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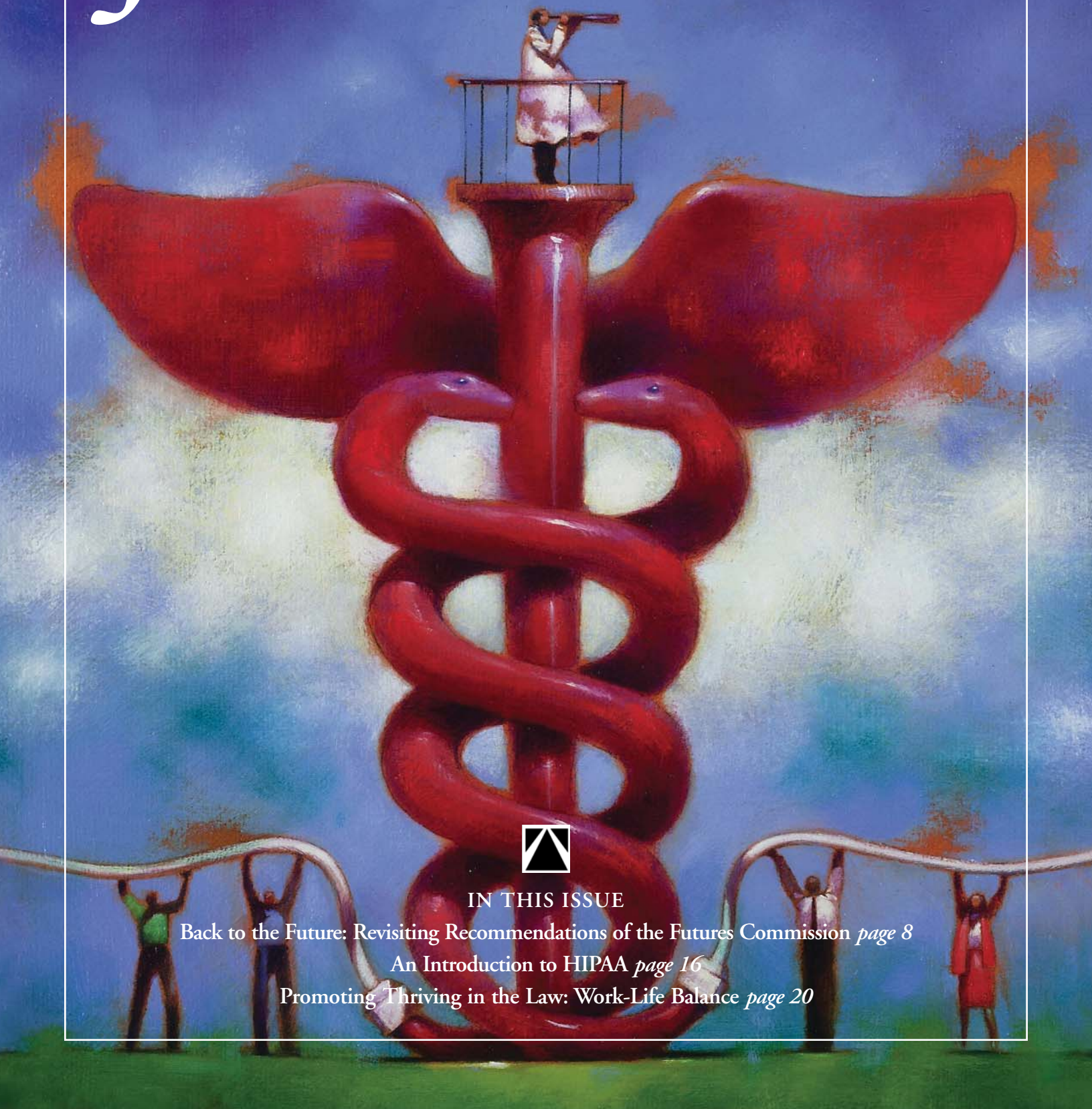


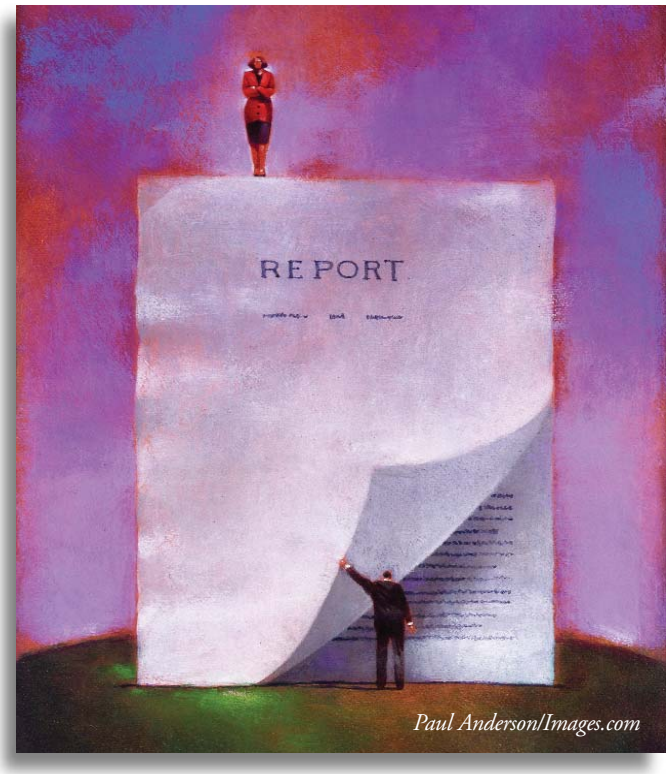
IN THIS ISSUE

Back to the Future:

Revisiting the Recommendations of the Commission for the Future of Justice and the Courts in North Carolina

By Michael Crowell

This article was written just as the 2009 General Assembly was getting underway. At the time of writing, legislation had been introduced consistent with some of the Futures Commission's recommendations—e.g., merit selection of judges, Supreme Court control of rules of procedure, a separate office for prosecutors—but it was too early to know whether any of those efforts would be successful.



Paul Anderson/Images.com

In December 1996 the Commission for the Future of Justice and the Courts in North Carolina—more commonly known as the "Futures Commission" or the "Medlin Commission" after its chair, John G. Medlin Jr.—issued its report, "Without Favor, Denial, or Delay," a 92-page blueprint for improvement of the state court system. It was the first comprehensive review of the General Court of Justice since its establishment in the 1960s.

The commission called for a significant restructuring: a judicial council to allocate funds within the court system, set salaries, determine jurisdiction of trial courts and realign districts; merger of the district and superior courts into a single-level trial court with many fewer districts; transfer of prosecutors to the executive branch; appointment of all judges; the creation of more "problem-solving courts" such as family court; and so on. Some of the commission's proposals were implemented—the family court idea has been popular, for example, and the judicial council was established, although not with the kind of authority recommended—but no significant restructuring of the court system has taken place.

A major premise behind the Futures Commission recommendations was that in a time when state population and caseloads are rising dramatically, court resources are limited and are likely to remain so. Therefore, a more efficient way of doing business is essential. With the current economic crisis hitting the state, and resources more precious than ever, it is a good time to look back at the Futures Commission's recommendations

and see whether some ought to be dusted off and brought back for debate.

The Futures Commission

The Futures Commission was established by Chief Justice Jim Exum in 1994 and continued by his successor, Burley Mitchell. Its chair was John Medlin Jr., retired chairman of Wachovia, and the vice-chairs were former Chief Justice Rhoda Billings and retired superior court judge Bob Collier. The commission had a diverse and distinguished list of members, from lawyers and business CEOs to legislators and newspaper editors and police chiefs. There were no sitting court officials, however, as Chief Justice Exum wanted commission members to approach their work free of any ties to the present court organization. Still, a number of sitting judges, clerks, and prosecutors served advisory committees and by that means helped shape the commission's recommendations.

The commission met almost monthly for nearly two and half years, held numerous hearings, conducted polls, visited other states, circulated papers for discussion, and finally issued its report in December 1996. Both the North Carolina Bar Association and General Assembly later established special committees to review the recommendations. Some proposals were successful, and the commission's report has been mentioned frequently in public debate about the courts, but interest faded after a few years.

Commission Themes

Several major themes run through the Futures Commission's report and shape the recommendations. First is the accountability of court officials, which in turn depends on their having sufficient authority to warrant being held responsible. Independence of the judiciary likewise is of great importance. The court structure must be flexible. And justice should be uniform throughout the state.

Those themes strongly echo the work of the Bell Commission (named for its chair, Spencer Bell), which was the driving force in the 1950s for the last major overhaul of the courts in North Carolina: the 1962 revision of the State Constitution. The Bell Commission applied the same fundamental principles—accountability, independence, flexibility, and uniformity. For the Bell Commission that meant, more than anything else, elimination of the hodgepodge of local courts that then existed, substituting in their place the statewide General Court of Justice with its new district court division and court of appeals, operated by officials who all became state employees, subject to uniform rules of jurisdiction and procedure. Committed to the same guiding principles, the Futures Commission often found itself looking back at the Bell Commission and trying to apply that study's vision to the courts of the 21st century.

Accountability and responsibility - Perhaps most important for the Futures Commission was the premise that court officials must be accountable for efficient management of the system, and to be accountable they must be given authority to manage. The judiciary should be a truly independent, equal branch of state government, with court officers given the power to decide how to allocate funds, where to assign personnel, what procedure to follow, and how to organize districts. Thus, the Futures Commission recommended:

- Creation of a Judicial Council which would submit the courts' budget directly to the General Assembly rather than going through the governor.
- Appropriation of funds to the courts in two lump sums, one for personnel and one for non-personnel, with court authority to decide how to allocate moneys within those broad categories.
- Appointment of a single chief judge for each district by the chief justice, following the consolidation of districts and the merger of superior and district court into a single trial court.
- Employment of a professional court administrator for each district.
- Authorization for the Judicial Council to set judicial salaries, subject to veto by the legislature.
- Establishment of performance standards for court officials.
- Enactment of all rules of procedure and evidence for all levels of court by the Supreme Court.
- Authorization for the Judicial Council to redraw judicial district lines.
- Elimination of the concept of terms of court, and assignment of more cases to judges to hear from start to finish.
- Appointment of magistrates by the chief judge, the same official who is responsible for their supervision.

These recommendations in particular harken back to the Bell Commission. It believed that "effective administration of justice, as any other type of administration, requires that responsibility be fixed upon a single point or agency."[1] Consistent with that view, the Bell Commission had wanted the chief justice to appoint all district judges and the supreme court to determine the jurisdiction of the trial divisions and set all rules of procedure for both the trial and appellate courts. Those proposals did not make it into the uniform court system established in the 1960s and, in the eyes of the Futures Commission, the absence of a fixed point of responsibility—and sufficient authority for judicial officials to manage the courts—continues to trouble the court system.

Independence - A second strong theme of the Futures Commission recommendations, closely related to accountability and responsibility, is judicial independence. To that end the commission proposed that all judges be appointed rather than elected, subject to retention elections. As already mentioned, the commission also favored the establishment of performance standards for judges. Those standards would be used for periodic evaluations, with the results made public, along with a recommendation on whether the judge should be retained. Other aspects of judicial independence proposed by the commission include court control over rules of procedure and organization of judicial districts. Recognizing that prosecution is an executive, not judicial function, the Futures Commission would have transferred district attorneys to a new state solicitor's office under the attorney general. Likewise, the defense of indigents would be the responsibility of a new executive branch agency.

Flexibility - Perhaps of most interest in the current economic situation, a principal theme of the Futures Commission is flexibility, the creation of a court structure which is capable of adjusting to changing caseloads and changing responsibilities. The Bell Commission had the same goal. To maintain flexibility after the establishment of the General Court of Justice with its two-tiered trial division, the Bell Commission would have allowed the Supreme Court to adjust the responsibility and jurisdiction of district and superior court by court rule. It also would have authorized superior court judges to be assigned for temporary duty to the district

court or court of appeals. The General Assembly kept control of court jurisdiction for itself, however, and the incremental adjustments that have made it through the legislative process over the years have not kept up with the changing workload.

Traffic offenses and domestic cases have overwhelmed the district court; civil actions in superior court have declined relative to other cases; the urban areas of the state have exploded in population; judicial districts have been split and re-split to accommodate local politics; and terms of court and rotation still circumscribe the availability of superior court judges. Some courtrooms are busy beyond capacity every day of the week and others sit empty after the calendar is completed or breaks down on Tuesday. Consequently, the Futures Commission concluded that the present court structure was not sufficiently flexible and needed to be reconsidered.

Foremost of the flexibility recommendations is that the district and superior courts be merged into a single-level trial court, to be called a circuit court. The multitude of judicial districts which have come about in recent years, often with no tie to workload and court efficiency, would be consolidated to around a dozen to 18 circuits and could be redrawn by the Judicial Council when necessary. Judges would be assigned to different kinds of court based on ability, experience, and interest, and would hold court only within the circuit. Court would be in session at all times within a circuit, eliminating the restrictive concept of terms of court. The Judicial Council would be able to increase the jurisdiction of lawyer magistrates.

Flexibility also would be promoted by some of the recommendations mentioned earlier, such as giving the Supreme Court control over rules of procedure and allowing judicial officials to decide where best to allocate personnel and other resources.

Uniformity - Uniformity was a driving force for creation of the General Court of Justice, and North Carolina made great strides as a result. The Bell Commission saw uniformity from the establishment of "one court, rather than many different courts to serve the state."[2] The General Court of Justice and the new statewide district court replaced the mishmash of municipal courts, recorders courts, justices of the peace and the like. Many other states still are burdened with varieties of local courts with vastly different jurisdictions, procedures, and resources.

Unfortunately, the uniform statewide court system created here in the 1960s has fallen prey to local political maneuvering, huge differences in population growth, and limited state dollars. Judicial and prosecutorial districts have been subdivided for many reasons other than workload; new positions have been added unevenly; some districts have become too small to support the administrative and technical assistance needed in a well managed system; local governments have been allowed to affect resources by supplementing state funding of operating expenses; and innovative programs have begun as pilots, then remained available only in some jurisdictions.

The result is that by many measures, the court system is becoming less and less uniform. Instead of 30 districts unified for superior court, district court, and prosecution purposes, as existed in the 1960s, today there are 50 superior court districts and 43 district court and prosecutorial districts with varying lines. When the General Court of Justice was established, the largest district had about four times the population of the smallest; now the difference is 16 to one. In the last reporting year one judicial district had only 125 civil superior court filings, 913 felonies filed, and eight felony trials while another district had 3,609 superior court civil filings, 9,553 felonies filed, and 225 felony trials. Twenty-two counties in 13 districts have family courts, but 78 counties do not; likewise, 19 counties in 15 districts have drug treatment courts while the other 81 counties do not. A few county governments help the courts by spending millions of dollars to pay for additional prosecutors, public defenders, and clerks, but all the other counties rely solely on state operating funds.

