrusted funds and engaged in fraudulent bank transactions.

**Freddie Lane Jr.** of Fayetteville tendered his affidavit of surrender and was disbarred by the State Bar Council at its October 2014 meeting. Lane acknowledged that he misappropriated at least \$500,000 in entrusted funds and failed to file and pay federal and state income and withholding taxes.

**Christopher Vaughn** of Raeford misappropriated entrusted funds, neglected numerous clients' cases, did not respond to the State Bar, and knowingly made false representations to the State Bar. He surrendered his law license and was disbarred by the DHC.

**Scott Spransy** of Charlotte misappropriated entrusted client funds for his personal use, neglected his clients' case, did not communicate with his clients, and did not maintain adequate trust account records. He was disbarred by the DHC.

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## Suspensions & Stayed Suspensions

**Jerry Braswell** of Goldsboro deposited into his trust account a fraudulent check that he received as part of an apparent scam. Braswell instructed the bank to wire funds to the source of the fraudulent check, thereby disbursing funds out of his trust account against provisionally credited funds from an instrument that he could not have reasonably believed was certain to be honored and that was in an amount in excess of what his assets or credit could fund if it was dishonored. Braswell also did not file a bank directive, did not promptly disburse his earned fees from the trust account, did not maintain an accurate ledger, and did not reconcile his trust account. The DHC suspended Braswell for two years. The suspension is stayed for two years upon his

compliance with numerous conditions.

**Lori M. Glenn** of Raleigh did not communicate with a client, was not diligent, did not reconcile her trust account, and did not properly maintain and disburse client funds. The DHC suspended her law license for three years. After serving one year active, she may petition for a stay of the balance upon showing compliance with numerous conditions.

**Robert E. Griffin** of Fuquay-Varina did not communicate with a client, was not diligent, engaged in conduct prejudicial to the administration of justice, did not refund unearned fees, did not reconcile his trust account, did not deposit entrusted funds into his trust account, commingled his funds with entrusted funds, did not properly maintain and disburse client funds, and did not supervise a nonattorney assistant. The DHC suspended him for three years. After serving six months active suspension, Griffin may petition for a stay of the balance upon showing compliance with numerous conditions.

**Lynne Hicks** of Mocksville mishandled entrusted funds, did not provide written accountings of entrusted funds, and did not maintain proper trust account records. The DHC suspended her for two years. The suspension is stayed for three years upon compliance with numerous conditions.

**Christopher Rahilly** of Elizabeth City sent obscene photographs via text message to three domestic clients, had sexual relations with one client, and wrote off one client's bills without authorization from his law firm employer. He also made multiple false statements to the State Bar. The DHC suspended him for five years.

**Conan Lee Schwilm** of Charlotte had sex with a client and continued to be involved in the representation of the client. The DHC suspended him for two years. The suspension is stayed for two years upon compliance with numerous conditions.

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## Censures

**Peter R. Shedor** of Cary was censured by the Grievance Committee for disbursing funds improperly in real estate transactions. Shedor issued commission checks to real estate agents in violation of the Good Funds Settlement Act

(N.C. Gen. Stat. § 45A-4 and Rule 1.15-2(a) and (m) of the Rules of Professional Conduct). He also disbursed funds for closings before all funds required for those closings were deposited into his trust account.

**Russell Warnock** of Winchester, Kentucky, was censured by the Grievance Committee. Warnock neglected his client's patent application, did not communicate with his client, and misrepresented the status of the patent application to his client. Warnock also did not cooperate with the Grievance Committee.

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## Reprimands

**Victoria Block** of New Bern was reprimanded by the Grievance Committee. Block did not act diligently in handling administration and tax issues for the estate of her client's brother. She also lacked competence to handle the tax issues and did not communicate with her client.

**William P. Bray** of Charlotte was reprimanded by the Grievance Committee. Bray did not keep his client informed about the status of the client's case. He also conditioned settlement of a lawsuit he brought against the client to collect attorney fees upon the client's withdrawing grievances he had filed with the State Bar.

**Hilda Burnett-Baker** of Raleigh was reprimanded by the Grievance Committee. In a bankruptcy proceeding, Burnett-Baker made a false statement of material fact to a tribunal and/or failed to correct a false statement of material fact she had previously made to the tribunal.

**Kenneth A. Free Jr.** of Greensboro was reprimanded by the United States District Court for the Middle District of North Carolina. The court found Free failed to file a notice of appeal on his client's behalf knowing that his client wanted to exercise his right to appeal. The court previously found that Free provided ineffective assistance of counsel to his client.

**Isham Faison Hicks** of Raleigh was reprimanded by the Wake County Superior Court. On two occasions Hicks intentionally signed verifications of attendance at separate CLE

CONTINUED ON PAGE 57

## Amendments Approved by the Supreme Court

At a conference on October 2, 2014, the North Carolina Supreme Court approved the following amendments to the rules of the North Carolina State Bar:

### Amendments to the Procedures for Reinstatement from Inactive Status and Administrative Suspension

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

The amendments eliminate the three different CLE requirements for reinstatement from inactive status and administrative suspension in favor of one standard that applies to all petitioners for reinstatement without regard to when the petitioner was transferred to inactive or suspended status; make March 10, 2011, the effective date for the requirement of passage of the bar exam if a petitioner was administratively suspended for seven years or more; and permit a member to take up to 6.0 CLE credits per year online to satisfy the requirements for reinstatement from inactive status and administrative suspension.

### Amendment to the Rules Governing the Administration of the CLE Program

27 N.C.A.C. 1D, Section .1500, Rules

Governing the Administration of the Continuing Legal Education Program

The amendment requires a lawyer to be a nonresident for at least six consecutive months in a given year to qualify for the nonresident exemption from mandatory CLE.

### Amendments to the Standards for Certification as a Specialist

27 N.C.A.C. 1D, Section .2500, Certification Standards for the Criminal Law Specialty, and Section .2600, Certification Standards for the Immigration Law Specialty

The amendments to the standards for the criminal law specialty reduce the number of opposing counsel and judges that must be listed as peer references on an application for certification in criminal law. The amendments to the standards for the immigration law specialty clarify that CLE courses on topics related to immigration law may be used to satisfy the CLE requirements for certification and recertification, and require four peer references from lawyers or judges who have substantial experience in immigration law.

### Amendments to the Rules of Professional Conduct

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

Conduct

The amendments to 13 North Carolina Rules of Professional Conduct address issues relative to outsourcing, lawyer mobility, and advances in technology. An executive summary of the rule amendments can be viewed in the Spring 2014 edition of the *Journal* and on the State Bar website ([ncbar.gov/PDFs/Ethics\\_20-20.pdf](http://ncbar.gov/PDFs/Ethics_20-20.pdf)). The following rules were amended:

Rule 1.0, *Terminology*

Rule 1.1, *Competence*

Rule 1.4, *Communication*

Rule 1.6, *Confidentiality of Information*

Rule 1.17, *Sale of a Law Practice*

Rule 1.18, *Duties to Prospective Client*

Rule 4.4, *Respect for Rights of Third Persons*

Rule 5.3, *Responsibilities Regarding Nonlawyer Assistance*

Rule 5.5, *Unauthorized Practice of Law; Multijurisdictional Practice of Law*

Rule 7.1, *Communications Concerning a Lawyer's Services*

Rule 7.2, *Advertising*

Rule 7.3, *Solicitation of Clients*

Rule 8.3, *Disciplinary Authority; Choice of Law*

## Amendments Pending Approval by the Supreme Court

At its meetings on July 25, 2014, and October 24, 2014, 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 and Fall 2014 editions of the *Journal* or visit the State Bar website):

### Proposed Amendments to the Discipline and Disability Rules

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

The proposed amendments change the name of the Trust Accounting Supervisory Program to the Trust Account Compliance

Program. There are no changes to the substance of the rule other than the name change.

### Proposed Amendments to the Rules Governing the Administration of the CLE Program

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

The proposed amendments change the name of the mandatory CLE program for new lawyers from "Professionalism for New Admittees" to "Professionalism for New Attorneys" (PNA program), and permit the

Board of Continuing Education to approve alternative timeframes for the PNA program, thereby giving CLE providers more flexibility to be creative in their presentations of the program.

### Proposed Amendments to Certification Standards for the Juvenile Delinquency Subspecialty

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

The proposed amendments reduce the number of practice hours required to meet the substantial involvement standard for the

juvenile delinquency subspecialty and allow for additional forms of practice equivalents.

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

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

The proposed amendments permit a degree from a foreign educational institution

to satisfy part of the educational requirements for certification if the foreign degree is evaluated by a qualified credential evaluation service and found to be equivalent to an associate's or bachelor's degree from an accredited US institution.

### Proposed Amendments to the Rules of the Board of Law Examiners

Rules Governing Admission to the

Practice of Law in the State of North Carolina, Section .0100, Organization

The proposed amendments to Rules Governing Admission to the Practice of Law change the street and mailing address listed for the offices of the Board of Law Examiners to reflect the board's recent move to a new location.

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## Proposed Amendments

At its meeting on October 24, 2014, the council voted to publish the following proposed rule amendments for comment from the members of the bar:

### Proposed Amendments to the Rules Governing the Board of Law Examiners

27 N.C.A.C. 1C, Section .0100, Board of Law Examiners

The proposed amendments will allow graduates of law schools that are not accredited by the American Bar Association to qualify for admission to the North Carolina State Bar under certain circumstances.

#### .0105 Approval of Law Schools

Every applicant for admission to the N.C. State Bar must meet the requirements set out in at least one of the numbered paragraphs below:

....

**(4) The applicant holds an LL.B. or J.D. degree from a law school that was approved for licensure purposes in another state of the United States or the District of Columbia, was licensed in such state or district, and, at the time of the application for admission to the North Carolina State Bar, has been an active member in good standing of the bar in that state or district in each of the ten years immediately preceding application.**

### Proposed Amendments to The Plan of Legal Specialization

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

The proposed amendments will eliminate the possibility of one person serving as board chair for an excessive period of time and will enable a logical succession of the chairmanship among the members of the board.

#### .1709 Succession

Each member of the board shall be entitled to serve for one full three-year term and to succeed himself or herself for one additional three-year term. Thereafter, no person may be reappointed without having been off of the board for at least three years; provided, however, that any member who is designated chairperson **at the time that the member's second three-year term expires** may serve one additional **year on the board** ~~three-year term~~ **in that the capacity of chair.**

### Proposed Amendments to the Workers' Compensation Law Specialty Certification Standards

27 N.C.A.C. 1D, Section .2700, Certification Standards for Workers' Compensation Law Specialty

The proposed amendments will add insurance as a related field in which a lawyer may earn CLE credits for certification and recertification.

#### .2705 Standards for Certification as a Specialist in Workers' Compensation Law

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

(a) Licensure and Practice - ...

(b) Substantial Involvement - ...

(c) Continuing Legal Education - An applicant must earn no less than 36 hours of accredited continuing legal education (CLE) credits in workers' compensation law and related fields during the three years preceding application, with not less than six credits earned in courses on workers' compensation

law in any one year. The remaining 18 hours may be earned in courses on workers' compensation law or any of the following related fields: civil trial practice and procedure; evidence; **insurance**; ...

(d) Peer Review - ...

#### .2706 Standards for Continued Certification as a Specialist

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

(a) Substantial Involvement - ...

(b) Continuing Legal Education - The specialist must earn no less than 60 hours of accredited continuing legal education (CLE) credits in workers' compensation law and related fields during the five years preceding application. Not less than six credits may be earned in any one year. Of the 60 hours of CLE, at

## *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.**

least 30 hours shall be in workers' compensation law, and the balance may be in the following related fields: civil trial practice and procedure; evidence; insurance; ...

(c) Peer Review - ...

### Proposed Amendments to the Rules of Professional Conduct To Address Bullying and Intimidation

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

The proposed amendments clarify that the term "tribunal" encompasses any proceeding of a court, including depositions, and add comments to Rule 3.5, Rule 4.4, and Rule 8.4 to specify that conduct that constitutes bullying and attempts to intimidate are prohibited by existing provisions of the Rules of Professional Conduct.

#### Rule 1.0: Terminology

(a) ...

(n) "Tribunal" denotes a court, an arbitrator in a binding arbitration proceeding, or a legislative body, administrative agency, or other body acting in an adjudicative capacity. The term encompasses any proceeding conducted in the course of a trial or litigation, or conducted pursuant to the tribunal's rules of civil or criminal procedure or other relevant rules of the tribunal, such as a deposition, arbitration, or mediation. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, may render a binding legal judgment directly affecting a party's

interests in a particular matter.

#### Rule 3.5 Impartiality and Decorum of the Tribunal

(a) A lawyer shall not:

(1) ...

(4) engage in conduct intended to disrupt a tribunal, including:

(A) failing to comply with known local customs of courtesy or practice of the bar or a particular tribunal without giving opposing counsel timely notice of the intent not to comply;

(B) engaging in undignified or discourteous conduct that is degrading to a tribunal; or

(C) intentionally or habitually violating any established rule of procedure or evidence; or

(5) ...

(b) ...

#### Comment

[1] ...

[10] As professionals, lawyers are expected to avoid disruptive, undignified, discourteous, and abusive behavior. Therefore, the prohibition against conduct intended to disrupt a tribunal applies to conduct that does not serve a legitimate goal of advocacy or a requirement of a procedural rule and includes angry outbursts, insults, slurs, personal attacks, and unfounded personal accusations as well as to threats, bullying, and other attempts to intimidate or humiliate judges, opposing counsel, litigants, witnesses, or court personnel. Zealous advocacy does not rely upon such tactics and is never a justification for such conduct. This conduct is prohibited both in open court and in ancillary proceedings conducted pursuant to the authority of the tribunal (e.g., depositions). See comment [11], Rule 1.0(n). Similarly, insults, slurs, threats, personal attacks, and groundless personal accusations made in documents filed with the tribunal are also prohibited by this Rule. "Conduct of this type breeds disrespect for the courts and for the legal profession. Dignity, decorum, and respect are essential ingredients in the proper conduct of a courtroom, and therefore in the proper administration of justice." *Atty. Grievance Comm'n v. Alison*, 565 A.2d 60, 666 (Md. 1989). See also Rule 4.4(a)(prohibiting conduct that serves no substantial purpose other than to embarrass, delay, or burden a third person) and Rule

#### 8.4(d)(prohibiting conduct prejudicial to the administration of justice).

~~[10]~~ [11] The duty to refrain from disruptive conduct applies to any proceeding of a tribunal, including a deposition or mediation. See Rule 1.0~~(m)~~(n).

