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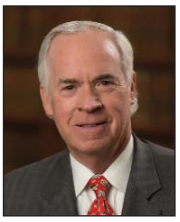

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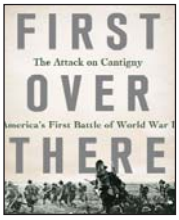

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The Role of Lawyers in a Post-Truth World

By Mark W. Merritt

Each year the *Oxford Dictionaries* releases a "Word of the Year." For 2016 the Word of the Year is "post-truth." *Oxford* defined "post-truth" as an adjective "relating to or denoting circumstances in which objective facts are less influential in shaping public opinion than appeals to emotion and personal belief." In making that selection, *Oxford* noted that the adjective had "become associated with a particular noun, in the phrase *post-truth politics*." To further justify its selection as word of the year, *Oxford* referenced the assessment of *The Independent* that "We've entered the post-truth world and there's no going back."

I found this selection for word of the year to be both sobering and more than a little disturbing. I was equally unsettled when the *New York Times* reported on January 18, 2017, that a recent Davidson graduate created a fake news site and false story that Hillary Clinton benefitted from election fraud in Ohio. Remarkably, the fabricated news story was shared over six million times. This story hit me hard. Davidson College takes its honor code seriously, and Davidson College graduates take honor seriously. The fabricator of the fake news site said he did it for money.

For lawyers, truth is an important thing. We tell our clients to tell the truth. Our clients swear to tell the truth. We cross-examine witnesses in an attempt to test the truth. We count on juries and judges to discern the truth. We convict defendants and send them to prison for reasons that we hope represent the truth. If truth is important to lawyers, then the question that must be answered is: what is the role of lawyers in the "post-truth" world"?

I have no interest in living in a world where truth does not matter. It is clear to me that lawyers have a special obligation and unique training that place them in a unique position to ensure that truth continues to matter. That special obligation flows from the Rules of Professional Conduct. The Preamble to our Rules states that a "Lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system, and a public citizen having special responsibility for the quality of justice." Rule 0.1[1]. The Preamble further instructs us that a "lawyer's word to another lawyer should be the lawyer's bond." Rule 0.1[13]. Rule 3.3 instructs us that lawyers have a duty of candor to the court and not offer evidence we know to be false. By the time a lawyer takes the oath, the truth should be imbedded in our DNA.

Lawyers are also uniquely trained to discern the truth. We are trained to ask questions. We are trained to seek the source document to verify the facts. We are trained to corroborate sources of information. We test conflicting contentions and try to determine what is credible and what is unreliable due to bias, prejudice, or lack of first-hand knowledge.

We also have the unique privilege of being trained in the Rules of Evidence. Rule of Evidence 102 states that we have the law of evidence "to the end that the truth may be ascertained and proceedings justly determined." We learn what kinds of statements are reliable under the hearsay rules. We are trained to test opinions, both lay and expert, pursuant to a framework set by the Rules of Evidence to validate their veracity. The Rules of Evidence put limits on a lawyer's ability to appeal to prejudice, and lawyers know all too well that playing to people's emotions and prejudices can sometimes be effective, but is also likely to be destructive when it comes to discerning the truth. Simply stated, lawyers are trained to discern, to separate the wheat from the chaff, and to find the truth in all the noise.

So, how do we deploy these special talents not just in the court system, but as a "public citizen having special responsibility for the quality of justice?" There are a number of roles that lawyers historically have and should continue to play. In any North Carolina community, our lawyers serve leadership roles in a variety of ways. Whatever the topic of interest or subject of civic discourse, lawyers should be the ones digging for the facts, testing the credentials of experts, and critically examining their opinions, calling out those who appeal to prejudices and biases, and looking for what will actually work. When the State Bar convenes a group of lawyers who disagree about a topic, I am always amazed how the process of civil dialogue driven by facts and reason leads to good outcomes. Despite the public perception that lawyers are unduly contentious, lawyer leaders are uniquely positioned to be role models on how to make decisions through civil dialogue based on facts and well-grounded opinions and not on the appeals to emotion and prejudice that drive the post-truth world.

Lawyers can also be conveners and mediators. In a number of communities where tensions have grown after police shootings of unarmed victims, lawyers have played the role of convening the public and engaging people who had differing viewpoints. After the police shooting of Michael Brown in Ferguson, Missouri, the Missouri State Bar and lawyers throughout Missouri played an important role in educating citizens and promoting constructive dialogue about legal issues such as excessive force, the role of a grand jury indictment, and the corrosive effect of municipalities relying on fines and

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An Introduction to Title IX Higher Education Sexual Misconduct Cases

By John I. Winn

Campus sexual assaults are serious matters that should be properly investigated and fairly adjudicated. Suspensions, expulsions, and transcript notations involving sexual misconduct are the functional equivalent of a criminal conviction for future employment, transfer to other schools, and graduate admissions. Basic familiarity with substantive and procedural aspects of current US Department of Education, Office of Civil Rights (DOE-OCR) oversight of sexual violence on private and public colleges represents an important practice area. All college students, especially victims of sexual assault, should be treated with care, concern, honor, and dignity. Unfortunately, even the most conscientious campus tribunals are imperfect vehicles for adjudicating serious sex offenses.