The principal recommendation of the Futures Commission to address the uniformity issue is, as discussed above, the consolidation of the superior and district courts into a single trial court and the drastic realignment and reduction in the number of districts. With 12 to 18 circuits—the commission's new term for judicial districts—workloads would be more evenly distributed. Most importantly, each district would have the critical mass of cases and population to justify the specialty courts and administrative and technical assistance that ought to be available to citizens throughout the state rather than in just some areas.

Other ideas - Some other recommendations of the Futures Commission do not fit so neatly into the categories discussed above but certainly are consistent with the themes of responsibility, accountability, independence, flexibility, and uniformity. Among the other recommendations are:

- Creation of a family court in which all matters involving the same family are heard by a single judge; case managers are employed to manage the docket; alternative dispute resolution is required for most issues; and non-judicial resources are available to assist with the problems that cause or result from the family breakup.
- Revision of the jury system to allow six-member juries in misdemeanors; elimination of the trial *de novo* system for misdemeanors; permissible waiver of jury trials in all criminal cases; and a constitutional amendment to provide that the legislature may decide whether jury trials should be required for cases involving less than six months imprisonment.
- Investment in a wholesale upgrade in court technology, including a single case management system, assignment of a unique and permanent identifier for each individual, appearances of defendants by audio and video link, and warrant centers for the criminal justice information system.

What Happened and What Didn't

Although the Futures Commission viewed its recommendations as a package with several parts dependent on each other, its proposed overhaul of the court system never came close to enactment. Any number of reasons explain the lack of interest in the reorganization of the courts. There was no pending crisis to spur things along; court organization issues do not grab the public imagination; legislators react slowly to big ideas; and many court officials made clear they did not want any change at all. With no strong interest in the commission's overall plan for revamping the court system, individual recommendations were separated out for consideration. A few were hits, most went nowhere.

Family court - The biggest success has been the family court. Although the structure is not exactly what the Futures Commission drew up, 13 districts encompassing 22 counties have established family courts and most everyone seems to agree it

is an improvement. The receptivity to the family court recommendation may be partly attributable to the recent trend toward "problem-solving courts," a new view of the judicial system that sees the courts' role as something much broader than just adjudicating cases. Courts become more like social service agencies to help solve the underlying problems that put the parties in the courtroom. Family courts are consistent with that model, as are the state's new drug treatment courts and mental health courts.

State Judicial Council - In 1999 the General Assembly established the State Judicial Council with essentially the membership recommended by the Futures Commission. The council's duties include advising the chief justice on budget matters as well as studying and recommending salaries, new judgeships, court performance standards, case management guidelines, and changes in judicial district boundaries. While a significant step forward, the council is not nearly the "board of governors" for the court system that the Futures Commission envisioned. The commission wanted the judicial council itself to be able to act on performance standards, salaries, judicial district boundaries, and those other issues, rather than just making recommendations. The commission thought that a strong judicial council, with prominent business leaders among its members, would make legislators more comfortable with loosening their control over the operation of the judicial branch.

Selection of judges - Although for decades every study on the issue, like the Futures Commission report, has recommended merit selection of judges—usually meaning the Missouri Plan of appointment by the governor followed by "yes" or "no" retention elections—North Carolina has yet to embrace that reform. Nevertheless there have been significant changes in the manner of electing judges since the commission report. All judicial elections now are nonpartisan and North Carolina has adopted a groundbreaking public financing scheme for candidates for appellate judgeships. Certainly appellate judges' reliance on lawyers for contributions has diminished greatly, but that is still the world for trial judges where perceived bias may be more of an issue. Political parties still endorse and support candidates, and capable judges still cannot plan on long tenure as long as challengers keep lining up to run in races that draw minimal public attention and knowledge.

Performance standards and evaluations - The Futures Commission tied performance standards and regular evaluations of judges to a merit-selection appointment process. Although there has been no progress on appointment of judges, the General Assembly directed the new State Judicial Council to recommend performance standards. Based on the council's work, the chief justice adopted standards developed by the National Center for State Courts. Since then the AOC has been working to provide various measures of case processing—case clearance percentage, number of case disposed within time guidelines, etc.—to individual court officials. The AOC also has surveyed court users about their experiences and has posted those results.

When the judicial council shied away from the job of evaluating judges, that project was taken up by the North Carolina Bar Association. In 2006 it created a Judicial Performance Evaluation Study Group and in 2008 implemented a pilot program. This initial effort solicited lawyers' evaluations and resulted in reports being distributed to all trial judges. The aggregate results were made public, but the identity of individual judges was kept secret, and only the judges saw the individual written comments made by the lawyers. Next up is a pilot to bring court personnel, witnesses, and parties into the evaluation process. At this stage the bar association is simply trying to figure out whether it is possible to create a satisfactory evaluation instrument. If that can be done, the debate will shift to how the reports should be used.

Divestiture of prosecution and defense functions - There has been little public discussion of moving prosecutors from the judicial system, but a state agency for defense of indigents, the Office of Indigent Defense Services, was established outside the Administrative Office of the Courts. Although the IDS office is within the Judicial Department it receives only administrative support from AOC and prepares and manages its own budget.

Budget autonomy - A keystone of the Futures Commission's plan for the courts was budget autonomy. The commission wanted the judicial branch to present its proposed budget directly to the General Assembly rather than going through the governor, and wanted appropriations to the courts to be made in two large lump sums, one for personnel and one for non-personnel, with court officials free to decide how to spend the money within those broad categories. Though the General Assembly has not yet seen fit to treat the judiciary as a coequal, independent branch of state government for financial purposes, there has been some incremental loosening of the legislative purse strings. The governor now submits to the legislature the judicial branch's own budget estimates and is to consult with the chief justice on reductions when necessary to help balance the overall state budget. The AOC now has new authority to convert some contractual positions to permanent jobs. All that is a far cry from the Future Commission's proposal, however, and bills to provide court officials with more control over the judicial budget have not advanced very far in the General Assembly.

Single-level trial court—A 1999 act, Session Law 1999-396, authorized a pilot experiment with a circuit court arrangement. The pilot depended, however, on one or more judicial districts volunteering. None did.

Technology - Any meaningful discussion of court technology requires a separate article. Suffice it to say that the Futures Commission thought in 1996 that the court system was already 15 years behind in the use of technology and that enormous benefits, and savings, were possible from a substantial, well-planned investment in that area. The commission used its report, for example, to illustrate how much work could be saved by a electronic citation system in which speeding ticket information did not have to be copied and written by hand time after time.

The General Assembly has enhanced the funding for court technology and a number of upgrades have been initiated, including NCAWARE (an automated repository of all outstanding criminal warrants); eCitation to automate production of criminal and traffic citations and allow electronic transmission from officers to clerks; eFiling for electronic filing of civil papers; a new information system for clerks; a case management system for DAs; automated criminal discovery for prosecutors; and ePayment to allow credit card payment for offenses that

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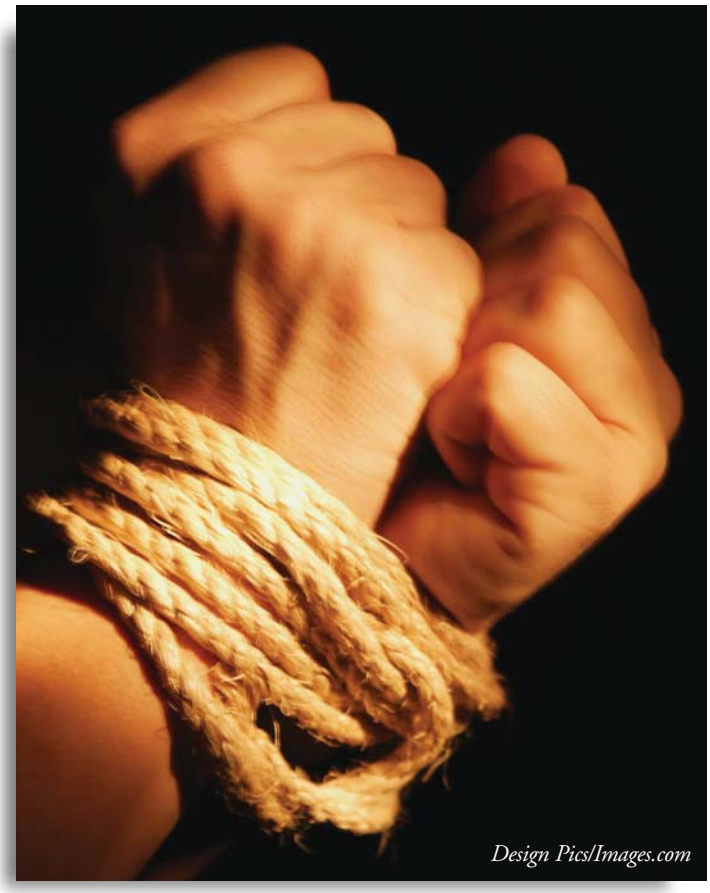
Modern-Day Slavery: Myth or Appalling Reality?

By Olga Vysotskaya

Modern day sex slavery is a hot button issue in the mass media. Frequently, we hear troubling stories about brothels employing 12-and 13-year-olds in East Asia, trafficking rings busted in Eastern Europe, and so on. On the other hand, trafficking in persons is not something that we commonly associate with the United States and even less so with North Carolina. It is definitely not something that we would normally imagine to be encountering as attorneys.



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When I graduated from Campbell Law in the spring of 2003, trafficking in human beings was probably the last subject I was thinking about. My most pressing concern was to pass the bar examination, then figure out what exactly I wanted to do with my law license. My husband and I all along toyed with the idea of visiting Belarus, a former Soviet Republic where I was born and raised. The unexpected death of my mother in May 2003 sealed this plan for us. I survived the blistering heat of a July bar exam, and the same day, off we went. Once in Eastern Europe, my husband enrolled in a graduate conservatory course to study piano, and I was recruited by the International Organization for Migration for its project "Combating Trafficking in Human Beings."

Wide-eyed and full of naiveté that is common to all recent graduates, I started my first day at work. A 30-year-old woman came to my office. To protect her privacy and for purposes of this article, I will call her by a fictitious name, Irina. She told me that she had just returned from one of the Western European countries, where she worked as a prostitute. How did she get there? She was a single moth-

er who, upon her graduation from law school, could not find a job in the tough Belarusian job market. "Stop right there," I thought to myself. "A lawyer? It's not supposed to happen to well-educated people, especially to someone like myself. Someone who had a good enough head to earn a professional diploma. Seriously, a lawyer?" Her story fit neatly, as I later learned, into a scenario quite typical for Belarusian victims of trafficking. Not being able to find a decent job in Belarus, Irina was happy to come across an announcement in the newspaper about a waitress position in one of the restaurants in Western Europe, paying $1,000 per month plus tips. She was interviewed, and she was told that she got the job and that the employment agency would take care of all travel and other work-related arrangements. Once Irina arrived to her Western European destination (a trip "paid for" by the agency), her passport was taken away from her and she was put in a locked apartment with five other women, one of whom explained to Irina that she was there to prostitute, not to waitress. She had to repay "her debt" consisting of her transportation costs and phony documents; this technique, I later learned, was called "debt bondage." If she refused to comply now, drugs, beatings, rape, referral to the police as an illegal immigrant, and other pressures would be used to make her a sex slave. She initially resisted, but after the first round of beatings by her "owner," she succumbed to the pressure.

It is estimated that every year approximately 800,000 people are trafficked across national borders. This statistic is rough and does not include millions trafficked within their own countries. Approximately 80% of transnational victims are women and girls and up to 50% are minors.[1] What is human trafficking? The international community defines trafficking in human beings as: "… recruitment, transportation, transfer, harbouring, or receipt of persons...by improper means, such as force, abduction, fraud, or coercion, for an improper purpose, like forced or coerced labour, servitude, slavery, or sexual exploitation."[2] Domestic and transnational forms of trafficking are both recognized by the international community. From a practical point of view, most practitioners are likely to place a greater weight and focus on abuse of human rights and exploitation aspects of trafficking, rather than transportation. The trafficking process typically falls into several stages: recruiting, transportation/harboring/receipt, exploitation, and return or some other outcome. The techniques and methodologies used by traffickers vary and morph with time and parts of the world where trafficking occurs.

Traffickers and their intermediaries became increasingly inventive in their recruiting techniques. Trafficking victims are found through newspaper ads and TV commercials, through girlfriends who allegedly had a good experience working abroad. They are sometimes outright kidnapped or sold by family members or friends, deceived and put on the trafficking market by boyfriends in a "love story" scenario. One of the most despicable forms of recruitment I encountered involved a mentally handicapped young girl being tricked into sex trafficking by promises of sweets.

The deception, abuse, violence, and threats of force do not stop at the recruiting phase of trafficking. Instead, the cycle continues and coercion and brutality increases well into the exploitation stage. Victims' abuse takes on different shapes, such as forced abortions when a female trafficking victim becomes pregnant, force-feeding drugs to the point of addiction to secure a trafficked person's obedience, infliction of physical pain and torture, instillation of psychological barriers and fear by threats to find and punish victims' families and friends, starvation, isolation, and so on. The victims' identification and travel documents are frequently confiscated; trafficked persons could be sold and resold to different brothels, sweatshops, and "owners" numerous times, sometimes trafficking stretchs over territories of several countries. In the case of international trafficking, the stigma of being either an illegal worker or an undocumented migrant subject to deportation creates yet another obstacle to seeking help. The exploitation of a trafficked person, whether sexual or for labor, is ruthless, involving long hours of daily work for little or no compensation, countless clients, all under a veil of threats, bondage, and physical abuse.

The range of exploitation is wide, including sexual exploitation, bonded labor, forced labor, involuntary servitude, child labor and child sexual exploitation, use of child soldiers, and other forms. In Belarus and in my travel abroad during the two years of service, I came across different forms of exploitation of trafficked victims: a man who was taken to a guarded construction site in Russia to be kept in barracks and fed only once a day while working 14-16 hours daily; a 13-year-old girl who was turned into a drug addict and raped repeatedly with the purpose of forcing her into prostitution; a beautiful model who under pretenses of a photo shoot at an exotic location was instead required to serve as an escort for rich men; a 40-year-old woman forced to work 14-hour shifts at factories for free; a man who sold his kidney to a black market organ broker and had a surgery abroad to support a child at home; a small boy begging on the streets of a foreign country, whose parents sold him to strangers because they were unable to support him at home. Each story sent shudders through me in its own unique way.