#### Rule 4.4 Respect for Rights of Third Persons

(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

(b) ...

#### Comment

[1] Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons. It is impractical to catalogue all such rights, but they include legal restrictions on methods of obtaining evidence from third persons and unwarranted intrusions into privileged relationships, such as the client-lawyer relationship.

[2] Threats, bullying, harassment, insults, slurs, personal attacks, unfounded personal accusations generally serve no substantial purpose other than to embarrass, delay, or burden others and violate this rule. Conduct that serves no substantial purpose other than to intimidate, humiliate, or embarrass lawyers, litigants, witnesses, or other persons with whom a lawyer interacts while representing a client also violates this rule. See also Rule 3.5(a) (prohibiting conduct intended to disrupt a tribunal) and Rule 8.4(d)(prohibiting conduct prejudicial to the administration of justice).

~~[2]~~ [3] ...

~~[3]~~ [4] ...

#### Rule 8.4 Misconduct

It is professional misconduct for a lawyer to:

(a) ...

(d) engage in conduct that is prejudicial to the administration of justice;

(e) ...

#### Comment

[1] ...

CONTINUED ON PAGE 53



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# Committee Seeks Comment on Alternative Proposed Opinions on Multiple Representation in Commercial Real Estate Loans

## Council Actions

At its meeting on October 24, 2014, the State Bar Council withdrew 2013 Formal Ethics Opinion 2, *Providing Defendant with Discovery During Representation* (Adopted 1/24/14), and adopted the ethics opinion published as a proposed substitute for 2013 FEO 2 in the Fall 2014 edition of the *Journal*. The adopted ethics opinion is summarized below:

### 2013 Formal Ethics Opinion 2

#### *Providing Incarcerated Defendant with Opportunity to Review Discovery Materials*

Opinion rules that if, after providing an incarcerated criminal client with a summary/explanation of the discovery materials in the client's file, the client requests access to any of the discovery materials, the lawyer must afford the client the opportunity to meaningfully review relevant discovery materials unless certain conditions exist.

The council also adopted the ethics opinion summarized below:

### 2014 Formal Ethics Opinion 7

#### *Use of North Carolina Subpoena to Obtain Documents from Foreign Entity or Individual*

Opinion rules that a lawyer may provide a foreign entity or individual with a North Carolina subpoena accompanied by a statement/letter explaining that the subpoena is not enforceable in the foreign jurisdiction, the recipient is not required to comply with the subpoena, and the subpoena is being provided solely for the recipient's records.

## Ethics Committee Actions

At its meeting on October 23, 2014, the Ethics Committee voted to send the following proposed opinion to a subcommittee for further study: Proposed 2014 FEO 1, *Protecting Confidential Client Information When Mentoring*. Upon the recommendation of the Executive Committee of the

council, Proposed 2014 FEO 9, *Private Lawyer Supervision of Investigation Involving Misrepresentation*, was also sent to a subcommittee for study. The Ethics Committee voted to publish a revised version of one proposed opinion and two new proposed opinions. The comments of readers on the proposed opinions are welcomed.

In light of a division between the members of the committee on the question of whether a lawyer may represent multiple parties to a commercial real estate loan closing, the committee voted to publish two proposed opinions that reach different conclusions. Readers are urged to comment on the proposed opinions in order that the committee might benefit from the perspective of the bar at large. On page 39, the Legal Ethics column considers the competing concerns addressed in the two alternative opinions. The alternative proposed opinions appear immediately below.

### Proposed 2013 Formal Ethics Opinion 14 Representation of Parties to a Commercial Real Estate Loan Closing October 23, 2014

*Proposed opinion rules that common representation in a real estate commercial loan closing is, in most instances, a "nonconsentable" conflict, meaning that a lawyer may not ask the borrower and the lender to consent to common representation.*

#### Background:

In the standard closing of a commercial loan secured by real property (a "commercial loan closing"), the borrower and the lender have separate legal counsel. The borrower's lawyer traditionally handles most aspects of the closing, including the preparation of the settlement statement as well as the collection of funds, the payoffs, and the disbursements.

The borrower understands that its lawyer represents its interests alone. Unlike a residential real estate closing in which the lender's documents can rarely be modified once entered into by the borrower/buyer, it is common in a commercial loan closing for the borrower's lawyer to be actively involved in negotiating provisions of the commitment letter that establishes the basic terms of the mortgage, and to also negotiate specific revisions to the loan documents to address material matters such as default, disbursement of insurance proceeds, permitted transfers, and indemnification.

A large regional bank recently changed its commercial loan closing policies to require all lawyers who close commercial loans with the bank to be employed by law firms that are "authorized" by the bank to close its loans. These lawyers are designated as "Bank's Counsel." Bank's Counsel is asked by the bank to handle the entire closing including the title search, title certification, and the holding and disbursing of the closing funds.

Lawyers who traditionally represent the borrower in a commercial loan closing are concerned about this policy for a number of reasons including the following:

- Having closing funds delivered to the lender's lawyer instead of the borrower's lawyer subjects the borrower to responsibility for the funds without the benefit of its own legal counsel's guidance, protection, and assistance;
- Once the loan funds are committed to the borrower by the lender, they become the responsibility of the borrower. When there is separate, independent representation of the borrower, the protections of malpractice insurance and the closing protection letter are available to the borrower.
- The borrower's recourses may be limited if closing funds are mishandled and the borrower suffers a loss in connection with Bank's

Counsel's preparation of the closing statement and disbursement of the loan proceeds. However, when the borrower's lawyer performs the escrow and closing functions, the lender gets an insured closing letter and a legal opinion relative to authority and enforceability from the borrower's lawyer and has protection.

- Having the lender's lawyer perform the property and business due diligence functions may result in the disclosure of confidential information relative to the borrower's property or its business interests that would not be disclosed if the borrower's lawyer performed these functions.

- Unless the borrower is sophisticated and instructs its lawyer to be actively involved, the borrower's lawyer may be placed in the role of "outsider" or passive observer, which may limit the quality and scope of the representation that the borrower receives. It will also invite, notwithstanding disclosure, the perception that the lender's lawyer is looking out for the interests of all of the parties.

#### **Inquiry #1:**

May a lawyer represent both the borrower and the lender for the closing of a commercial loan secured by real property? If so, is informed consent of both the borrower and the lender required, and what information must be disclosed to obtain informed consent?

#### **Opinion #1:**

In most instances, a lawyer may not represent both the borrower and the lender for the closing of a commercial loan even with consent.

Rule 1.7 prohibits the representation of a client if the representation involves a concurrent conflict of interest unless certain conditions are met. A concurrent conflict of interest exists if the representation of one client will be directly adverse to another client or the representation of one client may be materially limited by the lawyer's responsibilities to another client. Rule 1.7(a). The closing of a commercial loan secured by real estate is an "arm's length" business transaction in which large sums of money are at stake, the documentation is complex, and the opportunities to negotiate on behalf of each party are numerous. As observed in the comment to Rule 1.7:

Even where there is no direct adverseness, a conflict of interest exists if a lawyer's ability to consider, recommend, or carry out

an appropriate course of action for the client may be materially limited as a result of the lawyer's other responsibilities or interests. For example, a lawyer asked to represent a seller of commercial real estate, a real estate developer, and a commercial lender is likely to be materially limited in the lawyer's ability to recommend or advocate all possible positions that each might take because of the lawyer's duty of loyalty to the others. The conflict in effect forecloses alternatives that would otherwise be available to the client. The mere possibility of subsequent harm does not itself preclude the representation or require disclosure and consent. The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.

Rule 1.7, cmt. [8].

Rule 1.7(b) allows a lawyer to proceed with a representation burdened with a concurrent conflict of interest, but only if the lawyer determines that the representation of all of the affected clients will be competent and diligent and each affected client gives informed consent. In other words, the lawyer must decide whether the conflict is "consentable." Rule 1.7, cmt. [2]. If the lawyer's exercise of independent professional judgment on behalf of any client will be compromised, the conflict is not consentable. As noted in the comment to Rule 1.7:

[S]ome conflicts are nonconsentable, meaning that the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent...Consentability is typically determined by considering whether the interests of the clients will be adequately protected if the clients are permitted to give their informed consent to representation burdened by a conflict of interest...[R]epresentation is prohibited if in the circumstances the lawyer cannot reasonably conclude that the lawyer will be able to provide competent and diligent representation.

Rule 1.7, cmt.[14]-[15]. Although deleted from the comment to Rule 1.7 when the Rules of Professional Conduct were comprehensively revised in 2003, the following is an excellent test for determining whether a con-

## *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: NC Rules of Prof'l Conduct Rule 1.1 (2003)

- To cite a North Carolina formal ethics opinion: NC 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.

flict is "consentable": "when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent." Rule 1.7, cmt. [5] (2002).

In RPC 210, the Ethics Committee held that a lawyer may represent the seller, borrower/buyer, and lender in a residential real estate closing with the informed consent of all of the parties. Even so, the opinion includes the following cautionary language:

A lawyer may reasonably believe that the common representation of multiple parties to a residential real estate closing will not be adverse to the interests of any one client if the parties have already agreed to the basic terms of the transaction and the

## 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 December 30, 2014.

## 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.

lawyer’s role is limited to rendering an opinion on title, memorializing the transaction, and disbursing the proceeds. Before reaching this conclusion, however, the lawyer must determine whether there is any obstacle to the loyal representation of both parties. The lawyer should proceed with the common representation only if the lawyer is able to reach the following conclusions: he or she will be able to act impartially; there is little likelihood that an actual conflict will arise out of the common representation; and, should a conflict arise, the potential prejudice to the parties will be minimal.

A commercial loan closing is substantially different from a residential closing in which there is little opportunity to negotiate on

behalf of the borrower/buyer once the purchase contract and loan commitment letter are signed. In a commercial loan closing, there are numerous opportunities for a lawyer to negotiate on behalf of the parties, so impartiality is rarely possible. There are also numerous opportunities for an actual conflict to arise between the borrower and the lender and, if a conflict does arise, the prejudice to the parties would be substantial. Therefore, common representation in a commercial loan closing is, in most instances, a “nonconsentable” conflict, meaning that a lawyer may not ask the borrower and the lender to consent to common representation. *Restatement (Third) of The Law Governing Lawyers*, §122, Comment g(iv), cites decisions in which the court denied the possibility of client consent as a matter of law in certain categories of cases. These decisions include *Baldasarre v. Butler*, 625 A. 2d 458 (N.J. 1993), in which the Supreme Court of New Jersey observed:

This case graphically demonstrates the conflicts that arise when an attorney, even with both clients’ consent, undertakes the representation of the buyer and the seller in a complex commercial real estate transaction. The disastrous consequences of [the lawyer’s] dual representation convinces us that a new bright-line rule prohibiting dual representation is necessary in commercial real estate transactions where large sums of money are at stake, where contracts contain complex contingencies, or where options are numerous. The potential for conflict in that type of complex real estate transaction is too great to permit even consensual dual representation of buyer and seller. Therefore, we hold that an attorney may not represent both the buyer and seller in a complex commercial real estate transaction even if both give their informed consent.

635 A. 2d at 467. *See also* Fla. Bar. Prof’l Ethics Comm., Op. 97-2 (1997)(lawyer may not represent both buyer and seller in closing of sale of business where material terms of contract have not been agreed to or discussed by parties).

In summary, dual representation of the borrower and the lender for the closing of a commercial real estate loan is a nonconsentable conflict of interest unless the following conditions can be satisfied: (1) the contractual terms have been finally negotiated prior to the commencement of the representation; (2) there are no material contingencies

to be resolved; (3) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; (4) it is unlikely that a difference in interests will eventuate and, if it does, it will not materially interfere with the lawyer’s independent professional judgment in considering alternatives or foreclose courses of action that should be pursued on behalf of a client; (5) the lawyer reasonably concludes that he will be able to act impartially in the representation of both parties; (6) the lawyer explains to both parties that his role is limited to executing the tasks necessary to close the loan and that this limitation prohibits him from advocating for the specific interests of either party; (7) the lawyer discloses that he must withdraw from the representation of both parties if a conflict arises; and (8) after the foregoing full disclosure, both parties give informed consent confirmed in writing.

Regardless of the above conditions allowing common representation of the borrower and lender, consent may never be sought to represent the lender, the borrower, and the seller of real property if the seller will provide secondary financing for the transaction and accept a secondary deed of trust. In this situation, the risks to the interests of the seller are too great to permit a lawyer to seek consent to common representation.

### Inquiry #2:

The bank intends for Bank’s Counsel to represent only the bank (lender) but to handle all aspects of the closing.

May a lawyer represent only the lender but handle all aspects of a commercial loan closing including the title search, title certification, marshalling the necessary documents, and holding and disbursing of the closing funds? If so, what information must be disclosed by Bank’s Counsel to the borrower relative to the role of Bank’s Counsel?

### Opinion #2:

Yes, a lawyer may be the lead lawyer for the closing (“the closing lawyer”) provided the lawyer represents only one party—either the lender or the borrower. Because the title work and other due diligence are for the benefit of the lender, there is no prohibition on the lender’s lawyer performing these tasks. *See* 2004 FEO 10 (because buyer is the intended beneficiary of the deed although not a signatory, buyer’s lawyer may prepare deed without creating a lawyer-client rela-

tionship with seller). However, if the closing lawyer represents the lender, certain conditions must be satisfied.