The outcomes of trafficking victims' stories are as diverse as the accounts of how they were lured into trafficking. Some do not survive their trafficking experience, dying in factories, brothels, foreign streets, or in their attempts to escape enslavement. Some are freed by a police raid, escape, or get released with the help of a client and do well upon return home, while others return only to relapse and have their lives go downhill. I also had experiences with female victims of sex trafficking who were retrafficked again and again. Some victims of trafficking for sexual exploitation are forced into prostitution and then resign themselves to a life in the sex trade, even when they are allowed to leave. Lastly, some victims of trafficking, after years of being abused, themselves turn into abusers, recruiting other unsuspecting victims and supervising the brothels where trafficked women are kept. The discussion of how and why this happens is outside the scope of this article, but to me it felt as if these victims' souls, dignity, and respect for themselves were torn away by the process of trafficking. They either became numb and let go of all moral and ethical restraints, or in some cases acquired a false sense of empowerment by becoming intermediaries in the trafficking process.

Causes of trafficking are diverse and could be viewed through the lenses of domestic or global variables. First, trafficking in human beings is the third most profitable criminal enterprise in the world, trailing behind only illegal trade in drugs and weapons.[3] High profitability increases the attractiveness of this crime, especially as earnings from one trafficked human being, unlike from drugs or weapons, are continual and recurring every time the victim is exploited or sold. Other oft-cited transnational causes of trafficking include porous borders, globalization, regional armed conflicts and instabilities, globalization of transnational criminal syndicates, and the fast

development and accessibility of modern technologies, such as the Internet. On the domestic level, such factors as poverty and economic instability, lack of employment opportunities, presence of organized crime, corrupt government, social disparities, social and cultural prejudices, insufficient criminal recognition of trafficking, and armed conflict all serve as conducive grounds for traffickers.

For purposes of simplification and categorization, it is common to divide countries into three different categories: countries of origin; countries of transit; and countries of destination. The US Department of State follows this subdivision in its annual Trafficking in Persons (TIP) report. The United States, Germany, and United Arab Emirates would generally be categorized as destination countries, i.e., countries where women and children are brought and where forced labor or forced prostitution occur. Belarus, Ukraine, and some South American and Asian countries are generally considered countries of origin, i.e., native countries of trafficking victims, countries where recruitment or kidnapping happens. Some countries could be straddling two or even all three categories. Russia, for instance, is a country of origin, but also to a lesser extent a country of destination for men and women from Central Asian republics and neighboring countries. As a rule, countries where trafficking victims come from are countries with poverty-stricken or transitional economic conditions and countries with porous borders. The former Soviet Union block is an excellent example to that extent. As soon as the Soviet Union collapsed, borders somewhat opened and economic conditions rapidly deteriorated in the early 1990s, and these former Soviet Republics became hot spots for recruiting trafficking victims.

Trafficking is much more widely spread than is understood or believed by many people, and it is not confined to remote parts of the world. Many of us do not realize that the United States is affected by this phenomenon. Yet, it is estimated that over the last decade up to 750,000 women and children have been trafficked into the United States.[4] The US government further estimates that between 14,500 and 17,500 people are trafficked into the country annually. Each year we hear about appalling and ugly cases of modern-day slavery existing right here within our own borders. To give just few examples: In December 2008 a forced farm labor case in south Florida drew the attention of media and political blogosphere. In that case, migrant farm workers from Mexico and Guatemala were chained to a pole, beaten, imprisoned inside trucks, and made to work on tomato farms without or for very little pay.[5] In 2006, several people were arrested in Seattle in connection with their involvement in an international sex-trafficking ring, trafficking women from several Asian countries and shuffling them between brothels in the US. Most of these women paid a fee to a smuggler and then worked as prostitutes to pay off the debt, according to investigators.[6]

North Carolina is not immune from this phenomenon. While I am not aware of any official data analyzing the number of trafficking cases in North Carolina, there are rough and unofficial estimates that are quoted by different organizations that are truly shocking. According to a story run in the summer of 2007 on WSOC Television,[7] the Federal Bureau of Investigation and Charlotte-Mecklenburg Police Department believe that hundreds of foreign-born women are drawn into the Charlotte area every week to be forced into prostitution by deception and violence. A staff attorney for Legal Aid of NC listed North Carolina's growing population and the easy availability of farm work as factors in the increase of local trafficking cases. She was quoted saying "We don't have good statistics on it. But my sense is that it's growing. … We're seeing more cases."[8] Durham was recently named as a transitional drop off and pick up point in a case featuring women trafficked to the United States from Mexico to work as prostitutes at Baltimore brothels.[9] Several people in the Charlotte area were arrested in connection with suspected sex trafficking at a local massage parlor in the summer of 2008.[10] With the globalizing world economy and popularity of North Carolina with Hispanic laborers, this phenomenon in our state is only likely to increase in the years to come.

What is being done to combat trafficking internationally and domestically? The international community has generally combated trafficking through the scheme of "triple P" standing for Prevention, Protection and Prosecution in its anti-trafficking agenda. This acronym presupposes prevention by education and raising public awareness, protection through the creation of confidential and effective reintegration and rehabilitation systems for victims of trafficking, and prosecution by educating and empowering law enforcement, and toughening criminal standards and penalties for traffickers and intermediaries. Both federal government and state authorities participate in anti-trafficking efforts. The federal government funds various international efforts to combat trafficking. The annual US TIP Report by the Department of State analyzes trends and developments in global human trafficking. On the national level, the Trafficking Victims Protection Act of 2000[11] codifies trafficking and creates a comprehensive framework for criminalizing trafficking, and preventative and protective anti-trafficking activities. Numerous efforts and campaigns are in progress under the auspices of several US agencies to address trafficking. In fiscal year 2007, the federal government commenced 182 investigations, charged 89 persons, and secured 103 convictions in trafficking cases.[12]

On the state level, by the end of 2007, 33 states had passed criminal anti-trafficking legislation. Our state government has joined a number of states recognizing trafficking as a criminal offense by passing Session Law 206-247, which defined trafficking and made it a Class C or Class F felony and Session Law 2007-547, which provided protections for victims of trafficking. In addition to legislative efforts, this growing problem is also addressed by various nongovernmental and charitable organizations, RIPPLE coalition, and academic groups. The task force named RIPPLE, standing for Recognition, Identification, Protection, Prosecution, Liberation, and Empowerment, consists mainly of activists, the public, and the nonprofit sector. It was established in 2004 with its first meeting being held at the NC Attorney General's Office. The group and its individual member-organizations work on training and outreach, including an annual conference on sex trafficking at UNC. However, many are still not cognizant of the problem, and more work in the area of protection and prosecution is needed at the local stage.

During my service at the International Organization of Migration, I glimpsed the darkest corners of the human nature, learning that despite the huge strides made by international authorities and national and local governments to eliminate slavery, the atrocious practice endures and flourishes. Modern forms of slavery go on even stronger; seeping into the safest societies, including the state where we all practice law. The powerful and unsettling anti-trafficking experience taught me humility and

provided me with deep respect for survivors of human trafficking and anti-trafficking activists who inspired this commentary. I am profoundly thankful to have had an opportunity to serve and to learn from my work in the anti-trafficking field. Daily, face-to-face work with trafficking victims, while troubling me profoundly and robbing me of my youthful naiveté, implanted strong compassion for and special insight into perseverance of the human spirit in spite of the most degrading circumstances. I hope that this article will raise awareness about the phenomenon of trafficking in human beings in the North Carolina legal community, as we are faced with this increasing problem. Our profession is rumored to be stressful, so I also hope that this article will allow those attorneys who read it to take a step back, breathe in deeply, and become conscious of how fortunate they are and how inconsequential our stress is when compared to the big picture of life. ■

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Back to the Future (cont.)

do not require a court appearance. In 2008, though, the General Assembly's new Program Evaluation Division in one of its first reports lambasted the AOC for delays in implementing the projects, which collectively had received more than $18 million since 2000. NCAWARE, for example, was scheduled for implementation in July 2004, but was not introduced until mid-2008 and then only as a pilot in one county. The report criticized the AOC's means of setting priorities and its failure to involve and listen to the users of the technology, in addition to inadequate reporting and tracking of progress.

In short, while there has been a significant investment in improved court technology, the benefits of up-to-date automation still seem a long way off.

Alternative dispute resolution - The Futures Commission recommended more use of mediation and other forms of alternative dispute resolution, and there definitely has been an upsurge in those programs, but it would be a stretch to say the two are connected. The trend toward alternative dispute resolution was well underway before the commission's report and would have continued regardless of what the commission said. While it is a good development, consistent with the Futures Commission's view of how the court system should operate, the commission cannot claim credit.

Conclusions

The Futures Commission report has had a modest impact on court improvement. The commission generated some ideas which gained traction and led to incremental changes in the court system. Foremost of those is the family court, though the establishment of the State Judicial Council and the introduction of performance standards are significant as well. Additionally, for the last decade the commission's report has helped shape the debate in the legislature over the autonomy due the judicial branch, even if there has yet to be any fundamental change in that regard.

In the end the most important point is that despite the Futures Commission's recommendations the same court structure remains in place. There has been no receptivity to the reorganization of the trial court or to realignment of judicial districts. Predictably, then, the same inefficiencies remain in place and, indeed, continue to worsen. The strict division of workload between district and superior court, and the adherence to terms of court and rotation of judges, combined with the creation of smaller and smaller districts, means that some districts and judges are overworked while others are looking for more to do. When the balkanization of districts is combined with local funding of court operations and limited expansion of pilot programs such as family court and drug court, it brings a real threat to the ideal of a uniform statewide court system. In various measures the North Carolina court system is noticeably less uniform today than it was when the General Court of Justice was first established at the end of the 1960s.

It may be that the Futures Commission's recommendations are not the best answer to those problems of inefficiency and disparity. The commission's proposals are worthy of debate, however, and at a minimum should inform the discussion—thus far avoided—as to the larger structural issues of the court system. ■

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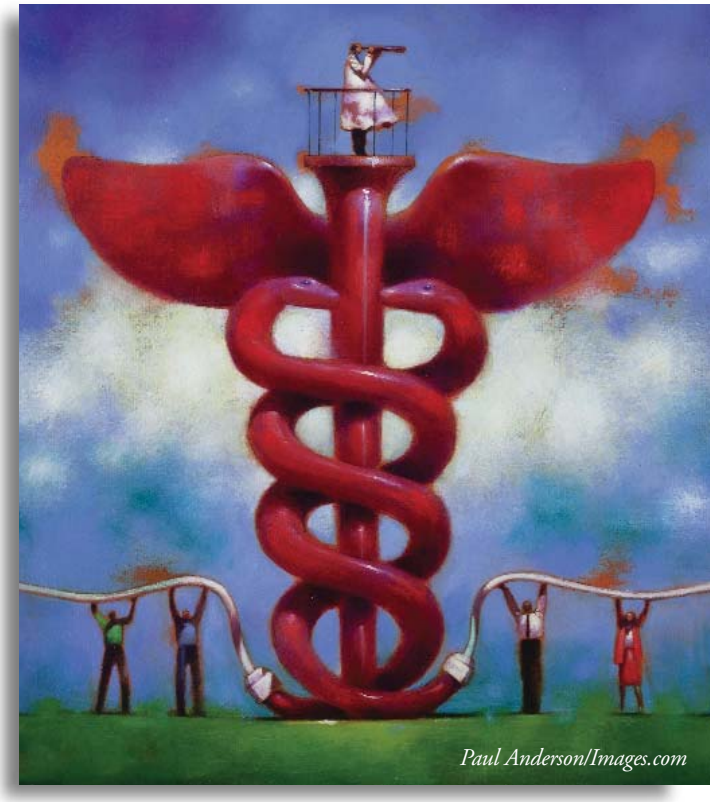
An Introduction to HIPAA and Electronically Protected Health Information

By John I. Winn and Peter A. Winn

The Internet has been the greatest boon in history for interpersonal communications, international commerce, and, unfortunately, the perpetration of criminal theft and fraud. Cyber-crooks use the web anonymously to obtain goods, services, and cash while exploiting time-lags in discovery and investigation. In this context, the introduction of large networks of computerized health information has caused the number of individuals with access to patient medical records to explode. While computer networks of medical information provide society with many potential benefits, they also constitute a "mother-lode" of confidential data for identity thieves and other criminals.


Paul Anderson/Images.com

As the healthcare industry comes to depend more and more heavily upon electronic data for patient treatment and billing, paper-based information systems are becoming a thing of the past. Medical providers make widespread use of laptops, home-computer links, Smart Phones, Smart Cards, USB flash drives, and PDAs. "E-Prescribing" systems link physicians and others directly to pharmacies. A contemporary doctor's Blackberry typically contains far more patient information than the

locked file cabinets of the past. However, all this healthcare data—ranging from medical diagnosis and treatment codes, to names, addresses, birthdates, Social Security numbers, insurance information, bank and credit card data—has enormous value to identity thieves who have begun to learn how to exploit open networks and Wi-Fi systems. Providers such as doctors and hospitals are increasingly facing the risk of medical data compromise, placing their patients in harm's way, and exposing the providers themselves to an increasing risk of liability.

HIPAA Privacy Rules

Attorneys representing hospitals, physicians, and other healthcare providers, as well as counsel representing an increasingly wide network of companies providing ancillary services, such as insurance payers, medical billers, consultants, and even attorneys specializing in estate law,[1] must become familiar with the Standards for Privacy of Individually Identifiable Health Information (the "Privacy Rule")[2] issued pursuant to the Health Insurance Portability and Accountability Act (HIPAA) of 1996.[3] Counsel not only need to advise their clients in an increasingly complex and difficult area of the law, but as "business associates" of healthcare providers, payers, and other ancillary entities, attorneys themselves can be subject to the same strict data privacy regulations under HIPAA with respect to any patient information they obtain from their clients.