In 2006 FEO 3, the Ethics Committee considered whether a lawyer may represent a lender on the closing of the sale to a third party of property acquired by the lender as result of foreclosure by execution of the power of sale in the deed of trust on the property. The opinion holds (among other things) that a lawyer may serve as the closing lawyer and limit his representation to the lender/seller if there is disclosure to the buyer:

Attorney A must fully disclose to Buyer that [the lender/seller] is his sole client, he does not represent the interests of Buyer, the closing documents will be prepared consistent with the specifications in the contract to purchase, and, in the absence of such specifications, he will prepare the documents in a manner that will protect the interests of his client, [the lender/seller], and, therefore, Buyer may wish to obtain his own lawyer. *See, e.g.*, RPC 40 (disclosure must be far enough in advance of the closing that the buyer can procure his own counsel), RPC 210, 04 FEO 10, and Rule 4.3(a). Because of the strong potential for Buyer to be misled, the disclosure must be thorough and robust.

Consistent with the holding in 2006 FEO 3, in a commercial loan closing, the lender's lawyer may serve as the closing lawyer provided the borrower is informed that the closing lawyer will not represent its interests and will interpret loan documents in the light that is most favorable to the lender; the borrower is given a reasonable opportunity to retain its own counsel and is not misled as to its right to do so; the lawyers for both parties advise their clients about the risks and benefits of a having the lender's lawyer serve as the closing lawyer; and the borrower's lawyer is allowed to observe and participate in the transaction to the extent necessary to protect the borrower's interests.

This opinion cannot address all of the concerns expressed in the Background section above relative to the additional risks to the borrower if the lawyer for the closing is the lender's lawyer. However, if the closing funds are deposited to and disbursed from the trust account of the lender's lawyer in accordance with the requirements of the trust accounting rule, Rule 1.15, the funds should not be at risk. To the extent that there are other risks to the interests of the borrower, the borrower's

lawyer must analyze those risks and advise the borrower about steps that may be taken to minimize the risks including negotiating with the lender's lawyer for aspects of the closing to be handled by the borrower's lawyer.

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### ALTERNATIVE Proposed 2013 Formal Ethics Opinion 14 Representation of Parties to a Commercial Real Estate Loan Closing October 23, 2014

**Note: Differences between this alternative proposed opinion and the proposed opinion above are shown with overstrikes.**

*Proposed opinion rules that common representation in a real estate commercial loan closing is, ~~in most instances,~~ a "nonconsentable" conflict, meaning that a lawyer may not ask the borrower and the lender to consent to common representation.*

#### Background:

[There are no changes to this section.]

#### Inquiry #1:

May a lawyer represent both the borrower and the lender for the closing of a commercial loan secured by real property? If so, is informed consent of both the borrower and the lender required, and what information must be disclosed to obtain informed consent?

#### Opinion #1:

~~In most instances~~ **No**, a lawyer may not represent both the borrower and the lender for the closing of a commercial loan even with consent.

Rule 1.7 prohibits the representation of a client if the representation involves a concurrent conflict of interest unless certain conditions are met. A concurrent conflict of interest exists if the representation of one client will be directly adverse to another client or the representation of one client may be materially limited by the lawyer's responsibilities to another client. Rule 1.7(a). The closing of a commercial loan secured by real estate is an "arm's length" business transaction in which large sums of money are at stake, the documentation is complex, and the opportunities to negotiate on behalf of each party are numerous. As observed in the comment to Rule 1.7:

Even where there is no direct adverseness, a conflict of interest exists if a lawyer's ability to consider, recommend, or carry out

an appropriate course of action for the client may be materially limited as a result of the lawyer's other responsibilities or interests. For example, a lawyer asked to represent a seller of commercial real estate, a real estate developer, and a commercial lender is likely to be materially limited in the lawyer's ability to recommend or advocate all possible positions that each might take because of the lawyer's duty of loyalty to the others. The conflict in effect forecloses alternatives that would otherwise be available to the client. The mere possibility of subsequent harm does not itself preclude the representation or require disclosure and consent. The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.

Rule 1.7, cmt. [8].

Rule 1.7(b) allows a lawyer to proceed with a representation burdened with a concurrent conflict of interest, but only if the lawyer determines that the representation of all of the affected clients will be competent and diligent and each affected client gives informed consent. In other words, the lawyer must decide whether the conflict is "consentable." Rule 1.7, cmt. [2]. If the lawyer's exercise of independent professional judgment on behalf of any client will be compromised, the conflict is not consentable. As noted in the comment to Rule 1.7:

[S]ome conflicts are nonconsentable, meaning that the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent...Consentability is typically determined by considering whether the interests of the clients will be adequately protected if the clients are permitted to give their informed consent to representation burdened by a conflict of interest...[R]epresentation is prohibited if in the circumstances the lawyer cannot reasonably conclude that the lawyer will be able to provide competent and diligent representation.

Rule 1.7, cmt.[14]-[15]. Although deleted from the comment to Rule 1.7 when the Rules of Professional Conduct were comprehensively revised in 2003, the following is an excellent test for determining whether a con-



flict is “consentable”: “when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client’s consent.” Rule 1.7, cmt. [5] (2002).

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A lawyer may reasonably believe that the common representation of multiple parties to a residential real estate closing will not be adverse to the interests of any one client if the parties have already agreed to the basic terms of the transaction and the lawyer’s role is limited to rendering an opinion on title, memorializing the transaction, and disbursing the proceeds. Before reaching this conclusion, however, the lawyer must determine whether there is any obstacle to the loyal representation of both parties. The lawyer should proceed with the common representation only if the lawyer is able to reach the following conclusions: he or she will be able to act impartially; there is little likelihood that an actual conflict will arise out of the common representation; and, should a conflict arise, the potential prejudice to the parties will be minimal.

A commercial loan closing is substantially different from a residential closing in which there is little opportunity to negotiate on behalf of the borrower/buyer once the purchase contract and loan commitment letter are signed. In a commercial loan closing, there are numerous opportunities for a lawyer to negotiate on behalf of the parties, so impartiality is rarely possible. There are also numerous opportunities for an actual conflict to arise between the borrower and the lender and, if a conflict does arise, the prejudice to the parties would be substantial. Therefore, common representation in a commercial loan closing is, in most instances, a “nonconsentable” conflict, meaning that a lawyer may not ask the borrower and the lender to consent to common representation. *Restatement (Third) of The Law Governing Lawyers*, §122, Comment g(iv), cites decisions in which the court denied the possibility of client consent as a matter of law in certain categories of cases.

These decisions include *Baldasarre v. Butler*, 625 A. 2d 458 (N.J. 1993), in which the Supreme Court of New Jersey observed:

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635 A. 2d at 467. *See also* Fla. Bar. Prof’l Ethics Comm., Op. 97-2 (1997)(lawyer may not represent both buyer and seller in closing of sale of business where material terms of contract have not been agreed to or discussed by parties).

~~In summary, dual representation of the borrower and the lender for the closing of a commercial real estate loan is a nonconsentable conflict of interest unless the following conditions can be satisfied: (1) the contractual terms have been finally negotiated prior to the commencement of the representation; (2) there are no material contingencies to be resolved; (3) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; (4) it is unlikely that a difference in interests will eventuate and, if it does, it will not materially interfere with the lawyer’s independent professional judgment in considering alternatives or foreclose courses of action that should be pursued on behalf of a client; (5) the lawyer reasonably concludes that he will be able to act impartially in the representation of both parties; (6) the lawyer explains to both parties that his role is limited to executing the tasks necessary to close the loan and that this limitation prohibits him from advocating for the specific interests of either party; (7) the lawyer discloses that he must withdraw from the representation of both parties if a conflict~~

~~arises; and (8) after the foregoing full disclosure, both parties give informed consent confirmed in writing.~~

~~Regardless of the above conditions allowing common representation of the borrower and lender, consent may never be sought to represent the lender, the borrower, and the seller of real property if the seller will provide secondary financing for the transaction and accept a secondary deed of trust. In this situation, the risks to the interests of the seller are too great to permit a lawyer to seek consent to common representation.~~

## **Inquiry #2:**

[There are no changes to this section.]

## **Proposed 2014 Formal Ethics**

### **Opinion 8**

### **Accepting an Invitation from a Judge to Connect on LinkedIn October 23, 2014**

*Proposed opinion rules that a lawyer may accept an invitation from a judge to be a “connection” on a professional networking website, and may endorse a judge. However, a lawyer may not accept a legal skill or expertise endorsement or a recommendation from a judge.*

## **Facts:**

Lawyer has a profile listing on LinkedIn, a social networking website for people in professional occupations. The website allows registered users (“members”) to maintain a list of contact details on their LinkedIn pages for people with whom they have some level of relationship via the website. These contacts are called “connections.” Members can invite anyone (whether a site user or not) to become a connection.

LinkedIn can be used to list jobs and search for job candidates, to find employment, and to seek out business opportunities. Members can view the connections of other members, post their photographs, and view the photos of other members. Members can post comments on another member’s profile page. Members can also endorse or write recommendations for other members. Such endorsements or recommendations, if accepted by the recipient, are posted on the recipient’s profile listing.

## **Inquiry #1:**

May a lawyer with a professional profile on LinkedIn accept an invitation to connect from a judge?

### Opinion #1:

Yes. Interactions with judges using social media are evaluated in the same manner as personal interactions with a judge, such as an invitation to dinner. In certain scenarios, a lawyer may accept a judge's dinner invitation. Similarly, in certain scenarios, a lawyer may accept a LinkedIn invitation to connect from a judge. However, if a lawyer represents clients in proceedings before a judge, the lawyer is subject to the following duties: to avoid conduct prejudicial to the administration of justice; to not state or imply an ability to influence improperly a government agency or official; and to avoid *ex parte* communications with a judge regarding a legal matter or issue the judge is considering. *See* Rule 3.5 and Rule 8.4. These duties may require the lawyer to decline a judge's invitation to connect on LinkedIn.

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." Rule 8.4(e) provides that it is professional misconduct for a lawyer to "state or imply an ability to influence improperly a government agency or official." Lawyers have an obligation to protect the integrity of the judicial system and to avoid creating an appearance of judicial partiality. *See* 2005 FEO 1.

If a lawyer receives an invitation to connect from a judge during the pendency of a matter before the judge, and the lawyer concludes that accepting the invitation will impair the lawyer's compliance with these duties, the lawyer should not accept the judge's invitation to connect until the matter is concluded. The lawyer may communicate to the judge the reason the lawyer did not accept the judge's invitation. Such a communication with the judge is not a prohibited *ex parte* communication provided the communication does not include a discussion of the underlying legal matter.

Rule 3.5 prohibits lawyers from engaging in *ex parte* communications with a judge. Because connected members can post comments on each other's profile pages, the connection between a judge and a lawyer appearing in a matter before the judge could lead to improper *ex parte* communications. Therefore, while the lawyer has a matter pending before a judge, the lawyer may not use LinkedIn or any other form of social media to communicate with the judge about the pending matter.

Rule 8.4(f) provides that it is professional misconduct for a lawyer to "knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law." To the extent that a judge is prohibited by the North Carolina Code of Judicial Conduct from participating in LinkedIn, or from sending invitations to connect to lawyers, a lawyer may not assist the judge in violating such prohibitions.

### Inquiry #2:

May the lawyer send an invitation to connect to a judge?

### Opinion #2:

Yes, subject to the limitations described in Opinion #1.

### Inquiry #3:

A LinkedIn member has the option of displaying a "skills & expertise" section within his profile. A member can add items to the "skills & expertise" section of his profile page. In addition, some connections can add a new item to another member's "skills & expertise" section, can "endorse" a skill or expertise already listed for the member, or write a recommendation for the member. A member who is being endorsed by another member will receive a notification containing the identity of the endorser and the specific skill or expertise that is being endorsed. The member may decline the endorsement entirely or choose the specific endorsements to be displayed. The endorsed member may also subsequently edit the "skills & expertise" section to "hide" selected endorsements. If a member endorses another member, and the endorsement is not declined by the recipient, the endorser's name and profile picture will appear next to the skill on the endorsed member's profile.

A recommendation is a comment written by a LinkedIn member to recognize or commend another member. When someone recommends a member, the recommended member will receive a message in the recommended member's LinkedIn inbox and a notification on the member's "Manage Recommendations" page. Recommendations are only visible to connections. A member can choose to hide a recommendation from the member's profile but cannot delete it. Recommendations written for others can be withdrawn or revised.

May a lawyer endorse a judge's legal skills

or expertise or write a recommendation on the judge's profile page?

### Opinion #3:

Yes, subject to the limitations explained in Opinion #1.

### Inquiry #4:

May a lawyer accept an endorsement or recommendation from a judge and display the endorsement or recommendation on his profile page?

### Opinion #4:

No. Displaying an endorsement or recommendation from a judge on a lawyer's profile page would create the appearance of judicial partiality and the lawyer must decline. *See* Rule 8.4(e).

### Inquiry #5:

May a lawyer accept and post endorsements and recommendations on his LinkedIn profile page from persons other than judges?

### Opinion #5:

Lawyers are professionally obligated to ensure that communications about the lawyer or the lawyer's services are not false or misleading. *See* Rule 7.1(a). Provided that the content of the endorsement or recommendation is truthful and not misleading in compliance with the requirements of Rule 7.1, the lawyer may post endorsements and recommendations from persons other than judges on the lawyer's LinkedIn profile page. *See* 2012 FEO 8.

### Inquiry #6:

Lawyer A previously accepted and displayed on his LinkedIn profile page an endorsement or recommendation from Lawyer B, who subsequently became a judge. Is Lawyer A required to remove Lawyer B's endorsement or recommendation?

### Opinion #6:

Yes, if Lawyer A knows, or reasonably should know, that Lawyer B has become a judge. *See* Opinion #4.

### Inquiry #7:

Do the holdings in this opinion apply to other social media applications such as Facebook, Twitter, Google+, Instagram, and Myspace?

## Opinion #7:

The holdings apply to any social media application that allows public display of connections, endorsements, or recommendations between lawyers and judges.