The Privacy Rules constitute perhaps the most significant, extensive, and detailed attempt by the federal government to protect the privacy of personal information in electronic form. The Rules impose national privacy standards within the context of three administrative areas: (1) standardized codes for transactions involving electronic health information; (2) national security and electronic signature standards for electronic health information; and (3) establishment of national health identifiers. The Rules reflect the new reality that as the healthcare system increasingly relies on electronic information systems to facilitate the efficient use and transmission of personal health information, the dangers of unauthorized disclosure and misuse of that information concomitantly increase. Thus, Congress understood there to be a critical need to implement a uniform system of Privacy Rules to establish a nationwide set of minimum standards for the protection of "electronically protected health information" (EPHI and sometimes also "PHI")[4] for what the HIPAA calls "covered entities."[5] A "covered entity" includes hospitals and other healthcare providers, health insurers, and healthcare clearinghouses.[6]

Healthcare providers include doctors, nurses, therapists, and medical technicians. It also includes hospitals, pharmacists, nursing homes, home health companies, medical equipment providers, and research institutes. A "health plan" is any plan that pays for healthcare, whether public or private, including Medicare, Medicaid, other federal and state programs, private health insurance payers, self-funded plans by employers,[7] and Health Maintenance Organizations (HMOs).[8] The term "health plan" excludes, however, insurance under which benefits for medical care are secondary or incidental to other insurance benefits such as property and casualty insurance; disability insurance; liability insurance, including automobile liability; and workers' compensation or similar insurance plans.[9] Finally the term "healthcare clearinghouses" includes computer data processing companies, billing companies, and reprising companies which process and aggregate computerized health information.[10]

The HIPAA Privacy Rule seeks a pragmatic and utilitarian balance between the need to protect personal health information and the need to disclose personal health information for treatment, payment, public health, research, and other socially beneficial purposes. It is also important to note that HIPAA does not pre-empt the patchwork of existing state confidentiality requirements, but merely provides a uniform federal floor of protection for personal medical information.[11] The Privacy Rules also establish fair information practices with respect to personal health information under which individuals are entitled to receive notice of the uses to which their healthcare information is to be put; the right to access their records to verify their accuracy; the right to consent before secondary disclosure may be made for reasons other than the original limited purposes for which the information was collected; the right to an accounting of all such disclosures; and the right to have their personal information maintained securely.[12]

As a general rule, attorneys whose practice involves the routine use or disclosure of health information or that enter into a written business associate contract with a healthcare entity are in fact "business associates" under HIPAA.[13] Outside counsel providing legal services to hospitals, medical insurers, medical collections agencies, or other covered entities may also fall within the broad definition of "business associates"[14] under HIPAA. Prior to 2009, business associates were merely contractually obligated by client covered entities not to use or disclose EPHI in violation of HIPAA privacy rules.[15] Effective February 2010, however, HIPAA amendments within the Health Information Technology for Economic and Clinical Health Act of 2009 (HITECH Act)[16] expressly mandate that "business associates" must also comply with the same administrative, technical, and physical security standards that protect EPHI within healthcare entities. Also, for the first time, business associates (including attorney business associates) risk the same civil and criminal penalties for privacy violations as previously faced by covered entities alone.[17] It remains unclear at this date whether law firms that fall within the HIPAA definition of business associate will be required to appoint information security officers, develop detailed policies and procedures, or increase physical security of data systems as would be required by healthcare entities.

Also problematic with respect to attorney-client privileges[18] and conflicts of interest[19] between business associates and covered entity clients are amended HIPAA Rules requiring business associates to make their records relating to the use or disclosure of PHI available for inspection by the DHHS.[20] Furthermore, HITECH/HIPAA provisions obligate business associates to terminate business arrangements with covered entities if a business associate discovers the healthcare entity provider has breached privacy obligations under HIPAA.[21] Under HITECH/HIPAA, business associates must report any incident involving "unsecured protected health information"[22] to the US Department of Health and Human Services.

HITECH/HIPAA amendments further require notifications (within 60 days) by covered healthcare entities to individuals whose EPHI has been, or may have been, accessed, acquired, or disclosed in violation of the Privacy Rules.[23] Breaches of EPHI within data systems maintained by business associates must be reported to covered entities.[24]

Breach notifications must include the names of individuals whose EPHI has been compromised.[25] If a data breach involves more than 500 persons, appropriate local media outlets must also be notified[26] and the same information will be posted on the HHS website.[27]

Civil Causes of Action for HIPAA Medical Data Breaches

HIPAA Privacy Rules have long been criticized for not creating a federal private cause of action for individuals who are injured by a violation of the Rules by healthcare entities, or the business associates of covered entities.[28] This was considered particularly troubling because business associates (as opposed to the healthcare entities themselves) were often responsible for many of the abuses of personal health information that led to the enactment of the Rules in the first place. Partially towards these ends, HIPAA/HITECH amendments dramatically increase civil penalties for Privacy Rule violations by entities (and now associates), authorize attorney fees in HIPAA lawsuits by state's attorneys general, and within the next three years[29] provide for mechanisms that grant partial civil recoveries by injured parties from civil penalties or settlements between governments and covered entities (or business associates).[30]

The failure of the HIPAA to create a private federal civil remedy does not necessarily imply that other civil remedies are not available to injured parties for data theft or stolen identities. Under certain circumstances, civil recoveries may be possible under the common law tort of breach of confidentiality,[31] via state identity theft statutes,[32] or the federal Fair Credit Reporting Act (FCRA).[33] Likewise, claims for breach of contract may lie between business associates and covered entities under indemnity provisions of business associate contracts. Downstream users of medical information under contract with covered entities might also claim an implied contractual duty to maintain the confidentiality of personal health information.

Despite recent limiting legislation including the Class Action Reform Act of 2005 (aka Class Action Fairness Act),[34] identity theft victims are more likely to share a jurisdictional "commonality of issues" requirement[35] or suffer consumer losses exceeding the five million dollar threshold. In the case of the HIPAA Privacy Rules, the statute itself does not expressly exclude application of the federal privacy standards to a state common law tort action as negligence *per se* as the Privacy Rule simply clarifies the standard that applies to a previously existing duty under common law.[36]

Best Practices and Due Diligence for EPHI

To ensure the integrity of EPHI, law firms need to implement an effective combination of administrative, physical, and technical safeguards. Access to data should always be carefully limited to the absolute minimum number of persons with a valid need for access. Employees engaged in EPHI related duties must be properly screened, trained, supervised, and disciplined as necessary. Supervising counsel with managerial authority must make reasonable efforts to establish internal policies and procedures that ensure all lawyers and employees in the firm are properly supervised vis-à-vis EPHI.[37] In the event of a resignation, suspension, or termination, managing counsel must be especially diligent to ensure data systems are immediately firewalled to prevent further access.

Representation, joint ventures, or other third party business arrangements[38] between healthcare entities and attorney business associates that involve utilization of EPHI must be based upon a mutual commitment to data privacy, adequate technical or physical safeguards, and realistic systems oversight. This commitment should be carefully memorialized in applicable business associate contracts. IT risk-assessment must always be based upon highest reasonably calculated risk. Pinching pennies with regards to IT security is always a poor business strategy when any significant system compromise yields a "zero" return on investment! There is a wealth of prevention-focused best practices available from the Internet Security Alliance (ISA) (www.isalliance.org) which provides a free 12-step security program for businesses. Similar secure networking information is available from the National Cyber Security Alliance (NCSA), the Chamber of Commerce, and United States Federal Trade Commission.

Other best practices for cyber-security may include some or all of the following measures:

- Continuous development and refinement of IT security policies, procedures, and training to ensure compliance with applicable rules and regulations;[39]
- Testing and auditing of data systems to ensure they are capable of detecting and preventing both external cyber-intrusions (hacking) and internal inappropriate usages;
- Ensuring that all employee IT security training is fully documented;
- Auditing janitorial, waste disposal, and shredding services to ensure compliance with applicable disposal rules.

Conclusion

This has been the most basic of surveys regarding HIPAA and privacy of healthcare data. Attorneys should be diligent and consult HIPAA Regulations whenever they enter into a representational association with a HIPAA-covered entity or business associate of a covered entity. Practitioners and firms engaged in actual business associate status relationships with healthcare entities should carefully review existing contract terms for compliance with HITECH/HIPAA. Additionally, non-client discovery requests involving EPHI from healthcare entities should probably assume that HIPAA's new data privacy standards apply, even if counsel are not otherwise technically business associates under HIPAA.[40]

The legal community should monitor future HIPAA pronouncements regarding any obligation of business associate law firms to meet specific security standards (such as encryption of e-mails), when to report data-breaches, and what specifically constitute attorney-client privileged relationships within HIPAA. Additionally, we hope counsel bear in mind the need to integrate strong preventive security measures into all law firm IT planning. As we grow in our appreciation and anticipation of future infrastructure risks, policies and laws should also evolve to not just resist, but to more effectively prevent and combat identity theft and other cybercrimes. ■

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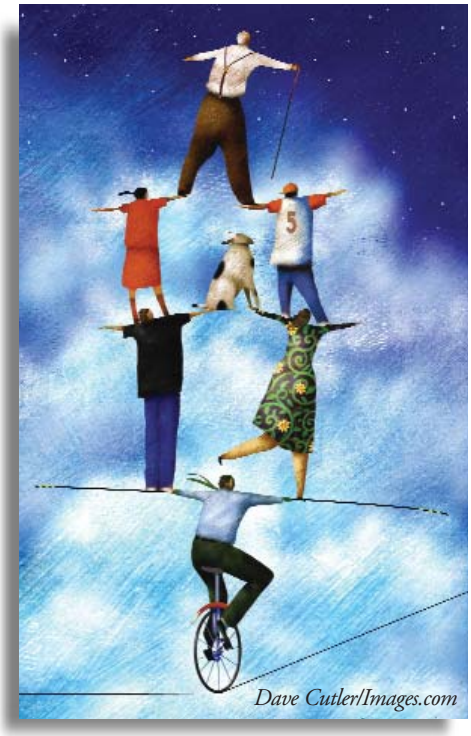
Promoting Thriving in the Law: A New Approach to Work-Life Balance

By Sean Doyle

What do people mean when they talk about "work-life balance"? We know it is something we want. We are told that organizations that allow for greater balance have lower turnover and happier employees. But what are we really looking for?



This question is particularly relevant for lawyers. Dissatisfaction within the legal profession is well documented. Despite statistics showing attorneys to be the highest paid profession, lawyers routinely score among the lowest in job satisfaction, and among the highest in pessimism, depression, and divorce. Lawyers are also at a greater risk than the general population for heart disease, alcoholism, and illegal drug usage and suffer from major depressive disorder at a rate 3.6 times higher than employed people generally. In 2003, the North Carolina Bar Association reported that the percentage of North Carolina lawyers using anxiety or depression medication rose from 3% in 1990-91 to almost 17% in 2002-03.

Research within law schools has had similar findings. Although there is little difference between beginning law students and the general population or students in other professional fields, symptoms of anxiety, depression, hostility, and paranoia increase over the second and third years of school. What is striking is that hard work does not seem to be the cause of these signs of mental strain. Law students exhibit poorer mental health than medical students, who are also involved in a rigorous professional program.

As a result, lawyers are increasingly leaving large law firms, or departing the practice of law altogether. Recent surveys report that 78% of lawyers leave large law firms within six years. Forty percent leave within four years. By some estimates, it costs a firm roughly $350,000 in actual costs and "friction-losses" to replace a fourth-year associate. The costs are significantly higher when it is your top rainmaker who leaves, lured by higher pay.

Yet the practice of law provides numerous opportunities for attorneys to engage their strengths and interests in ways that can lead to happiness and fulfillment. Lawyers are bright, accomplished problem solvers. Given the right direction, most can use these attributes to be happy, complete, and successful in their legal practice and home lives. So what can be done to promote engagement, success, and overall well-being among lawyers?

The Traditional Approach to Work-Life Balance

When organizations adopt work-life balance programs, they tend to focus on our physical needs as workers. Lawyers work long hours, require high levels of concentration, and often have tight deadlines. These types of stressors can lead to emotional exhaustion, disengagement from work, and a bad mood that can carry over into one's home life. To address these issues, conscientious companies may adopt flex-time or work from home options.

Maybe the drycleaner comes by your office so you do not have to leave your desk. Let's face it: perks like a babysitting service for late nights serve a very real need. However, while these programs address the physical needs of lawyers, they do little to make one feel connected to his or her job, or increase enjoyment while having to work those longer hours. If another opportunity comes along that has more pay, better hours, or more flexibility—even if it is outside of the law—we could lose some of our star performers or top rainmakers.

Why Not Just Pay Them More?

While salaries do need to be competitive to attract and retain good attorneys, paying lawyers more will not increase their commitment to your organization or the profession, or increase their satisfaction with life. Wealth has been a poor predictor of life and job satisfaction. There is even some evidence that money may interfere with people's ability to enjoy life's simple pleasures.

Lawyers are not alone. In a workplace study of over five million employees across multiple industries, the Gallup organization found that approximately 70% of workers were either disengaged or actively disengaged in their jobs. The 30% that were engaged were more cooperative, efficient, and punctual, missed fewer work days, and more likely to find creative solutions to problems.

Is It Really Work-Life "Balance"?

The fact that "work-life balance" has been framed in this particular dichotomy is quite telling: there is "work" and then there is "life." It is as if work is not a part of our "real" lives. But when we leave a part of ourselves at home, our burnout, stress, and work dissatisfaction all increase. What's ironic is that when we are unhappy or overstressed at work, it interferes with our ability to enjoy ourselves outside of the office. Often we feel guilty about taking a vacation because there is too much work back at the office. Yet when we are in the office physically, mentally we are back at home.

The good news is that through research in positive psychology, we know what typically makes people happy. We know what causes people to feel engaged and committed in their jobs and fulfilled in their lives. There are things that employers and individuals can do to foster greater well-being. Positive psychology is the scientific study of how people and organizations thrive and succeed. It examines why some people cannot wait to get to work every day, and whether there are ways to promote greater engagement and sense of purpose in work. It looks at how we balance life's competing demands, and demonstrates ways to utilize our strengths even in moments of tedium or hardship. In short, positive psychology takes seriously the study of those things that make life worth living. Psychologists have long theorized about notions of individual and organizational thriving. However, psychologists have only recently begun to study these concepts empirically, and to measure and test ways to promote long-term human flourishing.

Ultimately, very few people are going to find a true "balance" between work and life. The law demands long hours of concentrated attention. It is going to take up a great deal of time and energy. But we can implement strategies to make the work more enjoyable and engaging. Likewise, there are things we can do to increase our satisfaction away from the office, allowing us greater peace of mind and more commitment while at work. This essay addresses two such strategies: capitalizing on strengths and managing moments.

Capitalizing on Strengths

Researchers have demonstrated that one of the most effective ways to foster a sense of happiness, satisfaction, and commitment is through increased "engagement" or "flow." Most of us have had the experience of being so involved in what we are doing that we lose all sense of time, block out distractions, and forget to even to stop and eat. An activity that produces this "flow" experience is so gratifying that people are willing to do it for its own sake, even if difficult or dangerous. People in flow tend to be very productive, as well as very satisfied.

An essential element for achieving this "flow" state is identifying our strengths and finding ways to utilize them in creative and innovative ways. We all have certain strengths that energize us when we use them. Yet research done within hundreds of companies concluded that less than 20% of the workforce have opportunities to do what they do best every day.

There are numerous tools that people can use to help identify their strengths. An effective questionnaire is available online at no cost at www.viasurvey.org. Unlike the other tools that were designed with their own marketing in mind, the Values in Action (VIA) Inventory was developed by psychologists researching human flourishing. Rather than focus on selling an assessment tool, the goal in creating the VIA was the validity of the tool.

After completing the VIA questionnaire, the tool will identify your top five signature strengths. In reviewing survey results with people, most tend to glance at their top five, and then immediately scroll to the bottom to see their "weaknesses." In understanding and using the results, it is important to understand that the VIA does not say anything about one's weaknesses. Rather, the VIA emphasizes those particular strengths and attributes that increase and amplify the zest and energy of the individual lawyer. These may include love of learning, compassion, playfulness, or creativity. The energizing strengths will be different for each person. So while an extremely successful and competent lawyer may have mastered the strengths of self-control, prudence, and judgment, those attributes might not appear among his or her top strengths. This is why it is not always effective to have someone else identify our strengths. Your supervisor might recognize your good judgment without realizing that there are other attributes that make you feel more alive and committed to your job.

After you have identified your energy-giving strengths, the next step is to find opportunities at work and at home to use these strengths in creative ways. Someone with the strength of "persistence" or "creativity" might find more enjoyment at work when given the chance to work on difficult projects where the regulatory rules are not particularly clear. If you have to deliver uncomfortable or unpopular advice, an attorney who scored high in "bravery" might feel more engaged and energized by approaching the client. If "compassion" or "friendship" are among your higher strengths, you will likely leave work each night with a greater sense of purpose when given opportunities to connect with clients on matters about which the client has taken a personal interest.

Finding creative ways to use our strengths outside of the office also enables us to enjoy life more. One lawyer I know who is nearing retirement finds greater enjoyment at work and home life by using his strength of "prudence" to organize functions for his faith community. While using a strength with which he is comfortable and at ease, he is able to both give back to the community and connect directly with others.

The key is that the use of your strengths be creative and personal. No one can prescribe easy-to-follow steps that can be applied generically with every individual. While coaches and companies can guide you, ultimately you need to determine specific ways of using your

specific strengths. By so doing, you will experience greater engagement both in the office and away from it.

Managing Moments

To help promote life-work balance and counteract stress, a company or law firm would want to encourage its attorneys in the art and skill of managing moments. We have thousands of moments every day, both at work and at home. Any one of them can become a life-changing trigger for another person, helping them feel acknowledged, valued, and part of something bigger. It only takes a moment to connect with another person. In the office, supervisors should take a moment to acknowledge other's efforts in performance reviews, say "thank you" for a job well done, and strive to do what is right by employees. Yet when asked, only a fraction of people have received praise for their good work within the last week. This only takes a moment. One attorney I work with posts a note on his computer that says "catch people doing something good." His paralegals report that they feel appreciated and that their work is valued. In the end, they will be more likely to put in extra time when needed and will be less likely to leave the firm.

As with capitalizing on strengths, lawyers should also be encouraged to manage moments in their personal lives. Attorneys are busy and have much competing for their attention. Despite this, lawyers can have control over how they handle the moments of their lives. After working all week, a lawyer might feel frustrated that time on the weekend must be spent running errands and doing the chores required to maintain life. They might rather spend those hours relaxing with family. However, the time doing these chores can become positive experiences for lawyer, family, and friends. The employee should be encouraged to pay attention to what is going on around him and ask where, in that moment, is a chance to play. During meals, he can make the baked chicken dance. Morning pancakes can create and become smiling faces with well-placed blueberries. Waking the children up in the morning is an opportunity to shake their arms and legs and sing the "hokey pokey."

These are a few simple examples of ways to use the time that we have. Dancing chickens and singing are not the answer for everyone, but each person can learn to manage his or her moments from a point of individual energy-giving strengths. By so doing, the lawyer will feel more alive at work and at home, and will bring more joy to his or her interactions with co-workers, neighbors, and family. It will also help the employee feel more balanced with life in general, and less resentful about the long hours they do have to spend in the office.

Been There, Done That

Many organizations have experimented unsuccessfully with work-life balance programs and other management fads. To have lasting effect, the strategies proposed herein should not be approached as some one-time, soft, touchy-feely program. To be effective, these strategies require hard work, commitment, and continued follow-up. It takes work to learn to play the piano, become a successful lawyer, or be a good golfer or parent. Likewise, it takes work to balance life's competing demands, and to move from just "managing" to thriving. It takes hard, consistent (but fun) work on the part of the individual lawyer. But to have a long term effect, it helps to have the encouragement, support, and continued follow-up by the company or firm.

Conclusion

If companies and law firms want to retain their top talent and encourage people to be happy and productive, they should continue to address the physical demands of balancing work and the rest of life. This might include flex-time and work from home options. However, companies and firms should not stop there. Organizations that find ways to encourage their lawyers and staff to capitalize upon their individual strengths, and manage moments from those strengths, can expect meaningful increases in employee engagement, energy, and effectiveness. ■

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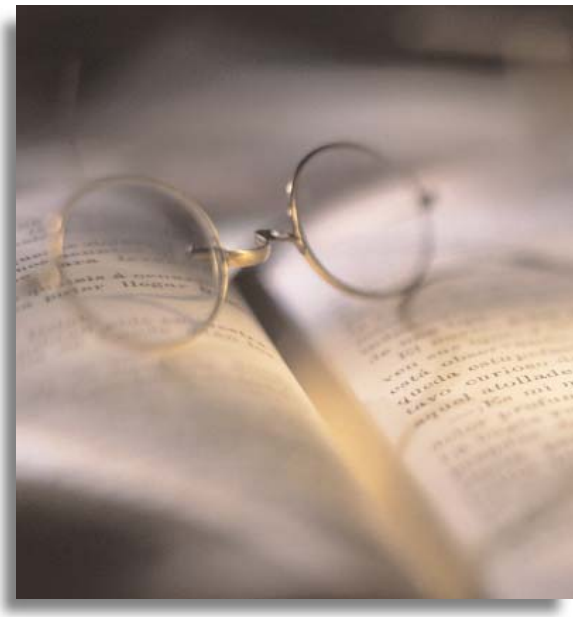
Reading Literature in Law School and Beyond

By Patricia L. Bryan

"Books are the quietest and most constant of friends; they are the most accessible and wisest of counselors, and the most patient of teachers."

—Charles W. Eliot



I taught my first seminar in Law and Literature almost 20 years ago now, in the fall of 1990. I had been at UNC Law School for eight years by then, and I had always taught tax courses—Federal Income Tax, Corporate Tax, and Partnership Tax—so it was a dramatic new direction for me. I still teach tax, and I always enjoy those classes, but the Law and Literature seminars, which I've taught every year since 1990, have proven to be uniquely rewarding and enjoyable for me and for my students.

I've often thought that lawyers in practice could also benefit, personally and professionally, from reading and discussing works of literature with their peers and colleagues. I was reminded of this most recently last October, when I was a co-moderator at a retreat sponsored by the North Carolina Center for Law and the Humanities. A group of 22 lawyers, judges, and law students came together for three days to talk about selections drawn from various branches of the humanities. Classics by philosophers and political theorists were intermixed with poems by Billy Collins, W.H. Auden and T.S. Eliot; and short stories by Ursula K. Le Guin, Susan Glaspell, and Leo Tolstoy. Discussions were spirited, focusing on broad issues of justice and morality, and on values and ideals of our profession. One evening, we shared personal recollections of lawyers who best represented those ideals, and we were encouraged to reflect on our own journey and goals for the future.

The energy of our dialogues, and the sense of community among participants, reminded me of my Law and Literature seminars. In my experience, those students are always enthusiastic and eager to respond in ways that are unmatched in other classes. Perhaps they're more willing to speak up in the seminar because I've said that any interpretation based on a reading of the text is legitimate and worth expressing; they know their answers won't be judged right or wrong. But their engagement is also due to the literary texts, which spark their emotions, stimulate their imaginations, and invite personal reflection. The seminar offers opportunities for conversations that are unusual in law school.

Often, as law students learn the rigors of legal analysis—how to "think like a lawyer" and advocate for a client—they're urged to put aside their own feelings, and even their moral convictions. But suspending emotions and personal judgments can lead to an increasingly narrow intellectual focus and gradual alienation from friends and family, and from past experiences.[1] As others have noted in articles and books about the legal profession, the habit of continued repression, when taken to extremes, can be maladaptive and dangerous. Lawyers can develop a sense of moral disengagement, ignoring significant ethical ambiguities that arise in practice. They can lose the ability, and the incentive, to talk about ethical and moral questions with their peers, ignoring their doubts and becoming more isolated in their work. And the very detachment and emotional distance that might be beneficial at work can be destructive if carried outside of the office, making personal relationships more difficult to form and sustain.[2]

Reading and discussing literature reminds law students that emotional engagement and self-reflection are crucial elements for continued moral development; that intuition and empathy can inform, rather than disable, our ability to make the right decisions. In my Law and Literature seminar, we discuss books that typically involve specific legal issues, but also provoke questions that go beyond particular doctrines, challenging students to consider the fairness and adequacy of the legal process and the justice and morality of the results.

We talk about the characters—the contexts in which they live, their relationships, and their motivations—and how an empathic understanding of other people can improve our skills as counselors and advocates while also making us wiser and more effective members of our society. As we read about fictional lawyers, we consider the specific ethical problems they face, as well as broader professional concerns. Moral dilemmas of characters in the books inspire reflection, both shared and private, on personal values and aspirations. A quote from Ursula K. Le Guin is a favorite of mine: "We read books to find out who we are. What other people, real or imaginary, do and think and feel…is an essential guide to our understanding of what we ourselves are and may become."[3]

My inspiration to teach the seminar came in the spring of 1990 from a book given to me by my close friend Judith Wegner, then dean of the law school. Perhaps she picked up on my desire, not yet articulated to myself, for a change in my professional life. She knew that I was an avid reader, that books, especially classic novels and contemporary fiction, had always been a great source of pleasure and relaxation for me. Ever since law school, though, I had kept my love of literature separate from my professional life; I read novels at home, but I spent my time at the office with the Internal Revenue Code.

Dean Wegner gave me *The Call of Stories: Teaching and the Moral Imagination* by Robert Coles, a psychiatrist and educator. Coles writes movingly about his experiences talking to high school and college students, using classic works of literature to encourage them to contemplate and discuss difficult personal issues. Coles assigned fiction to medical students at Harvard, suggesting that they should consider their patients from a more humanistic perspective, appreciating their life stories as well as their presenting symptoms. And he went on to teach a course to law students, entitled "Dickens and the Law," with conversations focused on legal issues and the legal protagonists in *Bleak House*, *Great Expectations,* and *A Tale of Two Cities*. His ideas fascinated me from a pedagogical standpoint, and also from a more selfish perspective, as I pondered the idea that I might be able to combine my love of literature with my work.

In 1989, "Law and Literature" was still relatively new as a serious subject for scholarship and for teaching. Some scholars talk about a "Law and Literature movement" beginning in the early 1980s, with the next ten years seeing a rapid increase in the number of articles and books in the area.

But the connection between law and literature can be traced back much earlier than that. In the early years of the American legal profession, lawyers were the intellectual, cultural, and political leaders of the society, and an understanding of the law was thought to be dependent on an education in other fields of knowledge. Broad reading of the greatest works of literature and philosophy was essential in order to comprehend the universal truths underlying republican ideology, and the best courtroom lawyers peppered their orations with allusions to classic texts as a way to reference, and justify, their ideas.[4]

By the end of the 19th century, though, perceptions of the law and of lawyers had changed. The practice of law grew more specialized, and more emphasis was placed on technical expertise, with practitioners focusing on statutes and judicial precedents. In view of the rising demand for entrance to the bar, educational requirements for admission were lowered; therefore, new attorneys lacked the broad classical education of their predecessors. As the society became more complex, requiring new kinds of regulation, the law itself was seen by many in a different light, as designed and interpreted to protect the vested interests of those in power rather than to reflect universal truths and shared moral values.[5]

Law schools reinforced the notion of law as an autonomous discipline. Learning the law was said to depend upon a scientific approach, with students reading and dissecting judicial opinions and statutory texts. Legal education, designed more as a trade school than as an academic endeavor, discouraged input from the humanities and social science.

During the first half of the 20th century, there were only occasional references to the connection between law and literature. In 1908, John Wigmore, then the dean of Northwestern Law School, suggested that reading novels could be important to a practitioner, fulfilling his "general duty as a cultivated man," as well as the "special professional duty to be familiar with those features of his profession which have been taken up into general thought and literature."[6] Wigmore came up with a list of 100 legal novels, noting that lawyers could also learn necessary lessons about people and human nature from fiction, "the gallery of life's portraits."[7]

Almost two decades later, Justice Benjamin Cardozo, then on the New York Court of Appeals, published an essay in the *Yale Law Review* entitled *Law and Literature*. He emphasized how much lawyers could learn stylistically from the great literary authors and their effective use of language, persuasive techniques, structure, and rhetorical devices. But, in Cardozo's mind, literature offered more to attorneys than education in style. To do their work well, lawyers and judges sometimes had to rely upon their understanding of other people and a personal sense of morality. Literature, by encouraging imagination, empathy, and introspection, could aid in the development of those crucial strengths.[8]

By the second half of the 20th century, advocates for change in the law school curriculum were more vocal, urging less isolation from other academic fields, and they began to realize success. Economics made the first inroads, and new studies of non-market behavior and increasing empirical work provided a different perspective to traditional courses such as criminal law, torts, and contracts. By the 1970s, scholars in Critical Legal Studies were citing philosophers and literary theorists to explain their doubts about the subjectivity of legal interpretations. And legal educators and scholars were exploring the connection between law and literature.

In 1989, a law review article, entitled *Law and Literature: An Unnecessarily Suspect Class in the Liberal Arts Component of the Law School Curriculum*, described this evolution, and reported that 38 schools, or almost 30% of the 135 law schools responding to a survey, were offering a course under the general heading of Law and Literature. When the survey was repeated in 1996, the number had more than doubled, with 84 schools offering the

Summer Reading List

By Nancy Olson

Add to the pleasure of your summer relaxation with this diverse list of recommended reading:

British author William Boyd is high on my list of favorite novelists these days. I first read his *Any Human Heart*, the "journal" of an idealistic but flawed writer. He records his sexual explorations and his marital tribulations and his valiant service in two wars. His meetings with the Duke and Duchess of Windsor and other royalty are entertaining and humorous and provide a clear picture of the snobbery and genteel brutality of the British social system. Immensely enjoyable.

Boyd grew up in in Africa, and some of his best work is the result. *A Good Man In Africa* presents a middle-aged, overweight, bumbling British diplomat, Morgan Leafy, who serves in Africa but has no understanding of the country or the natives. His attempts to solve problems created by his incompetence create sympathy but also are laugh-out-loud funny. There is a very good movie of the same title made from this novel.

Boyd's latest book, *Restless*, while very different from his earlier work, is a brilliantly plotted and compelling literary spy thriller. An elderly woman living quietly in the English countryside under an assumed name senses that she's being watched and we learn from a journal she gives to her daughter of her highly dangerous work in a secret propaganda unit whose mission is to coax America into World War II. This knowledge draws her daughter into a dangerous game as she seeks her mother's betrayer.

Old Filth, by Jane Gardam, is the fascinating story of a judge reflecting on his life as a failed London attorney and later successful career as a judge in Hong Kong. The title is the respectable nickname given him by his colleagues and is the acronym for "Failed in London, Try Hong Kong." As a child he is sent from Malaysia to Wales to cruel foster parents. His experiences before he attends school and is adopted by a kindly English family affect him profoundly. The author wastes no words in this beautifully written novel.