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## Proposed 2014 Formal Ethics

### Opinion 10

#### Lawyer Owned Adoption Agency

October 23, 2014

*Proposed opinion rules that a lawyer who handles adoptions as part of her or his law practice and also owns a financial interest in a for-profit adoption agency may represent an adopting couple utilizing the services of the adoption agency, but may not represent the biological parents.*

#### Facts:

Attorneys A and B, who handle independent adoptions as part of their law practice, also manage a for-profit adoption agency called "Adopt a Child." Adopt a Child is a limited liability company. Attorneys A and B receive compensation from Adopt a Child. The agency's office is located in separate office space within Attorneys A and B's firm. It has a separate telephone number, signage, fax machine, and copy machine. Adopt a Child is staffed by one employee. Adopt a Child contracts with independent social workers to screen and counsel birthmothers. Without assistance or influence from Attorneys A and B, a social worker conducts a home study on the adopting couple. The social worker then prepares a report which is reviewed by a supervisor and a review committee. A director of Adopt a Child may or may not be a member of the review committee. If the review committee approves the home study, the adoption proceeds. The adopting couple then engages a lawyer to represent their interests. If the home study report is unfavorable, the report is sent to the Department of Social Services. The adopting couple thereafter cannot become a client of Adopt a Child.

Typically, adopting couples learn about Adopt a Child through the agency's website and advertisements. An initial consultation with Attorney A or Attorney B is arranged. Attorney A or Attorney B meets with the adopting couple to discuss the adoption process. If the adopting couple has identified a child to adopt, then Attorneys A and B proceed with the legal work necessary to complete an independent adoption. If the adopting couple is interested in adoption, but

needs assistance in finding a child, a list of licensed adoption agencies is provided to the adopting couple. The adopting couple is informed that Attorneys A and B manage and own Adopt a Child. The adopting couple is encouraged to investigate other available agencies. If the adopting couple decides to use Adopt a Child, the adopting couple is given an application form and asked to pay a \$200 application fee. Once approved, the adopting couple becomes a client of Adopt a Child.

Adopting couples pay a \$4,500 fee to Adopt a Child, which gives adopting couples the following services: a completed home study, a family profile by a local artist, a two-page website, and access to birthmothers. Once there is a match between a birthmother and an adopting couple, the adopting couple signs a fee contract with the law firm and pays a legal fee to the law firm for legal services. Additional fees may occur in the form of pass-through costs for the birthmother's living and medical expenses, and legal fees as necessary for termination of parental rights, interstate legal representation, etc. The adopting couple is informed that if there is a conflict of interest, such as a dispute between the birthmother and the adopting couple or between the adopting couple and Adopt a Child, the adopting couple must hire another lawyer to represent them.

#### Inquiry #1:

May Attorneys A and B co-manage and accept compensation as managers of Adopt a Child and provide legal services to the adopting couple and Adopt a Child?

#### Opinion #1:

Yes. The primary concern in this inquiry is the ability of Attorneys A and B to identify and manage conflicts of interest. Actual or potential conflicts of interest exist based on (1) the lawyers' ownership of Adopt a Child, and (2) the referral of an adopting couple represented by Attorney A or Attorney B to Adopt a Child, or the referral of a client of Adopt a Child to Attorney A or Attorney B for legal representation in the adoption.

Rule 1.7 prohibits concurrent conflicts of interest. One type of concurrent conflict of interest exists if the representation of one or more clients may be materially limited by a personal interest of the lawyer. Comment [10] to Rule 1.7 provides, "[t]he lawyer's own interests should not be permitted to have an

adverse effect on representation of a client. In addition, a lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed financial interest."

Before Adopt a Child may refer an adopting couple to Attorneys A and Attorney B for legal services, the agency, acting through the two lawyers, must reasonably conclude that the lawyers can adequately protect the interests of the adopting couple and that their professional judgment on behalf of the adopting couple will not be adversely affected by their financial interest in Adopt a Child. The adopting couple must give informed consent to the representation, confirmed in writing. As part of the disclosure necessary for informed consent, the adopting couple must be informed that in the event of a conflict between the adopting couple and Adopt a Child, Attorneys A and B must withdraw from the representation and the adopting couple will need to obtain new counsel. *See* Rule 1.7(b).

If a couple that wants to adopt is already a client of either Attorney A or Attorney B, the lawyers may refer the couple to Adopt a Child for adoption services only in compliance with the Rules of Professional Conduct.

The referral of the adopting parents to Adopt a Child implicates Rule 5.7 as well as Rule 1.8. Adopt a Child provides "law-related services." Rule 5.7 sets out the ethical responsibilities for a lawyer who provides such services. Comment [6] to Rule 5.7 provides that when a client-lawyer relationship exists with a person who is referred by a lawyer to an ancillary business controlled by the lawyer, the lawyer must comply with Rule 1.8(a) pertaining to business transactions with clients. *See also* Rule 1.8, cmt. [1]. Pursuant to Rule 1.8(a) a lawyer may only enter into a business transaction with a client if: (1) the transaction and terms are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client; (2) the client is advised in writing of the desirability of seeking, and is given a reasonable opportunity to seek, the advice of independent legal counsel on the transaction; and (3) the client gives informed consent, in writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction. Accordingly, a lawyer must make these disclosures and secure the requisite consent before

providing law related services to a client.

In 2000 FEO 9 the Ethics Committee held that a lawyer who was also a certified public accountant could provide legal services and accounting services from the same office. The opinion cites Rule 1.7 and provides that the lawyer may offer accounting services to his legal clients, provided the lawyer fully discloses his self-interest in making a referral to himself, and the lawyer determines that the referral is in the best interest of the client.

Before referring legal clients to Adopt a Child, Attorneys A and B must make an independent professional determination that the services offered by Adopt a Child will best serve the interests of the adopting couple. In addition, the adopting couple must be informed that, if they become clients of Adopt a Child, they are not obligated to employ Attorneys A and B to handle the legal work related to an adoption, and that they have the right to legal counsel of their choice. Likewise, if a couple comes for a legal consultation concerning adoption with Attorneys A and B, Attorneys A and B must explain the relationship between Adopt a Child and their firm and their financial interest in the agency before referring the adopting couple to their agency. The adopting couple must be given access to other agencies and the freedom to choose another adoption agency even if they decide to retain Attorneys A and B to perform their legal work.

If Attorneys A and B comply with the requirements set out in Rule 1.7(b), Rule 1.8(a), and Rule 5.7, they may refer their legal clients to Adopt a Child. Similarly, if Attorneys A and B comply with the requirements of Rule 1.7(b) and Rule 1.8(a), they may accept referrals from Adopt a Child.

#### **Inquiry #2:**

May Attorneys A and B simultaneously represent the adopting couple, Adopt a Child, and the birth parent(s)?

#### **Opinion #2:**

No. Rule 1.7(a) provides that a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if (1) the representation of one client will be directly adverse to another client; or (2) the representation of one or more clients may be materially limited by the lawyer's responsibilities to another client.

In an informal opinion, the ABA opined as follows:

An adoption is a highly emotional undertaking for both the adoptive and the biological parent. In such situations, the lawyer must take particular care that the client fully understands the significance of the legal actions being taken. The lawyer has the obligation not only to advise the client of the legal rights and responsibilities, but also to counsel regarding the advisability of the action contemplated. *See* Rule 1.4. The biological parent is entitled to a full disclosure of all rights and obligations involved in the consent to the adoption, revocation of consent, post-adoptive rights, and post-adoptive restrictions, as well as the rights and obligations assumed by the adoptive parent. Where represented by counsel, the biological parent has the right to expect the lawyer to anticipate the consequences of the surrender and advise accordingly.

The rights surrendered by the biological parent and those assumed by the adoptive parent are in potential conflict. The biological parent's right to revoke the consent is in direct conflict with the interests of the adoptive parent. The biological parent has the right to independent advice regarding the revocation of the consent.

The lawyer representing the adoptive parent owes the duty to counsel the adoptive parent and to assist the adoptive parent in securing the consent and avoiding revocation. The rights of the adoptive parent after the adoption decree is final may be antagonistic to perceived rights of the biological parent.

The inherent conflicts cannot be reconciled. Thus, the lawyer seeking to represent both the adoptive and biological parents in a private adoption proceeding cannot have a reasonable belief that the representation of one client would not adversely affect the relationship with or representation of the other client. *See* Rule 1.7

ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 87-1523 (1987).

We agree with the reasoning of the ABA opinion and conclude that it is a nonconformable conflict for Attorneys A and B to represent the birth parents and simultaneously represent the adopting couple and/or Adopt a Child.

#### **Inquiry #3:**

What, if any, communication may Attorneys A and B have with a birth parent?

#### **Opinion #3:**

Rule 4.3 provides:

[i]n dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not: (a) give legal advice to the person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such person are or have a reasonable possibility of being in conflict with the interests of the client; and (b) state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

Any communication between a birth parent and the law firm must be limited to providing or collecting information to be used to complete the forms required by Adopt a Child.

Attorneys A and B must ensure that the birth parent(s) are provided with a written disclosure statement that explains that Adopt a Child is not a law firm; Attorneys A and B do not represent the birth parent(s) and cannot provide the birth parent(s) with legal advice; any communication with the law firm does not create a client-lawyer relationship; and the birth parent(s) are entitled to retain separate legal representation; and that the adopting couple will pay the legal fees.

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#### **Proposed 2014 Formal Ethics**

##### **Opinion 11**

##### **Notice to Parents Prior to Seeking Nonsecure Custody Order October 23, 2014**

*Proposed opinion rules that a DSS lawyer must follow legal guidelines as to the notice to parents required prior to filing a petition alleging abuse, neglect, or dependency, and must comply with Rule 3.5 as to an ex parte motion for nonsecure custody.*

##### **Facts:**

N.C. Gen. Stat. § 7B-500(a)(2001) permits a law enforcement officer or a department of social services worker to take temporary physical custody of a child without a court order if there are reasonable grounds to believe that the juvenile is abused, neglected,

or dependent and that he would be injured or could not be taken into custody if it were first necessary to obtain a court order. In other cases when immediate removal is deemed necessary, the Division of Social Services (DSS) must file a petition alleging abuse, neglect, or dependency, and obtain a nonsecure custody order.

The petition alleging abuse, neglect, or dependency must be filed prior to the request for a nonsecure custody order. The parties to the action are DSS as petitioner, the respondent parents, the child (who is appointed a guardian ad litem), and, depending upon the facts, a legal guardian, legal custodian, or adult caretaker of the child. N.C. Gen. Stat. § 7B-401.1 (2013). Upon the filing of the petition, respondent parents are each appointed provisional counsel by the clerk. The provisional counsel remain appointed to each parent unless the parent does not appear at the hearing; the court finds that the parent is not indigent; the parent retains his/her own counsel, or the parent waives his/her right to counsel. N.C. Gen. Stat. § 7B-602 (2013). Very specific criteria for nonsecure custody are set out in N.C. Gen. Stat. § 7B-503 (2011). Pursuant to N.C. Gen. Stat. § 7B-506 (2013), if nonsecure custody is needed for more than seven calendar days, there must be a hearing on the merits within that time.

The instant inquiry involves a family where there is a pending DSS action and each parent has been appointed counsel. The children have been adjudicated abused, neglected, and/or dependent, and the case is in the permanency planning and review stage.

The respondent mother is pregnant (it is unknown whether the father is the same father as in the underlying abuse, neglect, or dependency action). Upon the birth of the infant, DSS intends to file a petition alleging abuse, neglect, or dependency and to file an *ex parte* motion for nonsecure custody as to the newborn child.

#### **Inquiry #1:**

Is the lawyer for DSS required to notify the respondent parents' lawyers prior to or at the time of filing the new petition alleging abuse, neglect, or dependency as to the newborn child?

#### **Opinion #1:**

The issue of notice is a legal question not governed by the Rules of Professional Conduct. The DSS lawyer must follow the

legal guidelines established as to the notice or service required prior to or at the time of filing the petition alleging abuse, neglect, or dependency.

If the law does not require such notice, it would not be a violation of the Rules of Professional Conduct for the DSS lawyer to provide the parents' lawyers with notice prior to or at the time of the filing, particularly when the parents' lawyers have requested such notice as to the unborn child. Rule 1.2(a)(2) provides:

A lawyer does not violate this rule by acceding to reasonable requests of opposing counsel that do not prejudice the rights of a client, by being punctual in fulfilling all professional commitments, by avoiding offensive tactics, or by treating with courtesy and consideration all persons involved in the legal process.

#### **Inquiry #2:**

Is the lawyer for DSS required to notify the respondent parents' lawyers prior to or at the time of filing the *ex parte* motion for nonsecure custody as to the newborn child?

#### **Opinion #2:**

Rule 3.5 governs a lawyer's communication with a judge about a pending matter. Rule 3.5(a)(3) provides that a lawyer shall not communicate *ex parte* with a judge or other official except in the course of official proceedings; in writing, if a copy is furnished simultaneously to the opposing party; orally, upon adequate notice to the opposing party; or "as otherwise permitted by law."

The lawyer for DSS must comply with Rule 3.5(a)(3) as to any *ex parte* communications with a judge following the filing of the petition relative to the newborn child. Whether an *ex parte* motion for nonsecure custody is specifically authorized by law is a legal question beyond the purview of the Ethics Committee. For this exception to apply, however, there must be "a statute or case law specifically and clearly authorizing such communication. Such authorization may not be inferred by the absence in the statute or case law of a specific statement requiring notice to the adverse party or counsel prior to the *ex parte* communication." 2001 FEO 15.

As noted above, N.C. Gen. Stat. § 7B-500(a) permits a law enforcement officer or a department of social services worker to take temporary physical custody of a child without a court order if there are reasonable

grounds to believe that the juvenile is abused, neglected, or dependent and that the child would be injured or could not be taken into custody if it were first necessary to obtain a court order. This opinion has no effect on the procedure set out in § 7B-500. ■

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## **Proposed Rule Amendments (cont.)**

justice after forging another individual's name to a guarantee agreement, inducing his wife to notarize the forged agreement, and using the agreement to obtain funds.