If you're a fan of adventure writers like Jack London and Jules Verne, you will enjoy the short stories in *Tierra del Fuego*, written by Chilean writer Francisco Coloane (translated by Howard Curtis). They take place in the extreme reaches of South America and all the stories, like Patrick O'Brian's seafaring stories, are exciting and psychologically satisfying.

The Lost City of Z is a riveting true story of the great British explorer, Sir Percy Fawcett, who in 1925 disappeared in the Amazon jungle with his son and a friend in search of the lost city of El Dorado, the "City of Gold," an ancient kingdom of riches. Many others disappeared in their attempts to find what happened to the Fawcett expedition, victims of the hostile natives and the many other dangers of the jungle. Author David Grann also makes the attempt and may have come closer to solving the mystery than any other. This is fascinating reading!

Virginia Judge Martin Clark's third novel, *Legal Limit*, is a lively, suspenseful look into the legal system which asks, "What is lawful and what is just?" It is compelling reading from the first page to the last. Law student Mason Hunt is an innocent witness to his older brother's drunken killing of a rival. He helps cover up the murder and this comes back to haunt him when he returns home to be the town's prosecutor. Clark's great skill is creating character and description of life in a small community.

To lighten up your reading, try Pete McCarthy's nonfiction *McCarthy's Bar: A Journey of Discovery in Ireland*, which chronicles his attempt to drink in every pub named "McCarthy" in Western and Southern Ireland. We get a wonderful portrait of the landscape and people of Ireland, including the author's relatives (his mother is Irish), as the author travels the back roads and meets the quirky characters along the way. This is another book that made me laugh out loud.

If you want more, here's my short list:

Shadow of the Wind, Carlos Ruiz Zafon (a literary thriller set in l945 Barcelona);

Out Stealing Horses, Per Petterson (man seeking solitude on the coast of Norway);

Metzger's Dog, Thomas Perry (funniest hard-boil mystery I've ever read);

Stoner, John Williams (farm boy goes to agriculture college and falls in love with literature);

Tokyo Fiancee, Amelie Nothomb (an elegantly written love story between a Belgium girl and a Japanese boy);

Unaccustomed Earth, Jhumpa Lahiri (beautiful stories of Bengali families living in the US);

Being Caribou, Karsten Heuer (a couple spends their honeymoon tracking caribou for five months);

Asta In the Wings, Jan Elizabeth Watson (two children locked up by their crazy mother see the outside world for the first time);

The Joys of Motherhood, Buchi Emecheta (raising children in poverty in Nigeria brings little joy). ■

Nancy Olson was born and raised in Virginia. She moved to Raleigh in 1981 and started Quail Ridge Books & Music in 1984. She won three major awards in 2001, including Publishers Weekly Bookseller of the Year. She was inducted into the Raleigh Hall of Fame in 2007 "for putting North Carolina on the national literary map." Visit Quail Ridge Books at www.quailridgebooks.com.

course.[10] I'm sure the total would be even higher today.

The assignments and goals of these courses widely vary. Some classes include judicial opinions as readings, with students considering how writing style and rhetorical choices can engage the reader, persuading even when authority under the law is unclear. Sometimes assignments include articles

applying literary theories to legal analysis, considering whether any text can have objective or permanent meaning.

Most Law and Literature courses, though, assign works of fiction, and that's the path I've followed. I've chosen novels, short stories, and plays for my students to read, often taking suggestions from members of the class. Over the years, I've included many well-known classics which would make any "top ten" list of works with legal themes, such as *Billy Budd*, *The Merchant of Venice*, *The Stranger*, and *The Trial*. I've also assigned books by more contemporary authors, including Russell Banks, Margaret Atwood, Toni Morrison, and John Irving, and shorter works by Susan Glaspell and Katherine Anne Porter. We've read works that portray racial and ethnic prejudice, take place in other countries or unfamiliar cultures, and relate to significant historical and political events. Many of the works include lawyers both as protagonists and as minor characters, and almost all involve some aspect of the law and the legal process.

One of my goals reflects the point made years ago by Justice Cardozo: I hope that exposure to the elements of style on display in great literary works will help students become more effective writers and more careful readers. We focus on narrative structure, images, and metaphors, and we consider ambiguities and nuance. But the broader issues are the ones that primarily engage the students and encourage their active participation.

Frequently, the last work we read is *The Remains of the Day*, a novel by Kazuo Ishiguro that is only tangentially about the law. The protagonist of the story is an English butler in the mid-20th century, at the end of his career and looking back on the years he spent in the service of his master. The butler sought his rewards in his work, devoting himself to those responsibilities. And yet the attributes he so carefully cultivated for professional success—deference, detachment, and moral neutrality—have also led to personal isolation and a sense of moral failure. In class, we discuss his inability to engage with other people, and the opportunities for interaction that he ignored. We consider how a professional, whether a butler or a lawyer, might define the role of service to another in order to avoid such a sad ending.[11]

The butler suffered from the lack of meaningful connection: to his colleagues, his family, and his master as well as to a deeper sense of his own values. Law students and lawyers, who are encouraged to maintain an impersonal stance and an emotional distance in their work, can be in danger of heading toward that same fate. They should welcome, and search out, occasions for self-reflection, emotional engagement, and meaningful conversations with colleagues. Reading and discussing works of literature invites us to join with others, and to look within ourselves, as we strive to lead lives of moral purpose and personal fulfillment.

I have to admit to one other goal for my students in Law and Literature: that they leave with a renewed appreciation of the pure pleasure of reading a good book. Many of them tell me that they've enjoyed reading fiction in the past, but just haven't had time to pursue that hobby during law school. I know, of course, that they're not likely to have more free time once they enter the bar. And so, while I urge them to think about the professional benefits, I also want them to remember that reading can provide necessary rest and rehabilitation, that it can be (in the words of W. Somerset Maugham), "a refuge from almost all the miseries of life." As lawyers face the increasing demands and stress of law practice, they would do well to remember that literature, whether read alone or with others, can be an enduring source of reward and satisfaction.

Some of the works I've included in my Law and Literature seminar: *Antigone* (Sophocles); *Bartleby the Scrivener* (Herman Melville); *Beloved* (Toni Morrison); *Billy Budd* (Herman Melville); *The Bluest Eye* (Toni Morrison); *The Cider House Rules* (John Irving); *The Death of Ivan Ilych* (Leo Tolstoy); *The Handmaid's Tale* (Margaret Atwood); *Judgment at Nuremberg* (play version by Abby Mann); *A Jury of Her Peers* by Susan Glaspell; *Justice is Blind* (Thomas Wolfe); *A Lesson Before Dying* (Ernest J. Gaines); *A Man for All Seasons* (Robert Bolt); *Master Butchers' Singing Club* (Louise Erdrich); *The Merchant of Venice* (William Shakespeare); *Midnight Assassin* (Patricia L. Bryan and Thomas Wolf); *Native Son* (Richard Wright); *Noon Wine* (Katherine Anne Porter); *O Pioneers!* (Willa Cather); *Paris Trout* (Pete Dexter); *The Reader* (Bernhard Schlink); *Reading Lolita in Tehran* (Azar Nafisi); *Remains of the Day* (Kazuo Ishiguro); *Snow Falling on Cedars* (David Guterson); *The Stranger* (Albert Camus); *The Sweet Hereafter* (Russell Banks); *Their Eyes Were Watching God* (Zora Neale Hurston); *The Trial* (Franz Kafka); *Woman Hollering Creek* (Sandra Cisneros). ■

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Endnotes

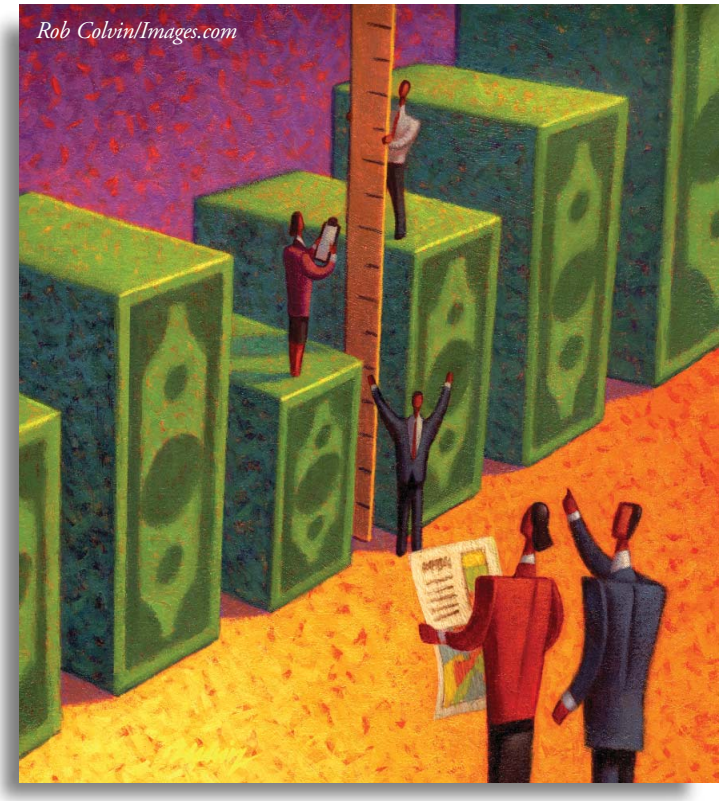
1. *Centaurs* by J. S. Marcus is a short story I've assigned in the seminar that describes these distressing changes from the perspective of a young law student who's in the process of "becoming a lawyer." *Centaurs* (and other stories I've assigned) may be found in the excellent collection edited by Jay Wishingrad: *Legal Fictions: Short Stories About Lawyers and the Law* (Overlook Press 1992).
2. *See*, for example, Walter Bennett, *The Lawyer's Myth: Reviving Ideals in the Legal Profession* (University of Chicago Press 2001); Susan Bandes, *Repression and Denial in Criminal Lawyering*, 9 Buffalo Criminal Law Rev. 339 (2006).
3. Ursula K. Le Guin, *Prophets and Mirrors: Science Fiction as a Way of Seeing*, 7 Living Light: A Christian Education Review 111-12 (1970).
4. For an excellent description of the early role of lawyers and changes that came after the Civil War, *see* Robert A. Ferguson, *Law and Letters in American Culture* (Harvard University Press 1984).
5. *Id.* at 199-206.
6. *See* Wigmore, *A List of One Hundred Legal Novels*, 17 Ill. Law Rev. 26 27 (1922). *See also* Richard H. Weisberg, *Wigmore's "Legal Novels" Revisited: New Resources for the Expansive Lawyer*, 71 *Nw. U. L. Rev.* 17 (1976).
7. *Id.*
8. *See* Richard Weisberg, *Coming of Age Some More: "Law and Literature" Beyond the Cradle*, 13 Nova Law Rev. 107 (1988), quoting several of Justice Cardozo's works, and offering a good description of the law and literature field.
9. Elizabeth Villiers Gemmette, *Law and Literature: An Unnecessarily Suspect Class in the Liberal Arts Component of the Law School Curriculum*, 23 Valparaiso Law Review 267 (1989).
10. Elizabeth Villiers Gemmette, *Law and Literature, Joining the Class Action*, 29 Valparaiso Law Rev. 665 (1995).
11. For an excellent discussion of this novel and questions it raises for lawyers, see Rob Atkinson, *How the Butler Was Made to Do It: The Perverted Professionalism of* The Remains of the Day, 105 Yale Law Journal 177 (1995).

NC IOLTA Perseveres Through Income Fluctuations

By Clifton Barnes

In celebration of the 25th anniversary of NC IOLTA, the NC State Bar Journal *is publishing a three-part series on NC IOLTA during 2009. The article that appeared in the spring issue focused on the program's establishment and its exceptional leadership throughout its history. This article discusses the ups and downs of IOLTA's income over the years. The final article will appear in the next quarter's issue and will highlight some of the program's grantmaking.*

When the NC Interest on Lawyers' Trust Accounts was implemented in April 1984, few could have imagined that one day every eligible lawyer would be taking part and that lawyers and bankers would be working hand-in-hand to make the program a success. Now, 25 years later, that's exactly what's happening.


Rob Colvin/Images.com

NC IOLTA was created by the State Bar, with approval from the NC Supreme Court, as a way to fund civil legal services for the poor, and programs that further the administration of justice. Prior to the IOLTA program, lawyers' general trust accounts earned no interest. Now, through IOLTA, attorneys place these nominal, usually short-term, client funds into a single, pooled, interest-bearing trust account. Banks forward the interest, minus permissible service charges, to the IOLTA program which uses the money for law-related charitable purposes.

By order of the NC Supreme Court, the NC IOLTA program became mandatory effective January 1, 2008. Prior to that time, 75% of eligible attorneys (i.e., those who maintain general trust accounts) already participated in the program.

In the early years, IOLTA staff and board members spent much of their time educating lawyers about the program and working to grow participation steadily. In addition, staff, trustees, and State Bar officers worked with the NC Supreme Court to get the IOLTA program converted from an opt-in to an opt-out program, which finally came to fruition beginning in 1994.

Martha Lowrance was one of those instrumental in pushing for that change, which resulted in participation growing to about 60%. "I did not think North Carolina would ever go to a mandatory program but would enforce the opt-out program to get the maximum funding it could," said Lowrance, who joined the program just a month after it started and served as executive director of IOLTA from 1985-1995. "Times changed after I left and I was wrong about North Carolina having a mandatory IOLTA program."

The US Supreme Court ruled in 2003 that the Washington State IOLTA program did not violate the Fifth Amendment. Subsequently, cases against the Texas and Washington programs were dismissed. In 2004, the Supreme Court refused to hear another Fifth Amendment case against the Missouri IOLTA program.

"The change from a voluntary program to a mandatory program was almost inevitable once it was clear that there were no legal impediments," said Tom Lunsford, NC State Bar Executive Director.

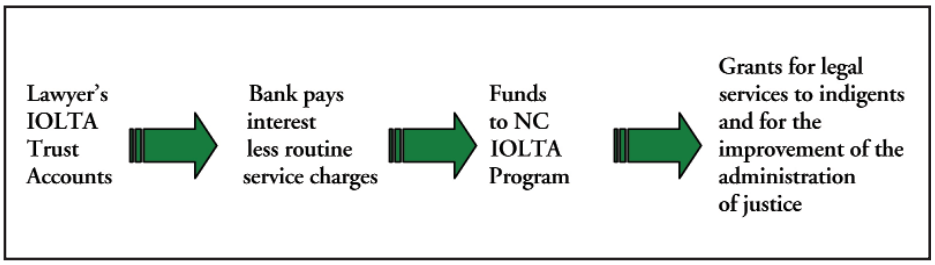
"Funds held in general trust accounts cannot be economically invested for individual clients and the interest on such funds is like 'found' money on the sidewalk," Lunsford said. "It really makes no sense to stoop down and pick up only 75% of it when the rest is there for the taking, and when the prescribed uses for such money are so compelling," he said.