**[5] Threats, bullying, harassment, and other conduct serving no substantial purpose other than to intimidate, humiliate, or embarrass anyone associated with the judicial process including judges, opposing counsel, litigants, witnesses, or court personnel, violate the prohibition on conduct prejudicial to the administration of justice. When directed to opposing counsel, such conduct tends to impede opposing counsel's ability to represent his or her client effectively. Comments "by one lawyer tending to disparage the personality or performance of another...tend to reduce public trust and confidence in our courts and, in more extreme cases, directly interfere with the truth-finding function by distracting judges and juries from the serious business at hand." State v. Rivera, 350 N.C. 285, 291, 514 S.E.2d 720, 723 (1999). See Rule 3.5, cmt. [10] and Rule 4.4, cmt. [2].**

{5}

[6]...

[re-numbering remaining paragraphs] ■

### *Thank You to Our Meeting Sponsors*

The Title Company of North Carolina  
*for sponsoring the Councilors Reception*

Lawyers Mutual Liability Insurance  
*Company for sponsoring the  
Annual Reception and Dinner*

## Client Security Fund Reimburses Victims

At its October 23, 2014, meeting, the North Carolina State Bar Client Security Fund Board of Trustees approved payments of \$70,538.21 to 14 applicants who suffered financial losses due to the misconduct of North Carolina lawyers.

The payments authorized were:

1. An award of \$1,000 to a former client of Thomas Clements of Fayetteville. The board determined that Clements was retained to handle a client's domestic matters. Clements failed to provide any valuable legal services for the fee paid prior to being administratively suspended. Clements failed to keep the client's retainer in a trust account. Clements was transferred to disability inactive status by order effective January 15, 2014. The board previously reimbursed one other Clements client a total of \$1,000.

2. An award of \$2,000 to a former client of Daniel Fulkerson of Hickory. The board determined that Fulkerson was retained to represent a client on criminal charges. Fulkerson failed to provide any valuable legal services for the fee paid prior to abandoning his practice and entering into drug rehabilitation.

3. An award of \$2,450 to a former client of Daniel Fulkerson. The board determined that Fulkerson was retained to represent a client on criminal charges. Fulkerson failed to provide any valuable legal services for the fee paid prior to abandoning his practice and entering into drug rehabilitation.

4. An award of \$1,525 to a former client of L. Pendleton Hayes of Pinehurst. The board determined that Hayes was retained to handle a client's real estate closing. Hayes failed to make all the proper disbursements from the closing proceeds prior to her trust account being frozen by the State Bar due to misappropriation. Hayes' trust account balance was insufficient to satisfy all of her clients' obligations.

5. An award of \$1,375.63 to former clients of L. Pendleton Hayes. The board determined that Hayes was retained to handle the clients' real estate closing. Hayes failed to make all the proper disbursements from the closing pro-

ceeds. Due to misappropriation, Hayes' trust account balance was insufficient to pay all of her clients' obligations.

6. An award of \$6,744.84 to a former client of Sue E. Mako of Wilmington, North Carolina. The board determined that Mako was retained to handle personal injury claims for a client and the client's minor daughter. Mako settled the matters and deposited the settlement proceeds and med pay checks into her trust account. Mako failed to make some of the disbursements on the client's behalf. Due to a shortage in her trust account caused by a check scam, Mako's disbursement against uncollected funds, and her dishonest act of failing to return missing funds to the trust account from money she subsequently earned, Mako's trust account balance was insufficient to cover all of her clients' obligations. Mako was disbarred on August 20, 2014. The board previously reimbursed one other Mako client a total of \$72,576.08.

7. An award of \$650 to a former client of John Mauney formerly of Nags Head. The board determined that Mauney was retained to handle a client's real estate closing. From the closing proceeds, Mauney failed to pay the title insurance premium on his client's behalf. Due to misappropriation from Mauney's trust account by his employee, the trust account balance was insufficient to pay all of his clients' obligations. Mauney was disbarred on October 31, 2013. The board previously reimbursed four other Mauney clients a total of \$13,170.

8. An award of \$529 to a former client of William W. Noel III of Henderson. The board determined that Noel was retained to handle a client's speeding ticket. Noel failed to provide any valuable legal services for the fee paid. Noel's license was suspended on November 4, 2011. The board previously reimbursed five other Noel clients a total of \$2,515.

9. An award of \$12,000 to former clients of Kevin Strickland of Burgaw. The board determined that Strickland was retained to handle the clients' real estate closing. After making the necessary disbursements from the

sale proceeds, there should have been a balance of funds remaining that should have been paid to the clients. Due to misappropriation, Strickland's trust account balance was insufficient to pay all of his clients' obligations. Strickland was disbarred on December 31, 2008. The board previously reimbursed one other Strickland client a total of \$100,000.

10. An award of \$1,500 to a former client of Daniel L. Taylor of Troutman. The board determined that Taylor was retained to handle the estates of a client's parents. For almost three years, Taylor failed to open either estate or provide any valuable legal services for the fee paid. Taylor had a stroke in October 2013, and died on December 25, 2013. The board previously reimbursed five other Taylor clients a total of \$46,138.30.

11. An award of \$9,721.10 to a former client of Daniel L. Taylor. The board determined that Taylor was retained to prepare estate planning and asset protection documents for the client's parents and to get the client's father qualified for Medicaid to cover his nursing home costs. The client's father died prior to Taylor preparing any documents for the client. Taylor never prepared any estate planning documents for the client's mother.

12. An award of \$2,125 to a former client of Daniel L. Taylor. The board determined that Taylor was retained to prepare estate planning documents for the client and his wife. The client's wife died eight days after Taylor was paid. Although Taylor completed the estate planning documents for the client, Taylor failed to provide any valuable legal services for the portion of the fee paid for the client's wife's estate planning.

13. An award of \$8,166.68 to an applicant who suffered a loss caused by W. Darrell Whitley of Lexington. The board determined that Whitley was retained to handle a personal injury matter for the applicant's husband. Whitley settled the matter and retained funds to pay medical providers. Whitley's client later died. Whitley misappropriated the balance of

CONTINUED ON PAGE 56

## State Bar Swears in New Officers



Gibson

### Gibson Installed as President

Charlotte attorney Ronald L. Gibson was sworn in as president of the North Carolina State Bar. He was sworn in by Chief Justice Mark Martin at the State Bar's Annual Dinner on Thursday, October 23, 2014.

Gibson is a graduate of Davidson College. He earned his law degree in 1978 from the University of North Carolina School of Law.

His experience includes serving as a law clerk to US District Court Judge James B. McMillan, private law practice with Chambers, Stein, Ferguson & Becton, and service as associate general counsel and vice-president of marketing with Duke Power Company. He was also a principal with Scott, Madden & Associates, a management consulting firm. In addition, he has owned an insurance and financial services agency. Gibson currently is a partner with the law firm of Ruff, Bond, Cobb, Wade & Bethune, LLP.

As a State Bar councilor, Gibson has served as vice chair of the Client Assistance Committee and Grievance Committee, and has chaired the Administrative Committee. He has also served on the Authorized Practice Committee, Executive Committee, Disciplinary Advisory Committee, Appointments Advisory Committee, Ethics Committee, Facilities Committee, Program Evaluation Committee, and Issues Committee.

During remarks following the swearing-in, Gibson had this to say about his upcoming



Hunt



Merritt

### Hunt Elected President-Elect

Brevard attorney Margaret McDermott Hunt was sworn in as president-elect of the North Carolina State Bar. She was sworn in by Chief Justice Mark Martin at the State Bar's Annual Dinner on Thursday, October 23, 2014.

### Merritt Elected Vice-President

Charlotte attorney Mark W. Merritt was sworn in as vice-president of the North Carolina State Bar. He was sworn in by Chief Justice Mark Martin at the State Bar's Annual Dinner on Thursday, October 23, 2014.

Merritt is a graduate of the University of North Carolina where he was a Morehead Scholar and a member of Phi Beta Kappa. He earned his law degree in 1982 from the University of Virginia and served as editor-in-chief of the *Virginia Law Review*. After law school he clerked on the Fifth Circuit Court of Appeals for Judge John M. Wisdom. He returned to Charlotte and has practiced law at Robinson Bradshaw & Hinson since 1983.

His professional activities include serving as treasurer and president of the Mecklenburg County Bar, serving on the Board of Directors and as president of Legal Services of Southern Piedmont, and serving as chair of the North Carolina Bar Association Antitrust Section Council. While a State Bar councilor he has served as chair of the Ethics Committee and of the Lawyers Assistance Program. He has served as a member of the Facilities, Grievance, Issues, and Authorized Practice Committees. He also served as chair of the Special Committee on Ethics 2020.

ing year of service: "As your president, I will remind lawyers and the public that lawyers do good things that touch peoples' lives. We are engaged meaningfully in practically every aspect of our society, in business, in government, and in all facets of the administration of justice. Lawyers act honestly and ethically for the benefit of our clients. Yet, we let our noble profession be denigrated by caricatures of ourselves. The role of lawyers in our civilization is embodied in the Bill of Rights, and lawyers and judges are at the forefront of protecting our Constitutional rights. We should take pride in who we are and what we do. As I travel the state, I will talk to every lawyer who will listen to me about the need for lawyers to take pride in and defend our profession."

of the Grievance Committee for two years, and chaired the Grievance Committee in 2012-2013.

### Merritt Elected Vice-President

Charlotte attorney Mark W. Merritt was sworn in as vice-president of the North Carolina State Bar. He was sworn in by Chief Justice Mark Martin at the State Bar's Annual Dinner on Thursday, October 23, 2014.

Merritt is a graduate of the University of North Carolina where he was a Morehead Scholar and a member of Phi Beta Kappa. He earned his law degree in 1982 from the University of Virginia and served as editor-in-chief of the *Virginia Law Review*. After law school he clerked on the Fifth Circuit Court of Appeals for Judge John M. Wisdom. He returned to Charlotte and has practiced law at Robinson Bradshaw & Hinson since 1983.

His professional activities include serving as treasurer and president of the Mecklenburg County Bar, serving on the Board of Directors and as president of Legal Services of Southern Piedmont, and serving as chair of the North Carolina Bar Association Antitrust Section Council. While a State Bar councilor he has served as chair of the Ethics Committee and of the Lawyers Assistance Program. He has served as a member of the Facilities, Grievance, Issues, and Authorized Practice Committees. He also served as chair of the Special Committee on Ethics 2020.

Merritt is a member of the American College of Trial Lawyers and the International Society of Barristers.

He is married to Lindsay Merritt and has three children; Alex, Elizabeth, and Jay. ■

## Resolution of Appreciation for Ronald G. Baker Sr.

WHEREAS, Ronald G. Baker Sr. was elected by his fellow lawyers from Judicial District 6B in January 2003 to serve as their representative in this body. Thereafter, he was elected for three successive three-year terms as counselor; and

WHEREAS, in October 2011 Mr. Baker was elected vice-president, and in October 2012 he was elected president-elect. On October 24, 2013, he was sworn in as president of the North Carolina State Bar; and

WHEREAS, during his service to the North Carolina State Bar, Mr. Baker has served on the following committees: Grievance, Client Assistance, Administrative, Legislative, Disciplinary Advisory, Executive, Program Evaluation, Program Evaluation, LAP/Grievance Subcommittee, Appointments, Special Committee to Study Disciplinary Guidelines, Issues, Issues Special Committee to Review AP Advisory Opinion 2002-1, and Finance and Audit.

WHEREAS, during his term as president of the North Carolina State Bar, Ronald G. Baker Sr. has, it would appear, logged more miles and spent more time meeting with his constituents than any other president in the history of the North Carolina State Bar. From his far-flung outpost on the Outer Banks, Ron Baker has, at considerable personal cost and inconvenience, managed to be a ubiquitous presence at bar meetings throughout the state, personifying the State Bar impressively and creditably on dozens of occasions; and

WHEREAS, Ron Baker, having pledged during his installation as president to use all the means at his disposal to broaden participation in the governance of the State Bar, has intentionally and systematically used his influence and his appointive authority to ensure that those responsible for self-regulation of the legal profession are truly representative of an increasingly diverse profession; and

WHEREAS, among his many superlatives, Ron Baker may very well be the most prolific and best defendant in State Bar history, having been made a party to numerous lawsuits and having been the Office of Counsel's most sophisticated client ever. Whether as a named party or as the State Bar's alter ego, Ron Baker has guided the State Bar through a daunting litigational labyrinth with the skill of a consummate trial lawyer, which he most surely is, and

WHEREAS, Ron Baker has proven equally adept at influencing the formation of public policy in the legislature with respect to the regulation of the profession. Under his leadership, the State Bar has thus far managed to thwart an ill-advised attempt to redefine the practice of law that would have placed the public at risk from legal services dispensed by business corporations acting through algorithms on the internet.

NOW, THEREFORE, BE IT RESOLVED that the council of the North Carolina State Bar does hereby publicly and with deep appreciation acknowledge the strong, effective, and unselfish leadership of Ronald Baker, and expresses to him its debt for his personal service and dedication to the principles of integrity, trust, honesty, and fidelity.

BE IT FURTHER RESOLVED that a copy of this resolution be made a part of the minutes of the Annual Meeting of the North Carolina State Bar and that a copy be delivered to Ronald Baker.

### Client Security Fund (cont.)

the client's funds prior to determining whether there were valid liens to be paid. Whitley's trust account was insufficient to pay all of his clients' obligations. Whitley died on December 6, 2011. The board previously

reimbursed several other Whitley clients and applicants a total of \$764,096.74.

14. An award of \$20,750.96 to a former client of W. Darrell Whitley. The board determined that Whitley was retained to handle a client's personal injury matter. Whitley settled the matter and deposited the settlement pro-

ceeds into his trust account. Whitley made disbursements to himself and the client, and accounted for advances made against the funds, but failed to pay any of the client's medical providers. Due to misappropriation, Whitley's trust account was insufficient to pay all of his clients' obligations. ■



## Fifty-Year Lawyers Honored

As is traditional, members of the North Carolina State Bar who are celebrating the 50th anniversary of their admission to practice were honored during the State Bar's Annual Meeting at the 50-Year Lawyers Luncheon. One of the honorees, Robert G. Baynes, addressed the attendees, and each honoree was presented a certificate by the president of the State Bar, Ronald G. Baker Sr., in recognition of his service. After the ceremonies were concluded, the honorees in attendance sat for the photograph below. ■



*First row (left to right):* P. Eugene Price Jr., Raymond Thomas, Stephen G. Calaway, Darl L. Fowler, Douglas P. Connor, Joseph B. Roberts III, Charles Katzenstein Jr., Judge Sidney S. Eagles Jr., William O. King, Edwin N. Kearns, Edward L. Murrelle, Robert B. Smith Jr., Bobby W. Bowers, James E. Martin Jr., William R. White Jr. *Second row (left to right)* Richard A. Bigger Jr., John S. Fletcher II, R. Cameron Cooke, Donald M Jacobs, Larry E. Harrington, J. Robert Gordon, Leon Henderson Jr., John C. Brooks, Douglas F. Debank, H. Vernon Norwood Jr., Paul Glen Stoner Jr., Robert Vance Suggs, David I. Smith, Phil S. Edwards *Third row (left to right)* Edward H. McCormick, Larry B. Sitton, Cowles Liipfert, Arnold T. Wood, Anthony E. Rand, James M. Talley Jr., Charles E. Clement, Henry V. Barnette Jr., Robert G. Baynes, W. Erwin Fuller Jr., Charles M. Whedbee, Frederick P. Parker III, William E. Underwood Jr.

### Disciplinary Actions (cont.)

programs claiming full credit for attendance when he had not attended all of the course hours and was therefore not entitled to the full credit hours he claimed.

**Scott Ingersoll** of Creston was reprimanded by the Grievance Committee. Ingersoll filed an affidavit containing an assertion that was refuted by documents in his possession and in the court file. In the same case, after being warned by the court about being accurate in court filings, Ingersoll submitted an affidavit of time containing numerous inaccuracies.

**Eric Levine** of Charlotte was reprimanded by the Grievance Committee. Levine did not file a required prehearing statement in his client's contested case.

**William Noel III** of Henderson was reprimanded by the Grievance Committee. Noel

neglected his client's traffic case, did not communicate with his client, did not supervise his nonlawyer assistant, did not refund an unearned fee, and did not participate in the State Bar's mandatory fee dispute resolution program.

#### Transfers to Disability Inactive Status

**Kevin L. Byrd** of Cary was transferred to disability inactive status by the chair of the Grievance Committee.

#### Reinstatements

In November 2007, **Ralph Bryant** of Newport surrendered his license and was disbarred by the DHC for misappropriating entrusted funds totaling \$64,847. In August 2014 the DHC recommended that his petition for reinstatement be denied. The DHC found that reinstatement would be detrimen-

tal to the integrity and standing of the Bar, the administration of justice, or to the public's interest. The council will consider Bryant's appeal after he submits the record on appeal.

#### Notices of Intent to Seek Reinstatement

Individuals who wish to note their concurrence with or opposition to this petition should file written notice with the secretary of the State Bar, PO Box 25908, Raleigh, NC 27611, before February 1, 2015.

#### In the Matter of Hilton S. Mitchell

Notice is hereby given that Hilton S. Mitchell intends to file a petition for reinstatement. Mitchell surrender his law license and was disbarred on December 18, 2009, for depositing legal fees into his account rather than forwarding them to the law firm of Brock & Scott in which he was employed. ■

## Law School Briefs

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

### Campbell University School of Law

**Campbell Law Extends Historical Streak on July NC Bar Exam**—Over the course of the past 25 years, 90.89% of Campbell Law graduates have passed the July North Carolina bar exam on their first try. That remarkable statistic—tops among the seven NC law schools—comes on the heels of a second-place showing by the institution's graduates on the July 2014 examination, which 85.61% (119 of 139) of Campbell Law's first-time test-takers passed.

**Campbell Law Facility Honored as One of the Nation's Best by PreLaw Magazine**—Campbell Law's downtown Raleigh campus has been tabbed as one of the 55 best law school facilities in the nation by *PreLaw Magazine*. In selecting institutions for inclusion, the magazine assessed aesthetics, square footage per student on campus, library hours, number of library seats per student on campus, and amenities—including dining options, parking, and lockers.

**Dean Leonard Named Lawyer of the Year by NC Lawyers Weekly**—Campbell Law Dean J. Rich Leonard was named 2014 Lawyer of the Year by *North Carolina Lawyers Weekly* at the Leaders in the Law awards banquet on September 19 at the Raleigh Marriott City Center. Previously announced as a Leaders in the Law award recipient, Leonard was selected as the 2014 Lawyer of the Year by a vote of an independent panel of judges.

**Brown Receives NC State Bar's Annual Student Pro Bono Service Award**—Anitra Brown, a 2014 Campbell Law graduate, has been selected as a recipient of the North Carolina State Bar's annual Student Pro Bono Service Award. Brown was honored for her *pro bono* work as a third-year student at the North Carolina State Bar's 50-Year Lawyers' Luncheon on Thursday, October 23.

### Duke Law School

**Levi Tapped to Lead New ABA Committee**—The American Bar Association has named Dean David F. Levi chair of its Standing Committee on the American Judicial System.

The appointment was made by ABA President William C. Hubbard in August, following the creation of the committee by the ABA House of Delegates. The committee focuses on protecting fair and impartial courts, improving the administration of justice, ensuring adequate court funding, and defending against unfair attacks on the judiciary. It supports efforts to increase public understanding about the role of the judiciary and the importance of fair courts. Hubbard called Levi, the former chief United States District judge for the eastern district of California, "uniquely qualified" to lead the committee.

**National Academies' STEP Leader Joins Center for Innovation Policy as Executive Director**—Stephen Merrill, the longtime head of the National Academies Board on Science, Technology, and Economic Policy (STEP), has joined Duke's Center for Innovation Policy as its first executive director. His extensive work on innovation policy during his 23-year tenure as STEP executive director included a 2004 report on patent system reform that served as a blueprint for the America Invents Act of 2011.

The center addresses issues of innovation law and policy in several sectors, including the life sciences, and information and communications technology. The future of Internet regulation was the focus of its second conference, held in October in Washington, DC.

**Wrongful Convictions Clinic Client Freed**—Michael Alan Parker, a client of Duke's Wrongful Convictions Clinic, was released from prison on August 26 after 22 years of incarceration for crimes he did not commit, including allegations of child sexual abuse. Since 2011, clinic students, fac-

ulty, and alumni have worked with Asheville attorney Sean Devereux on the motion for Parker's release. Parker is the fifth clinic client to gain release since 2010.

### Elon University School of Law

**New and Groundbreaking Model for Legal Education**—Elon University School of Law will launch a fully redesigned curriculum in fall 2015, better positioning students to excel in the rapidly evolving legal profession. In keeping with the school's original vision to be a pioneering "law school with a difference," the new curriculum will be highly experiential, personalized, and professionally connected—hallmarks of Elon University's nationally recognized programs of engaged learning. With this new program, Elon Law will provide leadership for the major changes taking place in legal education.

Among the highlights of Elon Law's new program are the following:

- The first and only law school to ensure that all students benefit from full-time, faculty-directed residencies in the practice of law
- Experiential learning integrated throughout the curriculum, representing more than 20% of the program, and far exceeding the new ABA experiential learning requirements
- Students will begin their studies with an introductory program focused on legal analysis, writing and communication, leadership, and professionalism
- Each student will be assigned a four-person professional advising team: a faculty adviser, a working attorney mentor (preceptor), an executive coach, and a career consultant
- In a new seven-trimester schedule, students will complete their studies in December, allowing them to take the February bar exam and begin law practice in the spring
- Total tuition for the entering class of 2015 will be lowered nearly \$14,000 from the current level, with a guaranteed fixed

cost for the entire program of study for the class.

“The Elon Law faculty has designed an intensive, deeply experiential, highly personalized approach that we believe is unmatched,” said Elon Law Dean Luke Bierman. “This bold new model will ensure that Elon graduates have the knowledge, skills, professionalism, and experience to become lawyer-leaders in this new era of law.”

More information is available at [law.elon.edu](http://law.elon.edu).

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### North Carolina Central University School of Law

**National Jurist Rankings Reveal NCCU's Brand**—The *National Jurist Magazine's* respected rankings of US law schools reveal the brand of NCCU Law as one that is fundamentally grounded in the realities of the American economy and demographic change. The publication has consistently ranked North Carolina Central University in the top five for the provision of clinical experiences to students. The school offers no less than 15 clinics in areas such as alternative dispute resolution, civil litigation, criminal defense, domestic violence, family, juvenile and veterans law, low income taxation, small business, financial transactions, and patents and trademarks.

With the recertification by the US Patent and Trademark Office, NCCU is one of only 11 law schools in the country that can offer representation in these fields, and there are plans in the near future to establish an Intellectual Property Center. The school has also expanded the Consumer Financial Transaction Clinic to include bankruptcy and consumer fraud protection.

This real world, experiential learning may have contributed to NCCU's 76% bar exam passage rate last July. But hands-on learning is not the only way that NCCU provides its students with an edge. NCCU Law is also highly diverse, and received an “A” rating in this category from *National Jurist*. Among faculty and student populations, 39% are white and the remaining 61% are black, Hispanic, Asian, or of mixed race.

“This variety of perspectives and life experiences enriches our classroom discussions and our legal advice so that it is more

relevant and realistic,” said Dean Phyllis Craig-Taylor.

With NCCU's strong, reality-based brand and an “A” rating by *National Jurist* for affordability, the school has returned to full enrollment of 600 seats from the recession low of 535 in Fall 2011. This contrasts with recent reports of many other top-notch schools that have become resigned to the decline in enrollment.

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### University of North Carolina School of Law

**Courtroom Renovation**—During summer break, UNC's Graham Kenan courtroom was gutted and rebuilt to modern standards. Practicing judges and a nationally renowned courtroom design specialist were consulted. The courtroom opened its doors for trial advocacy courses in late August to praise from students and faculty for its design and technology. Its features include flat-screen monitors throughout the jury box, and at the attorneys' tables, witness stand and judge's bench; touch panels for the presenting attorney to exhibit electronic evidence; onscreen annotation at the podium, witness stand or judge's bench; and a pivoting lectern to transition from courtroom to classroom mode.

**Pro Bono Online Database for Alumni**—The new *Pro Bono* Alumni Opportunities Portal offers attorneys and legal service providers an online system to post available *pro bono* opportunities needing attorney volunteers. Licensed attorneys can then view these available opportunities, searchable by geographic locations and areas of law, and sign up to volunteer ([law.unc.edu/probono/alumni/opportunities/](http://law.unc.edu/probono/alumni/opportunities/)).

**UNC Grads Earn Best Bar Exam Passage Rate in NC**—UNC School of Law graduates achieved the highest bar exam passage rate in the state, at 86.79%, according to the official July exam results released by the Board of Law Examiners in August. The percentage of UNC School of Law students who took the exam for the first time and passed was up from 81.29% last year.

**New Trademark Law School Pilot Program**—UNC School of Law students have a new hands-on learning opportunity: providing trademark counsel to entrepreneurs in conjunction with a program of the US Patent and Trademark Office

(USPTO). UNC was among 19 schools nationwide selected to participate in the Law School Clinic Certification Pilot Program. This program is being run out of the school's Community Development Law Clinic.

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### Wake Forest University School of Law

Wake Forest Law has introduced a new Criminal Justice Program, which is designed to facilitate critical thinking and scholarly engagement surrounding criminal justice systems in the United States. The program offers students interested in criminal justice an opportunity to engage in theoretical and practical dialogue about these issues to enhance their doctrinal classroom experiences. “The program will publicize the scholarship, advocacy efforts, and policy work of people within and outside the legal academy on a variety of criminal justice topics,” says Executive Associate Dean for Academic Affairs Ron Wright. “We believe this will enrich the student experience at Wake Forest Law.” Professor Kami Simmons, who currently teaches courses related to criminal law and criminal procedure, has been named director of the program. After earning her JD from Harvard Law School, Professor Simmons worked as an associate at private law firms in Washington, DC, where she practiced in the areas of civil litigation, white-collar criminal defense, and internal investigations. Professor Simmons frequently makes presentations on law enforcement issues, and is a national expert in the field of police accountability. According to Professor Simmons, “The Criminal Justice Program will sponsor scholarly discussions open to the entire campus and broader community on topics such as wrongful convictions, police accountability, mass incarceration, sentencing, and search and seizure issues. We also plan to tap into the valuable resources of our local alumni to serve as mentors for students interested in criminal justice careers.” Professor Simmons continued, “In addition to the black-letter law students learn in their doctrinal courses, we want students to develop an appreciation for the realities of the criminal justice system. The program will provide opportunities for all interested students to see criminal justice in action through prison tours, ride-alongs with police officers, and other organized activities.” ■

# Annual Reports of State Bar Boards

## Board of Legal Specialization

*Submitted by James B. Angell, Chair*

With the addition of 73 new specialists last November, the State Bar's specialization program now includes 910 lawyers who are board certified in the 11 specialties of appellate practice, bankruptcy law, criminal law and the subspecialty juvenile delinquency law, elder law, estate planning and probate law, family law, immigration law, real property law, social security disability law, trademark law, and workers' compensation law. In the spring we received 105 applications from lawyers seeking certification this year. This is the second year in a row in which over 100 applications were received. Of the 2014 applicants, 94 applicants met the substantial involvement, CLE, and peer review standards for certification, and were approved to sit for the specialty exams, which are being administered in the State Bar building this fall. Fourteen different examinations (including subspecialties) will be administered in our State Bar building during October and November 2014. We are grateful for the new building which is an efficient, comfortable, and cost-free place in which to administer the exams.

A program of this magnitude requires enormous amounts of volunteer time. The specialization program is the largest single volunteer effort of the North Carolina State Bar. The Board of Legal Specialization, itself made up of nine volunteers including three public members, often refers to the members of the 11 specialty committees as the "life blood" of the specialization program. The 84 lawyers who sit on the specialty committees devote untold hours to reviewing applications, drafting exam questions, and grading specialty exams. They do this because they are proud to be specialists, and they want the State Bar's specialization program to be one of the best in the nation.