Since 1985, NC IOLTA has provided urgently needed funding for civil legal services to poor North Carolinians through grants made to legal services programs and volunteer lawyer programs.

"And the beauty of it, as far as the lawyers are concerned, is that participation in IOLTA is hassle-free and cost-free," Lunsford said. "There's very little reason to oppose universal participation and, happily enough, there has been virtually no opposition."

In August 2007, the NC State Bar Council, with support from the NC Equal Access to Justice Commission and the NC Bar Association, petitioned the NC Supreme Court to direct the State Bar to implement a mandatory IOLTA program. In October of that year, the NC Supreme Court did just that.

Attorneys had until June 2008 to comply by ensuring that all their general client trust accounts had been set up as IOLTA accounts. The IOLTA program registered more than 3,000 new IOLTA accounts that they attribute to the change.



"As it turns out, we made this change at a particularly good time as the economic crisis has meant that most IOLTA programs have seen serious declines in IOLTA income," said Evelyn Pursley, executive director of the NC IOLTA program.

Some IOLTA programs have seen their income decline by as much as half and many have had to cut grants. "In some states legal aid programs have laid off staff due to cuts in IOLTA grants—all this coming at a time when the legal aid services are more sorely needed because of the economy," Pursley said.

In North Carolina, however, the IOLTA program's income surpassed $5 million for the first time in 2008 and increased 16% over 2007. "If we had not gone to mandatory, we estimate our IOLTA account income would have decreased by around 13%," Pursley said. "Approximately 25% of our total income in 2008 came from the new IOLTA accounts."

The 2008 income allowed more than $4.1 million in grant money to be awarded again for calendar year 2009. That was a NC IOLTA record for most money granted in a year in 2008, and grant-making was kept flat for 2009 in anticipation of income declines.

Pursley said the changeover to mandatory went "very smoothly." IOLTA staff spent a lot of time on the phone with bankers and attorneys answering questions and helping set up accounts.

"We focused on customer service," she said. "We have received thanks and compliments from attorneys for working with them quickly and efficiently."

The IOLTA staff disseminated information through the State Bar website and law-related publications and organizations, in addition to direct mailings to banks and law offices. Pursley was also asked to prepare presentations for banks and their attorney customers.

"We found this changeover provided a 'teachable moment' for educating attorneys about trust account practices," she said. "We also worked with Alice Mine (State Bar Counsel) and Bruno DeMolli (State Bar Auditor) to answer questions and to disseminate information about frequently asked trust account questions."

The mandatory trend has expanded nationwide. Rhode Island becomes the 39th mandatory IOLTA jurisdiction this year.

Former IOLTA trustees talk about how rewarding yet time-consuming it was to reach out to law firms to take part in the program prior to it becoming mandatory.

"I was enthusiastic about it when I joined the board," said Charlotte attorney Jim Talley, who served as a trustee from 2002-2008. "I worked with our law firm to make sure we were involved. Once firms knew about how much good the program does, most took part. I was pleasantly surprised that, even though it wasn't mandatory, some 75% of NC law firms participated in IOLTA."

Ray Owens, a Charlotte lawyer, credits Pursley in large part with increasing the participation of eligible attorneys from 59% in 1997 to 75% in 2007. Owens chaired the committee which hired Pursley as the executive director in 1997.

"Before mandatory, it was a continuing task to increase attorney participation, and she did an excellent job of increasing the figures," Owens said.

He said Pursley has credibility with all the various constituencies involved with IOLTA and that came in handy when working through some legal services restructuring that occurred throughout the state not long after she was hired. "I'll

take all the credit for hiring Evelyn," Owens said with a laugh.

Pursley said that, once hired, the trustees asked that she work to increase the number of lawyers with IOLTA accounts. "I believe that one reason I was selected for the position was that I was doing some fund raising and public relations work, and working with volunteers at my position at the Duke Law School," she said.

For her part, Pursley credits the trustees and the assistance of various councilors and other bar leaders who contacted non-participants in the IOLTA program. In fact, in 2001, then-State Bar President Jerry Parnell made a point to make contact with all non-participants during his tenure.

Pursley said her office worked to raise visibility of the program by putting regular updates highlighting income and grants in the State Bar *Journal*, by speaking to law students, by participating in continuing legal education programs, and by making reports at State Bar meetings as well as meetings of other voluntary bar groups.

"The program did well in signing up attorneys, and, prior to going mandatory had almost all the largest firms in the state participating," she said. "We kept a list of firms with ten or more attorneys and asked trustees to make contact with those firms."

Ed Aycock, a former trustee, said going to mandatory will allow board members to use their time in a different, more effective way. "Hopefully, mandatory participation has eliminated the need for trustees to devote time, energy, and resources to achieving full participation in the program by eligible lawyers, thereby enabling them to focus on enhancing revenue and effectively allocating funds to grant recipients," he said.

That's exactly what it has done, said Robert F. Baker of Durham, who currently serves on the board. "The main change for the work of the trustees is that less time is spent recruiting lawyers to participate and more time is spent in efforts to get banks to increase interest paid on lawyers' trust accounts and to decrease service charges on those accounts," Baker said.

In fact, Baker said that the most rewarding aspect of his service with IOLTA so far has been working with representatives of a large bank to successfully persuade them to increase the amount of interest paid and to waive service charges on the lawyer trust accounts at their bank. "That resulted in a very large increase in income to IOLTA from that bank," he said.

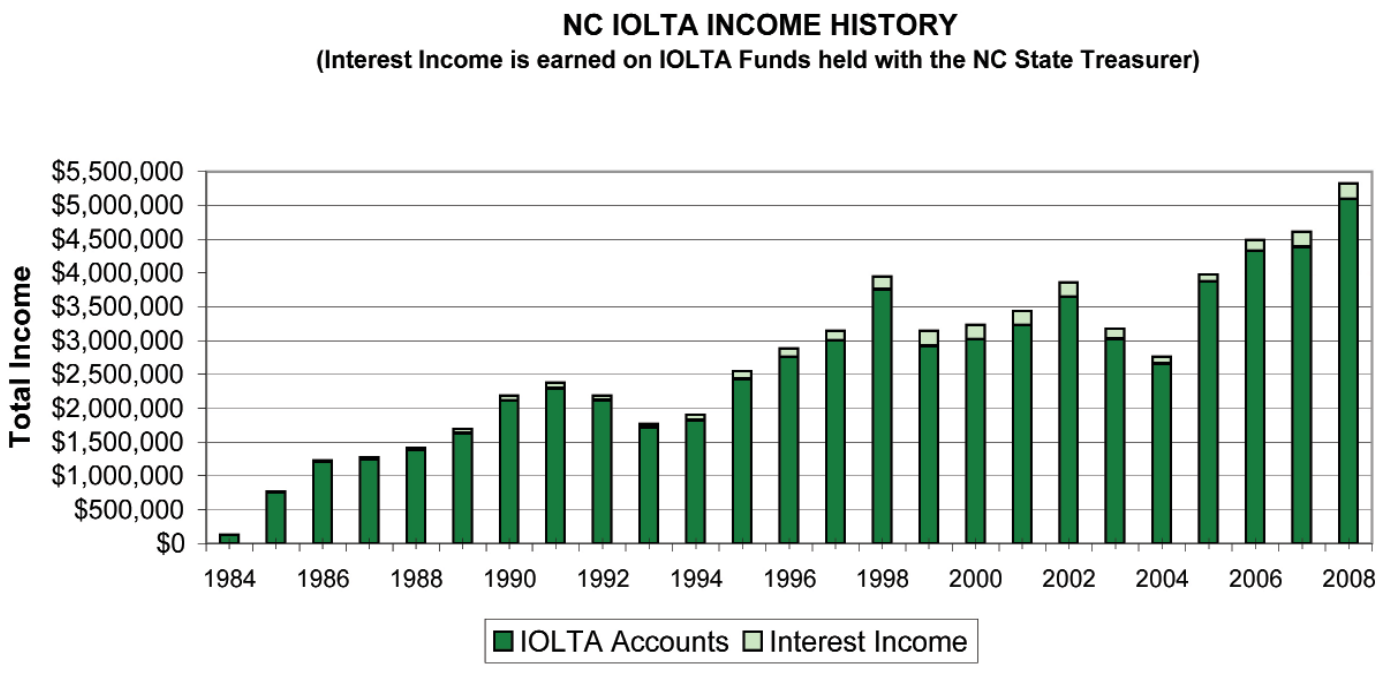
In the late 1990s, after speculating on how to approach banks and who to contact to negotiate for the best policies on IOLTA accounts, the State Bar put effort into adding IOLTA trustees who have ties to the banking industry. For example, Aycock, who is counsel at the NC Bankers Association, served two three-year terms on the board from 1999 to 2005 and chaired the board in 2004-05. "Not only was he a stellar trustee," Pursley said, "but he continues to be a wonderful resource for the program when we need to craft a message for or talk to bankers."

Because interest on lawyers' trust accounts is the main source of revenue for IOLTA, Aycock said it's essential that the board of trustees includes a representative of the banking industry.

"A representative of the banking industry provides information about, and understanding of, bank operations relating to IOLTA accounts, including rate and fee structures that banks apply to IOLTA and other commercial accounts," Aycock said.

The representative, who also acts as a liaison to the banking industry, helps bankers understand IOLTA and helps IOLTA trustees understand banking procedures, he said.

Ayock states that bankers and lawyers alike need to understand that IOLTA is an integral part of the State Bar and legal profession's responsibility to ensure that quality legal representation is available to all who need the assistance of counsel.



"Funding provided by IOLTA is essential to the continued success of those programs that provide legal services to the indigent and which further the administration of justice," he said.

A current trustee who understands bankers and lawyers is Michael C. Miller, who is president and CEO of CommunityOne Bank based in Asheboro. "Banks are already among the most generous corporate citizens in their communities," Miller said. "Even so, it can help for the IOLTA board to have a resource from the banking point of view to keep bank management and boards informed about the benefits of IOLTA participation, particularly in relation to banks' obligations to low and moderate income borrowers."

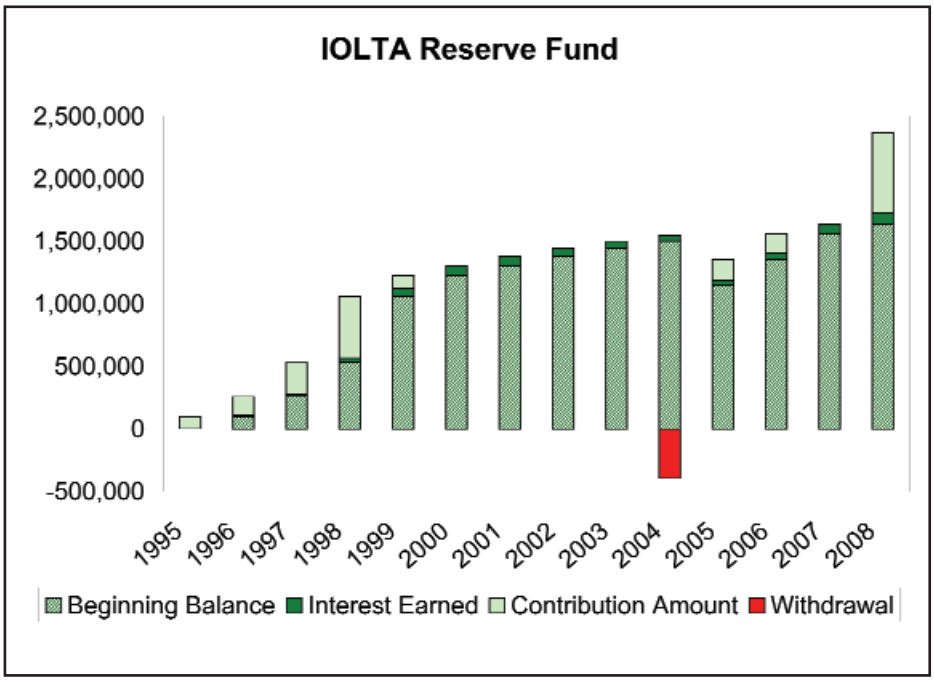
Miller, who was incoming chairman of the NC Banker's Association when he joined the board in 2003, had been an attorney with experience handling business transactions and closing real estate loans. Aycock solicited his interest and willingness to serve on the board if asked.

"He is now in his sixth year as a trustee and has served as our chair," Pursley said. "Mike is an attorney but has spent most of his career as a banker in North Carolina. He is a wonderful liaison to the banking industry and will continue to be able to educate his fellow bankers about IOLTA once he leaves the board."

Miller said that when he does leave the board he would like to see lawyers continue to "cultivate" the activities of banks with IOLTA. "Banks have voluntarily done a good job with rates paid and service charge waivers or limitations, and are positively influenced by the attorneys who do business with them," he said.

Although probably 90% of all IOLTA income is derived from six banks, mandatory IOLTA has given more community banks the incentive to join the effort, he said.

Pursley said the IOLTA program has used the carrot approach with banks. "We highlight the banks that give us the best policies on our bank list, which is on the State Bar website, (www.ncbar.gov), and we publish good news about changes to bank policies in a bank news box in the quarterly State Bar *Journal*," she said. "The banks have become very interested in whether they are highlighted on that list because they are interested in their attorney clients."



Ward Hendon, an Asheville attorney who served as a trustee from 1993 to 1999, said that, unfortunately, neither clients nor the general public knows much about IOLTA and the good works it does. But, while he understands and appreciates what lawyers have done to make IOLTA a success, he's not looking so much for the legal profession to receive the accolades.

"This is money that once went to the banks," Hendon said. "It's the banks that should get some credit for it."

It's Hendon himself who gets some credit for keeping funds available for grants steady. The amount of interest income IOLTA takes in depends on fluctuating interest rates. Hendon encouraged the trustees to establish a reserve fund in anticipation of the times when income falls so much that the ability to continue ongoing grants is affected. The reserve fund was established in 1996, and in 2004, for the first and only time, the trustees authorized use of the funds from reserve to keep ongoing grants steady.

"Although the reserve fund wasn't used for years, I thought it was a great idea when I was a trustee," Hendon said. "As it turns out, I have been reading about problems other states are having that we aren't having because we have a reserve fund."

Prior to the reserve fund, known informally as the Ward Hendon Fund, when interest rates dropped, grants had to be cut. In 2004, while income was down more than $1 million from just two years earlier and lower than at any time since 1995, IOLTA grants remained steady in North Carolina.

"Because our grants often support operating expenses, it affects individuals' salaries as well as the financial health of grantee organizations and their ability to provide equal access to justice," Pursley said. "So, grant decreases are particularly difficult for everyone."

The reserve fund balance started out at about $250,000 and had worked up to $1.5 million by the time it was first used. The board has not only replenished the reserve since 2004, it has increased it to more than $2 million, which is about half of the current annual grant amount. In fact, since income declines are expected now that all new mandatory accounts are signed up, the trustees put all additional income from the most recent cycle into the reserve fund so that the program would have what it needs for the 2010 grants.

Since the NC IOLTA program is not part of a bar foundation, nor does it take part in fundraising, the income for grants comes from the interest remitted from IOLTA accounts. Now that the program is mandatory, other than negotiating with banks for the best interest rates and lowest

service charges, there are few ways to increase income.

The next issue on the horizon aimed at increasing income is "comparability," which requires lawyers to hold their accounts only at banks that agree to pay IOLTA accounts the highest rate available on similar accounts at the bank.

"It is similar to other State Bar requirements for banks that want to hold attorney trust accounts—for example, Non Sufficient Funds notices and reporting requirements," Pursley said.

Twenty-four IOLTA programs have now instituted "comparability" with income doubling or tripling in some instances.

NC State Bar President John MacMillan has made exploring this concept a goal of his administration and a consultant is analyzing IOLTA accounts at the largest banks to see how well it would work in North Carolina. (For more information, see the Comparability FAQ on page 36.)

The trustees tend to agree that whatever can be done to help the grantees should be done. "The needs of the indigent population are probably beyond what any of us can imagine or forecast," Miller said. "The trustees will work to fund as much as is possible and prudent, given the difficult economic times in which we are all working." ■

The third and final article in the series celebrating 25 years of the NC IOLTA program will deal with grants and appear in the Fall 2009 Journal.

Barnes, who majored in journalism and political science at UNC-Chapel Hill, served as director of communications of the NC Bar Association from 1987-2002. He now runs his own writing, editing, and web development business named cb3media.com.

What IOLTA Has Meant to Me

BY GREG DIXON

My summer of work as an IOLTA-funded intern at Pisgah Legal Services (PLS) was an extremely rewarding, occasionally frustrating, and always challenging experience. I helped many of PLS's attorneys with a wide variety of cases in housing, consumer, and family law for its low-income clientele. On a day-to-day basis, I wrote memos on legal issues, conducted client interviews, prepared pleadings and interrogatories, collected evidence for litigation, and accompanied my supervisor, Shelley Pew Brown, at discovery and court proceedings. Additionally, I represented PLS at community outreach and education meetings, and aided the Hendersonville Affordable Housing Coalition with data assessment and housing advocacy for the poor, elderly, disabled, and mentally ill.

The highlights of my summer were both professional and personal. Professionally, I benefited greatly from working closely with Shelley on a daily basis. Throughout the summer, she went to great lengths to ensure my development, spending hours of her time to discuss cases and community issues with me, providing feedback on my work, and including me in her client interactions and discovery proceedings. Other attorneys at PLS were similarly generous, giving me practice at working with a wide range of personalities on a variety of issues. Additionally, my position at PLS opened doors for me throughout the western North Carolina legal community, setting me up with an instant network of attorneys and court personnel who were unfailingly ready to advise me on legal questions and my life as an attorney.

Personally, I enjoyed working in a small office with a relaxed environment, and interacting with my colleagues both inside and outside the office. Also, I found great satisfaction in talking with PLS's clients and assisting them with meeting their basic needs. In one case, a single mother and her three boys were being evicted from public housing because one of the boys had reported drug-related activity in the neighborhood to his mother, who, in an effort to do the right thing, immediately called the police. I was able to help Shelley present their case at a hearing, and ultimately keep them in their home. On other days, I had opportunities to protect victims of domestic violence from their abusers, and to prevent sometimes-tyrannical landlords from abusing the rights of elderly and disabled tenants. Driving home at the end of the day, I was able to feel good knowing that I had not only improved myself as a lawyer, but also helped to improve the lives of others.

The positive quality of my summer experience is a reflection of the quality of PLS itself. Its attorneys are passionate and assertive about protecting clients' rights, professional and congenial members of the local bar, and willing to share their legal and local knowledge with summer clerks. For this experience, I am also indebted to the North Carolina Bar's IOLTA grant program, without which I would have struggled to meet my summer room and board expenses.

The gratifying aspects of my experience at PLS firmed up my personal commitment to a lifelong involvement with poverty and public interest law. As I move forward with my career, I hope to regularly take on cases through a program like the 28th Judicial District's Mountain Area Volunteer Lawyers service, in which legal aid organizations refer indigent clients to private lawyers. ■

Greg Dixon is a second year student at Duke Law School who was an IOLTA-funded intern at Pisgah Legal Services in Asheville during summer 2008.

Mediation Manners (They Matter)

By Ms. Mannerly Mediator

As mediation becomes routine in North Carolina, parties and litigators may need more education about the proper behavior at mediation. While most attorneys and parties behave professionally, courteously, and appropriately, there are times when behavior may not conform with professional standards. Following are common mediation issues in North Carolina Superior Court cases, and the responses that would be appropriate by an etiquette columnist (such as Ms. Mannerly Mediator) to a litigator making the statements below.

1 I don't know what the damages are in this case, but we will work on that while you are meeting with the other side.

Gentle litigator, making this statement to a mediator is similar to saying, "I know this is a black tie dinner, but I need to sew on a few buttons and iron my clothes while the other guests are eating and then I will be ready...oh and I will have to run home and get my shoes, too." When one is attending an event, one should be as ready as possible as soon as one arrives at the door. Occasionally, one of the guests may need a safety pin or help with a hem, but failure to come to the party fully dressed puts all of the other participants at unease and will not be helpful to having an enjoyable and successful event.

The rules governing mediation in North Carolina require only the attendance of the parties at a mediation and do not require them to be ready, or even to participate in good faith. Rule 4, Revised Rules Implementing Statewide Mediated Settlement Conferences and Other Settlement Procedures in Superior Court Civil Actions (hereafter MSC Rules). The mediation, however, is generally the best time for the parties to try to discuss settlement. Participants should come to a mediation knowing their damages and who will be attending for the opposing side. Before the mediation, participants should be aware of the different ways their case can be resolved, and then at the mediation try to persuade the specific person attending of the merits of their proposed resolution.

While no party is required to make an offer at mediation, the mediator is authorized to be in control of the conference. Rule 6, MSC Rules. The mediator should not prolong a mediation conference unduly; however, the length of the conference can become an issue if one side comes to the mediation and attempts to prepare while the mediation is ongoing.

Ms. Mannerly Mediator knows that while we are all aware of this rule, a reminder of such proprieties is always helpful and in the future, except for an occasional missing button, the inquiring litigator will arrive at the mediation fully prepared.

2 Hey, aren't you glad that I called? We are giving you a day of vacation tomorrow, because we need to postpone the mediation.

Gentle litigator, while everyone enjoys a day of relaxation, that day is enjoyed much better if the vacation day is one that the person has selected for himself or herself. When a host and a number of guests have arranged their schedule around another person and a difficulty arises, it is incumbent upon the guest to let the host know as soon as possible. One must put oneself in the other party's shoes, so to speak, which will be a helpful perspective to have when the mediation is actually held.

Scheduling any social event, and a mediation in particular, can be almost as difficult as working towards a resolution at the mediation. As everyone knows, rescheduling a postponed mediation will take time and may result in issues with continuing the mediation deadline. Rule 3C, MSC Rules.

Different courts have different rules about continuations and there is no assurance, in any event, that the deadline can be extended. The parties may also have difficulty finding another date when everyone can get together. Of course, there are times when unavoidable circumstances require that the mediation be continued, but when one party or the other has simply decided the date is not convenient, then the continuance may become an issue in and of itself.

Rule 7E, MSC Rules, provides for a postponement fee. If the postponement request is made five business days before the scheduled date of the mediation, the fee, by rule, is $250 in addition to the one-time, per case, administrative fee. If a mediation is cancelled the day before the mediation, and not rescheduled because the parties have settled, then the MSC Rules cancellation fee would be $375. Of course, if the mediator is privately selected, then the fee may be greater or smaller, depending upon that mediator's agreed upon rate.

Fees may also be due if the parties change mediators. The MSC Rules provide for payment of an administrative fee if the parties substitute mediators after one has been appointed. Rule 7C, MSC Rules. Failure to pay the mediator's fee may result in a motion for sanctions by the mediator, and of course, Ms. Mannerly Mediator would hate to see the litigator and the mediator involved in such difficulties.

3 Go tell the plaintiff/defendant that you think this case should settle for "x" amount of money. Gentle litigator, Ms. Mannerly Mediator would never assume that you are trying to substitute your opinion for that of the mediator's, nor would she assume that you are asking the mediator to convey something that the mediator does not believe. Instead, Ms. Mannerly Mediator will assume that you are so persuaded by the righteousness of your position that you truly believe no one could possibly disagree with you. Ms. Mannerly Mediator will remind you, however, that the proper inquiry would be to determine whether your position is reasonable and whether the mediator can convey the information without violating any rules of ethics.

Mediators in North Carolina, as is typical of most learned professions, are governed by standards and rules of ethics. For those of you who need a refresher, you can find them on the North Carolina Dispute Resolution Commission's (DRC) website. Standard V of the NC Supreme Court Standards of Professional Conduct of Mediation governs Self Determination of the parties. Standard V provides that, "A mediator shall respect and encourage self-determination by the parties in their decision whether, and on what terms, to resolve their dispute, and shall refrain from being directive and judgmental regarding the issues in dispute and options for settlement." The rule does set boundaries as to when a mediator may express an opinion.

Subdivision C of Standard V provides that, "A mediator shall not impose his/her opinion about the merits of the dispute or about the acceptability of any proposed option for settlement." This provision instructs the mediator to resist giving opinions even when requested to do so. Expression of an opinion is permitted "as a last resort to a party or attorney who requests it and the mediator has already helped that party utilize his/her own resources to evaluate the dispute and options." The NC DRC certified mediator is governed by these standards and, as with an attorney's rules of ethics, must follow them during mediation.

Ms. Mannerly Mediator will assume that the gentle litigator is not aware that the other side would have to ask the mediator's opinion, after having exhausted options for settlement, before the mediator could give any opinion. Ms. Mannerly Mediator will assume that such an instruction to the mediator (that the mediator should tell the other side that their case is worth "x") would not now be given. It would be impolite to ask the mediator to violate his or her ethical rules.

4 We don't need to put our agreement in writing, because we will prepare a formal settlement document later.

Ms. Mannerly Mediator understands that you are a person of your word and that you would not change your mind after the mediation because to do so would be impolite

"Ms. Mannerly Mediator is confident that the parties would not intentionally misunderstand one another nor change their minds in the days following the mediation, but just in case...the agreement reached at the mediation must be reduced to writing and must be signed."

and would lead others to not trust your word. Ms. Mannerly Mediator would point out that, regardless of the good intentions of the parties, there are occasions when people misunderstand each other and they think they have an agreement on some particular matter, such as the proper way to prepare a dish, when in fact they mean two completely different dishes.

Rule 4C, MSC Rules, requires the parties to an agreement reached at mediation to reduce the agreement to writing and to sign it along with the counsel. Thus, under the rule, there are two requirements. First, the agreement must be reduced to writing and then second, the agreement must be signed. If the agreement is not reduced to writing and signed, then the work at the mediation may result in there being no agreement between the parties. *See Cohen Schatz Associates, Inc. v. Perry, et al,* 169 N.C. App. 834, 611 S.E.2d 229 (2005). Pursuant to N.C. Gen. Stat. Section 7A-38.1(l), a mediated settlement agreement must be in writing and signed in order for the agreement to be enforceable.

In addition to the rules for the parties, the mediator has an obligation to report to the court whether or not the case is resolved. If the case is resolved at mediation, then the mediator must make that report to the court, as well as obtain the signature on Form 813 of the attorney for the party reporting the dismissal. The mediator should not report that the case has been resolved unless the case has been reduced to writing and signed. See Advisory Opinion, NC Dispute Resolution Commission, Opinion Number 07-11 (Adopted and Issued by the Commission on March 16, 2007)("mediator seriously erred in failing to required that the agreement be reduced to writing").

Ms. Mannerly Mediator is confident that the parties would not intentionally misunderstand one another nor change their minds in the days following the mediation, but just in case, and in order to keep the mediator, the attorneys, and the parties from further unpleasantries, the agreement reached at the mediation must be reduced to writing and must be signed.

5 Yes, I am the only one appearing at the mediation on behalf of the defendant and I am sorry that I forgot to call you.

Gentle litigator, of course the polite response to any invitation, and a court order to attend a mediation holds at least the status of an invitation, is to either accept or decline the invitation, and to RSVP to let the host know if one of the invited parties will not be attending. While the host mediator may accept your expression of regret, there may be consequences for all of those involved.

Regardless of the social etiquette involved, as most litigators know, the North Carolina Rules, Rule 4, sets forth the requirements of who *must* attend a mediated settlement conference which is being held pursuant to a Superior Court order for mediation. Rule 4, MSC (emphasis added). There are similar rules for other courts and agencies in North Carolina. While these rules may change from time to time, they generally require attendance by at least the named party or, if the party is a corporation or agency, a representative of that entity, in addition to the attorney of record.

The rule provides that: "Any party or person required to attend a mediated settlement conference shall physically attend until an agreement is reduced to writing and signed as provided in Rule 4C or an impasse has been declared. Any such party or person may have the attendance requirement excused or modified, including the allowance of that party's or person's participation without physical attendance, (a) by agreement of all parties and persons required to attend and the mediator, or (b) by order of the senior resident superior court judge, upon motion of a party and notice to all parties and persons required to attend *and* the mediator." Rule 4, MSC.

Usually, mediators are very flexible in working with the parties about having the appropriate person present, but difficulties arise when one party has failed to notify the other that someone will not be attending the mediation. When a party fails to notify the other side that one party will be absent, or will only be available by telephone, the mediation very well may get off to a difficult start. The situation can be easily remedied by the litigator letting the mediator know if there is difficulty in securing the attendance of a participant and then the mediator can work with the parties to resolve whatever issues may arise.

Regardless of rule or program requirements, when the true decision makers are physically present at the mediation, the likelihood of having an efficient and effective mediation increases dramatically. Of course, as Ms. Mannerly Mediator would say, the more the merrier at the event, especially if the host has planned on the guests' presence. ■

Having had a number of challenges presented at mediation, it appears to me that most issues could be resolved by thinking how an etiquette columnist might respond to problems presented at mediation. Please forgive my weak attempts at humor, but I hope that the messages are appropriately conveyed.

Ms. Mannerly Mediator is the nom de plume of a mediator in Pilot Mountain, NC, who would like to remain anonymous. Ms. Mannerly Mediator is a past chair of the Dispute Resolution Section of the North Carolina Bar Association and she currently serves on the Board of Governors of the North Carolina Bar Association. Ms. Mannerly Mediator's column appears in The Peacemaker*, a publication of the Dispute Resolution Section of the North Carolina Bar Association. Further enquiries can be submitted to annanderson681@hotmail.com.*