Eight more volunteer lawyers—both specialists and nonspecialists—were asked early this year to serve on the board's Long Range Planning Committee. The Long Range Planning Committee was initiated under the

chairmanship of Jeri L. Whitfield, who has retired from the board but continues to serve as chair of this committee. The committee was created to take stock of the accomplishments of the specialization program, to evaluate the North Carolina program relative to other state programs, to determine where improvements might be made, and to lay a plan for meeting the challenges of the future. Specific tasks of the committee include a complete review of the rules in State Bar's Plan for Legal Specialization to determine whether there is need for substantive change; developing a three-to-five year plan for the administration of the certification process and the implementation of new specialties; and meeting the goal of 1,000 North Carolina legal specialists within that planning period. We will keep the council advised of the work of this important committee.

Our annual luncheon to honor 25-year and newly certified specialists was held in March at the Raleigh Renaissance Hotel. At the lunch, the new specialists who were certified in November 2013 were recognized and presented with specialization lapel pins. The board also recognized 31 specialists who were originally certified in 1989 and who have maintained their certifications for 25 years. I also had the honor of presenting the board's three special recognition awards named in honor of past chairs of the board. The Howard L. Gum Excellence in Committee Service Award was given to Matthew Ladenheim, a board certified specialist in trademark law, for his exemplary service in 2013 leading the specialty committee that developed the standards and wrote the specialty exam for the new trademark law specialty. The James E. Cross Leadership Award was presented to Margaret Burnham, a board certified specialist in real property law, who volunteers numerous hours of her time presenting CLE programs and mentoring other lawyers in her specialty of real property law. The Sara H. Davis Excellence Award was presented to Hank Patterson, a certified workers' compensation law specialist, for his dedication

to improving the laws governing the compensation of injured workers.

This year the board established a scholarship fund to provide scholarships that will pay the application fees for prosecutors, public defenders, and nonprofit public interest lawyers who wish to become certified specialists. Application fees can be a barrier to applying for certification for lawyers who work in the public sector. The fund is administered by the North Carolina Legal Education Assistance Foundation (NC LEAF). This collaboration with NC LEAF furthers the mission of both NC LEAF and the specialization program. Assisting public interest lawyers to seek board certification recognizes commitment to service, and will encourage these lawyers to continue to serve underrepresented citizens and the public and to improve their knowledge and skills in their practice areas. Three such lawyers received scholarships that paid their 2014 application fees. In recognition of her long service to the specialization program, the fund is named the Jeri L. Whitfield Legal Specialty Certification Scholarship Fund. Your tax-deductible contributions can be made through NC LEAF.

Also in this year's news, Alice Mine, the director of our specialization program, was reappointed chair of the ABA Standing Committee on Specialization, the leading national proponent of lawyer specialty certification.

The State Bar *Journal* featured interviews with board certified specialists Robert Kemp, criminal specialist and the public defender for Pitt County, and Pamela Silverman, an estate planning law specialist in Charlotte; and a joint interview with new trademark law specialists Matthew Ladenheim of Charlotte and William Bryner of Winston-Salem.

Finally, the board initiated a procedure for advanced review of requests for waivers of strict compliance with the CLE and substantial involvement standards. This procedure helped to streamline the application process and eliminated the need for many time-consuming appeals.

As I mentioned, the term of board member and chair Jeri Whitfield ended this year. Jeri brought the perspective of a workers' compensation law specialist, a former specialty committee chair, a defense lawyer, and a "big firm" lawyer to the deliberations of the board during her service from 2006 to 2014. She led the board with consummate professionalism, diplomacy, and good will. Jeri's contributions to the specialization program were unique and she will be missed.

On behalf of the board, I want to express my sincere appreciation to the members of the council for your continuing support of the specialty certification program.

### **Board of Continuing Legal Education**

*Submitted by Amy P. Hunt, Chair*

Lawyers continue to meet and exceed their mandatory CLE requirements. By mid-March 2014, the CLE department processed and filed over 24,500 annual report forms for the 2013 compliance year. I am pleased to report that 99% of active members of the North Carolina State Bar complied with the mandatory CLE requirements for 2013. The report forms show that North Carolina lawyers took a total of 352,683 hours of CLE in 2013, or 15 CLE hours on average per active member of the State Bar. This is three hours above the mandated 12 CLE hours per year.

The CLE program continues to operate on a sound financial footing, supporting the administration of the CLE program with the revenue from the attendee and noncompliance fees that it collects, while generating additional funds to support three programs that are fundamental to the administration of justice and the promotion of the professional conduct of lawyers in North Carolina. The program's total 2013 contribution to the operation of the Lawyer Assistance Program (LAP) was \$214,190 with \$127,125 paid in 2013 and \$87,065 paid in early 2014. To date in 2014, the board has collected and distributed \$142,680 to support the work of the Equal Access to Justice Commission and \$261,726 to support the work of the Chief Justice's Commission on Professionalism. The board also contributed \$69,085 to the State Bar to cover the cost of administering the CLE funds for these other programs.

Each spring the board receives hundreds of requests for exemptions from the CLE requirements. The requests range from pleas to be relieved of the penalty fee for late filing of

the annual report form to requests for exemptions from the annual mandatory minimum CLE hours. The chair of the board appoints an Exemptions Committee, comprised of one board member, to hear the requests because a committee of one has the flexibility to resolve the requests in a timely and efficient manner. To understand the volume of the committee's work, consider that in 2013, the Exemptions Committee heard and decided 474 requests for exemptions. Serving on the committee is literally a thankless task because the board tries to keep the identity of the board member as private as possible (while complying with the public records law) so that the board member is not inundated with importunings from lawyers. Although I will respect that anonymity in this report, I will express the great appreciation of the other members of the board for the work of the committee.

This year the CLE Board put into place the software programming and accreditation procedures necessary to permit lawyers to fulfill up to 6 hours of CLE by "attending" CLE programs online. This was possible because an amendment to the CLE rules last year increasing permissible online CLE from four hours to six hours. This year the board has proposed several amendments to the rules governing the program, including amendments to Rule .1517(d), which requires a lawyer to be a nonresident for at least six consecutive months in a given year to qualify for the nonresident exemption from mandatory CLE. Additional amendments to Rule .1518 were proposed to 1) change the name of the Professionalism for New Admittees program to Professionalism for New Attorneys (PNA) and 2) to permit the Board of Continuing Legal Education to approve alternative timeframes for the PNA program in order to give CLE providers more flexibility to be creative in their presentations of the program.

Regrettably, the board terms of Susan Hargrove, an attorney with Smith Anderson in Raleigh, and councilor Marci Armstrong from Smithfield have come to an end. Susan and Marci have been insightful and dedicated members of the board. They will be missed.

The board strives to improve the program of mandatory continuing legal education for North Carolina lawyers. We welcome any recommendations or suggestions that councilors may have in this regard. On behalf of the other members of the board, I would like to thank you for the opportunity to contribute to the protection of the public by advancing

the competency of North Carolina lawyers.

### **Board of Paralegal Certification**

*Submitted by G. Gray Wilson, Chair*

The Board of Paralegal Certification accepted the first application for certification on July 1, 2005. Since that date, over 6,819 applications have been received by the board, and I am proud to report that there are currently 4,169 North Carolina State Bar certified paralegals. In 2014 the board granted 102 new paralegal certifications and recertified 4,169 certified paralegals. The statistics and the anecdotal evidence all indicate that obtaining North Carolina certification has become the "gold standard" for paralegals and an expected precursor to obtaining employment as a paralegal in North Carolina.

Since July 2008, certification as a paralegal has required passage of a rigorous three-hour, 150-question multiple-choice examination. The exam tests an applicant's knowledge of the following subjects: civil litigation, commercial law, criminal law, ethics, family law, legal research, real property, and wills, trusts, and estate administration; and the following practice domains: communication, organization, documentation, analysis, and research. The exam requires an applicant to demonstrate that he or she possesses the skills and knowledge necessary to provide competent assistance to lawyers. During the past 12 months, the board administered the exam to 318 applicants for certification.

The Certification Committee that writes the exam is composed of seven exceptionally dedicated paralegals and paralegal educators. Teresa Irvin, a six-year veteran of the committee, continues to serve as chair. We are grateful to Karen Ferguson England for replacing Patricia F. Clapper on the committee. Ms. Clapper was appointed to the Board of Paralegal Certification last year.

To maintain certification, a certified paralegal must earn six hours of continuing paralegal education (CPE) credits, including one hour of ethics, every 12 months. I am pleased to report that certified paralegals continued to improve their competency by taking over 24,000 hours of CPE in the last 12 months.

The term of Grace Ward ends with this meeting of the council. Grace was one of the first paralegals to be certified. She is currently employed by the Winston-Salem firm of Allman, Spry, Davis, Leggett & Crumpler, PA. During her service on the board, Grace was a champion of paralegals and a dedicated

supporter of our certification credential. Grace's attention to detail, thorough preparation, and refusal to accept propositions at face value made her an invaluable member of the board and also demonstrated the very best that a certified paralegal has to offer to a lawyer. Although Grace will be missed, the board is grateful to the council for re-appointing board members Teri Bowling and Howard Gum to second terms on the board.

On May 2, 2014, the Board of Paralegal Certification hosted a reception to honor certified paralegals and to express the appreciation of the board and the council for the \$500,000 contribution made by the paralegal certification program to the North Carolina State Bar Foundation to provide additional funding for the construction of the new State Bar building. Over 200 certified paralegals and guests attended. In addition to the catered reception, the program included three hours of free CPE credit for those in attendance. John McMillan, chair of the State Bar Foundation, made opening remarks and offered a champagne toast to the success of the paralegal certification program and to the accomplishments of all paralegals who have become certified.

The Board of Paralegal Certification looks forward to continued success as an integral part of the North Carolina State Bar.

## **Lawyer Assistance Program**

*Submitted by Robynn Moraites, Director*

The Lawyer Assistance Program ("LAP") continues to grow and, out of sheer necessity, continues to streamline its processes and upgrade its infrastructure. For a detailed annual report, please visit [nclap.org/annual-report](http://nclap.org/annual-report).

In November 2013, the LAP launched the inaugural edition of *Sidebar*, a quarterly e-newsletter. *Sidebar* is a place where we share articles and information—from lawyers' personal stories and perspectives on the practice of law, to national, mainstream news articles about the effects of stress and strategies for work-life balance. All subscriptions are confidential and anonymous, and anyone is invited to subscribe directly to receive *Sidebar*. *Sidebar* currently has just over 1,000 subscribers.

In 2014 the LAP also launched a brand new website. It contains a great deal more information about the types of services the LAP provides and the most common issues we see. The content is all new and is geared to

answer some of the most common questions we field. The website also has some new sections including a one for our CLE topics and talks, one with guidance for law firms, a one for family members, as well as a password-protected section with resources specifically for LAP volunteers.

The ratio of addiction to mental health cases remains fairly consistent. We continue to see more complex mental health cases with multiple issues occurring in the same individual. Due to the current trend in the profession to attempt to medicate stress in lieu of making lifestyle changes, we continue to see impairments due to the over prescription, overuse, and combined use of prescribed medications. Alcoholism and addiction remain critical, ongoing problems, and we saw a small uptick this year in the number of lawyers who self-referred and were seeking inpatient treatment.

The LAP became involved in two major new initiatives this past year. First, we have undertaken a law school initiative aimed at reaching every law student in the state. With seven law schools in NC, this is a major undertaking, with the bulk of implementation scheduled to begin in early 2015. We began the early phase of implementation in 2014 by becoming the official provider of the work-life balance CLE credit hour as part of the mandatory, statewide Professionalism for New Admittees ("PNA") program. Eighteen LAP volunteers attended specialized speaker training and then volunteered to speak at the PNA events across the state, many of which occurred on the same day. With this training, our LAP presentation and information was consistent across presentations, and we reached every newly admitted lawyer in NC in 2014.

The second major initiative we undertook was to begin working collaboratively with the NC Bar Association's Transitioning Lawyer Commission ("TLC") (for older lawyers needing to transition out of practice). The TLC and LAP have begun cross-referring and working together as needed. The relationship is mutually beneficial, and we look forward to years of cooperative collaboration with the TLC.

## **The Year in Review**

Now in its 35th year of operation, NC LAP is busier than ever. NC LAP typically fields anywhere from five to ten "new inquiry or concern" calls a week in each of its Charlotte and Raleigh offices, totaling

approximately 600-800 telephone calls, from impaired attorneys, judges, or law students, or concerned family members, managing partners, or colleagues. Of these calls this year, 95 resulted in newly opened files, with 17 additional files reopened, bringing the total number of opened cases to 112. We closed 414 files resulting in a combined total of 427 open cases at year's end.

The rate of self-referral to LAP remains steady at 48%. Approximately 32% of LAP referrals came from colleagues, law firms, friends, family and judges who expressed concern about a lawyer or judge. The remaining 20% of referrals came from law schools, the Board of Law Examiners, other LAPs, therapists, physicians, or from the grievance process.

Please see the graph on the next page detailing the issues we are seeing. Many clients exhibit problems in more than one category, so there is overlap in documenting the issues. We continue to see psychological problems more often than other issues, and these frequently coexist with substance abuse issues.

The LAP presented at least 67 CLE programs this year. One of the most important developments was LAP's approval as the universal "work-life balance" presenter at the Professionalism for New Admittees program. As the approved provider, the LAP was able to reach every newly admitted lawyer this year.

The Minority Outreach Conference continues with great success. This year it was held in Chapel Hill on February 28, 2014. In its fourth year, the conference's goal is to reach out to minority members of the bar. Historically, the LAP has been underutilized by African American attorneys. We reached registration capacity of 400 African American attorneys with 326 in attendance.

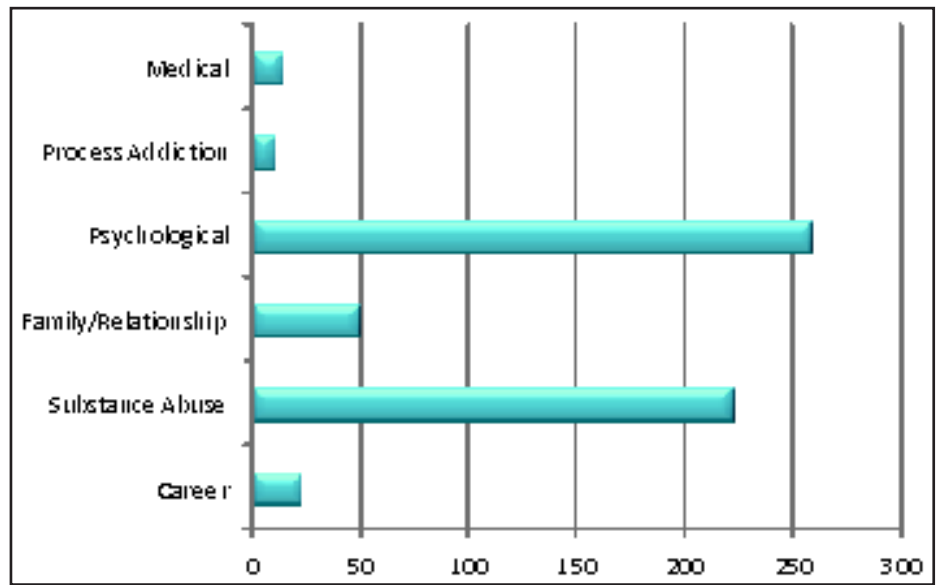
Judge Joe Webster did a wonderful job as keynote speaker for the conference. Following Judge Webster's keynote was a roundtable discussion with Judge Webster, Judge Keith Gregory, Vice Chancellor Winston Crisp, and attorneys Glenn Adams, Donna Rascoe, Brandon Shelton, and Harriett Twiggs-Small. The afternoon session featured a presentation by Dr. Michael Hall about how to thrive in practice. Terry Sherrill and Towanda Garner gave a LAP overview. The final session of the day was an outstanding presentation from Florida Representative Darryl Rouson, who shared

his personal story of renewal and recovery.

We currently have 200 LAP volunteers. The LAP network of volunteers and lawyer support groups provide a major part of the assistance given by the LAP to lawyers around the state. Without the extended volunteer network, it would be impossible for the LAP to be as effective as it has been during the past year. Eighteen volunteers attended specialized speaker training for high-demand CLE topics.

The LAP continues the development of local volunteer meetings to provide greater continuity and support in meeting the needs of lawyers new in recovery, and allowing volunteers the chance to grow in their own recoveries.

Nicole Ellington, LPC, LCAS, recently joined the LAP as the eastern clinical coordinator, and Delia Brown replaced Joan Renken as the Raleigh office administrator. There were no other changes in the LAP Staff: Robynn Moraites, executive director; Towanda Garner, Piedmont clinical coordi-



nator; Cathy Killian, clinical director and western clinical coordinator.

The LAP Board members are David W. Long, chair; Darrin Jordan, vice-chair;

Christopher Budnick; Jerry Jernigan; Lanée Borsman; Dr. Joseph Jordan; John Bowman; Dr. Nena Lekwauwua; and Robert "Bert" Nunley. ■

## 2015 Appointments to Boards and Commissions

### January Council Meeting

**Lawyer Assistance Program Board** (3-year terms) – There are three appointments to be made. Dr. Nena Lekwauwua and Lanée Borsman are eligible for reappointment. David W. Long is not eligible.

### April Council Meeting

**American Bar Association Delegates** (2-year terms) – There are three appointments to be made. M. Keith Kapp is eligible for reappointment. John B. McMillan and Andrew J. Epstein (young lawyer delegate) are not eligible.

**Disciplinary Hearing Commission** (3-year terms) – There are nine appointments to be made. Irvin W. Hankins III, Barbara B. Weyher, Renny W. Deese, Randy Moreau, (public member), Percy L. Taylor (public member), and Bradley Lail (public member) are eligible for reappointment. Steven D. Michael, Ronald R. Davis, and Karen B. Ray (public member) are not eligible for reappointment.

**Grievance Resolution Board** (4-year terms) – The council must make one recommendation to the governor for appointment to this

board. Darrin D. Jordan is eligible for reappointment.

**Legal Aid of North Carolina** (3-year terms) – There is one appointment to be made. Judge Jane P. Gray is eligible for reappointment.

### July Council Meeting

**Board of Legal Specialization** (3-year terms) – There are three appointments to be made. Larry Rocamora, Lana S. Warlick, and Delores S. Todd (public member) are eligible for reappointment.

**IOLTA Board of Trustees** (3-year terms) – There are three appointments to be made. E. Fitzgerald Parnell III is eligible for reappointment. Michael A. Colombo and F. Edward Broadwell Jr. are not eligible for reappointment.

**Commission on Indigent Defense Services** (4-year terms) – There is one appointment to be made. David R. Teddy is eligible for reappointment.

### October Council Meeting

**Client Security Fund Board of Trustees** (5-year terms) – There is one appointment to be made. LeAnn N. Brown is not eligible for

reappointment.

**Board of Law Examiners** (3-year terms) – There are three appointments to be made. Judge A. Leon Stanback and Samuel S. Woodley Jr. are eligible for reappointment. William K. Davis is not eligible for reappointment.

**Board of Continuing Legal Education** (3-year terms) – There are three appointments to be made. Arnita M. Dula and Christina G. Hinkle are eligible for reappointment. Judge J. H. Corpening II is not eligible for reappointment.

**NC LEAF** (1-year terms) – There is one appointment to be made. William R. Purcell is eligible for reappointment.

**Board of Paralegal Certification** (3-year terms) – There are three appointments to be made. Shelby D. Benton, Robert C. Bowers, and Patty Clapper (paralegal) are eligible for reappointment.

### Presidential Appointments

**Equal Access to Justice Commission** (3-year terms) – There is one appointment to be made. E. Fitzgerald Parnell III is eligible for reappointment. ■

# February 2015 Bar Exam Applicants

The February 2015 bar examination will be held in Raleigh on February 24 and 25, 2015. Published below are the names of the applicants whose applications were received on or before October 31, 2014. Members are requested to examine it and notify the board in a signed letter of any information which might influence the board in considering the general fitness of any applicant for admission. Correspondence should be directed to Lee A. Vlahos, Executive Director, Board of Law Examiners, 5510 Six Forks Rd., Suite 300, Raleigh, NC 27609.

<b>Michelle Abbott</b> Charlotte, NC	<b>Marvilyn Bohannon</b> Mebane, NC	<b>Alaina Byrd</b> Charlotte, NC	<b>Jason Craig</b> Charlotte, NC	<b>William Duncan</b> Columbia, SC
<b>David Allen</b> Pearl River, NY	<b>Callen Bolick</b> Apex, NC	<b>Micah Byrd</b> Winston-Salem, NC	<b>Kelly Crecco</b> Durham, NC	<b>Luka Duric</b> Salisbury, NC
<b>Matthew Andrews</b> Galac, VA	<b>Laura Boneau</b> Wilmington, NC	<b>Anil Caleb</b> Fayetteville, NC	<b>Shawntae Crews</b> Charlotte, NC	<b>William Dyer V</b> Charlotte, NC
<b>Patrick Apple</b> Pleasant Garden, NC	<b>Cortney Bonvillain</b> Cary, NC	<b>Richard Campbell</b> Suffolk, VA	<b>Brentley Cronquist</b> Baltimore, MD	<b>Daniel Dziuban</b> Greensboro, NC
<b>Generra Arnette</b> Charlotte, NC	<b>Vincent Borden</b> Weaverville, NC	<b>John Cargill</b> Raleigh, NC	<b>Gregory Crowder</b> Durham, NC	<b>Gregory Easley</b> Kernersville, NC
<b>Nicole Arrington</b> Charlotte, NC	<b>Cecelia Borkowski</b> Charlotte, NC	<b>Kriss Anne Carlstrom</b> Charlotte, NC	<b>Brooke Crump</b> Mount Gilead, NC	<b>Rebeca Echevarria</b> Charlotte, NC
<b>Kristina Ash</b> Raleigh, NC	<b>Glenna Boston</b> Durham, NC	<b>Ashley Carter</b> Mebane, NC	<b>Phyllis Culbertson</b> Winston-Salem, NC	<b>Andrew Eckstine</b> Charlotte, NC
<b>Leah Ash</b> Charlotte, NC	<b>Michael Bowlin</b> Charlotte, NC	<b>Leslie Casse</b> Asheville, NC	<b>Stephen Dalton</b> Brevard, NC	<b>Erin Edgar</b> Raleigh, NC
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<b>Erica Augello</b> Tampa, FL	<b>John Bradley</b> Birmingham, AL	<b>David Chambers</b> Winston-Salem, NC	<b>Kendra Davis</b> Winston-Salem, NC	<b>Phillip Elkins</b> Southern Pines, NC
<b>Helen Baddour</b> Raleigh, NC	<b>Kindra Bradley</b> Mebane, NC	<b>Cheyenne Chambers</b> Indian Trail, NC	<b>Terence Davis</b> Charlotte, NC	<b>Annie Ellis</b> Johnson City, TN
<b>Wilmoth Baker</b> Tallahassee, FL	<b>Brittany Brady</b> Charlotte, NC	<b>J. Chancey</b> Asheville, NC	<b>Candace Davis</b> Asheville, NC	<b>Pamela Entzel</b> Durham, NC
<b>Jennifer Baril</b> Saint Johns, FL	<b>Joshua Brasch</b> Charlotte, NC	<b>Nalina Chinnasami</b> High Point, NC	<b>Jill Dawkins</b> Charlotte, NC	<b>Erica Erickson</b> Duluth, MN
<b>James Bartorelli</b> High Point, NC	<b>Jennine Brazell</b> Greensboro, NC	<b>JeongYeong Cho</b> Raleigh, NC	<b>Aundrea Dean</b> Charlotte, NC	<b>Harold Eustache</b> Winston-Salem, NC
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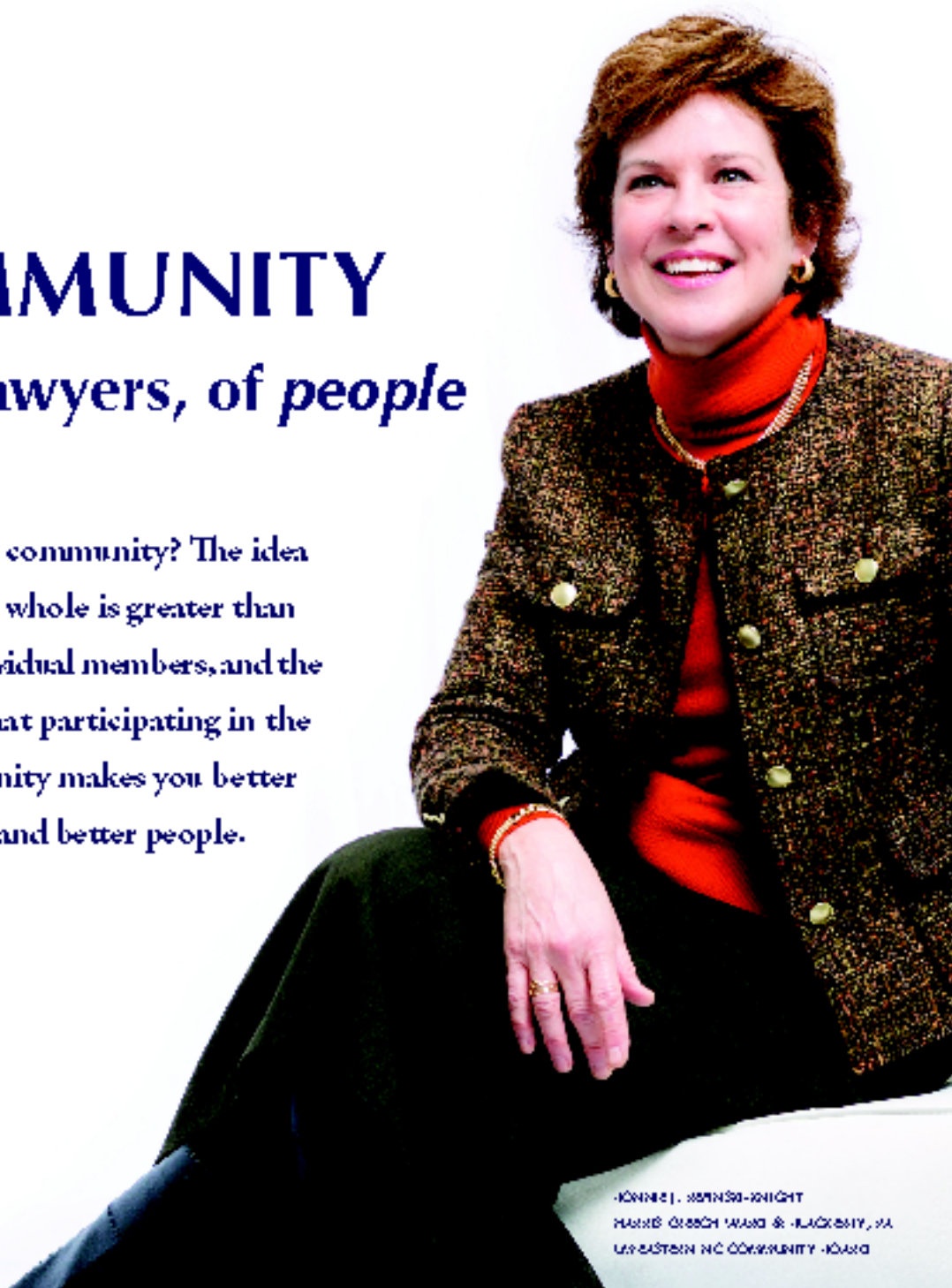
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# COMMUNITY

*of lawyers, of people*

What is community? The idea that the whole is greater than the individual members, and the belief that participating in the community makes you better lawyers and better people.



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