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Background

Title IX, also known as the Patsy Takemoto Mink Equal Opportunity in Education Act of 1972, provides that "[N]o person in the United States shall, on the basis of sex, be excluded from participation in, or be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance."[1] Previously, Title IX was associated most closely with college athletics; in particular, increased funding for women's sports programs on the basis of "substantial proportionality."[2] Recently, however, allegations of institutional mishandling with regard to Title IX cases involving campus sexual assaults have made headlines including, among others, at Duke University[3] and the University of Virginia.[4] These incidents include both complaints that schools failed to respond appropriately to victims,[5] as well as overreaching by school officials against alleged perpetrators. In general, institutional failures to appropriately respond to sexual

assault complaints may result in enforcement action by the DOE-OCR and/or parallel litigation from aggrieved students.

The expansion of Title IX into campus sexual violence began in 2011 following the DOE-OCR's issuance of a 19-page "Dear Colleague Letter" (hereinafter "DCL") to colleges and universities asserting that the "[S]exual harassment of students, including acts of sexual violence, is a form of sex discrimination prohibited by Title IX."[6] The DCL mandated that colleges "take immediate and effective steps to end sexual harassment and sexual violence."[7] The letter also made clear that institutions failing to fulfill their responsibilities under Title IX could be denied institutional access to federal funds. In order to add emphasis to the new policy, the DCL vested itself with the somewhat nebulous regulatory status of "significant guidance document" officially described as "helpful guidance to interpret existing law through an interpretive rule or to clarify how they tentatively will treat or enforce a governing legal norm through a policy statement."[8] The DOE-OCR subsequently followed upon the DCL with a 47-page joint DOE-OCR and Department of Justice "Blueprint" letter in 2013[9] and yet another 53-page "guidance document"[10] (clarifying the 2013 Blueprint) the next year. Finally, in October of 2014, the DOE-OCR promulgated implementing regulations in the Federal Register citing Section 304 of the Violence Against Women Reauthorization Act of 2013.[11]

Under the DCL and subsequent guidance, any college or university receiving federal funds[12] is expected to publish a notice of nondiscrimination,[13] designate at least one employee to coordinate Title IX compliance,[14] and adopt (and conspicuously publish) "procedures for investigating and adjudicating complaints of sex discrimination, sexual harassment, or sexual violence."[15] Title IX compliance by colleges may be summarized in four parts: (1) education, (2) prevention, (3) investigation,[16] and (4) remediation to ensure institutions are free of ongoing sex discrimination, sexual harassment, or sexual violence. Sexual violence education and training for students, faculty, and staff is also mandated. Under the DCL, sexual violence broadly defined includes "attempted or completed rape or sexual assault, sexual harassment, stalking, voyeurism, exhibitionism, verbal or physical sexuality-based threats or abuse, and intimate partner violence."[17] It is important to note that unlike Title VII discrimination cases,[18] persons or organizations seeking redress under Title IX are not required to exhaust administrative remedies nor file an administrative complaint[19] with the DOE-OCR before seeking compensatory damages, injunctive relief, or attorneys' fees in federal court.[20] Title IX allows anyone who believes there has been an act of sex discrimination against any person or group to file a complaint with either the host institution or directly with the DOE Office of Civil Rights.[21] Persons or organizations need not be actual victims of discrimination, but may claim to have been affected by a "hostile sexual environment" or may file complaints on behalf of other persons or even other groups.

While the only penalty available against a university found in violation of Title IX is termination of federal funding, this remedy has never actively been sought by the DOE-OCR.[22] Nevertheless, the mere threat of funding cut-offs has been taken quite seriously by the academic community. Clearly also of concern to university administrators is unfavorable publicity associated with federal civil rights investigations or from lawsuits by aggrieved student victims.[23] According to the *Chronicle of Higher Education*, the DOE-OCR has conducted almost 250 civil rights investigations of public and private colleges since 2011.[24] The *Chronicle* also reports that over the past 18 months alone, the number of new investigations has nearly tripled (197 open investigations targeting 161 institutions).[25] Perhaps a bit ominously, the DOE-OCR recently announced that it was prospectively setting a 90-day limit for affected campuses to negotiate and sign Title IX resolution agreements with the DOE-OCR following completion of campus DOE-OCR investigations.[26] Given this state of affairs, virtually every college and university in the United States has enacted new or improved sexual assault policies, implemented victim assistance programs, and hired thousands of full-time "Title IX coordinators"[27] responsible for implementing university compliance with Title IX.

The most frequently voiced objection to the expansion of Title IX is that rape and other gender-based acts of violence are serious criminal offenses best handled by professional law enforcement agencies and criminal courts. Adherents to expanded federal jurisdiction counter that gender-based violence is a form of sex discrimination that seriously impacts equal access to education. On-campus adjudication is focused upon campus climate and the well-being of a particular student while criminal investigations are crime prevention and prosecution. Further, the DOE-OCL asserts that the Title IX compliant process is not meant to replace law enforcement, but serve as a "parallel option"[28] for victims who may fear a loss of anonymity, the police, inconsistent sanctions from courts,[29] or retaliation by perpetrators. University policies are meant to allow victims to continue their education without further violence or harassment.[30] Facilitative and remedial measures may include academic and housing changes, no-contact directives (i.e. "stay away" orders), or mental health counseling. Under certain circumstances, universities may suspend or expel alleged offenders pending the outcome of either law-enforcement or university investigations or hearings.

Another objection involves cases involving (mostly male) students accused of sexual misconduct and disciplined by their institutions who allege that procedures for handling these matters are tipped in favor of complainants.[31] Many policies employ overbroad definitions of "consent," allow nonvictim witness anonymity, and invoke questionable investigatory presumptions such as all victim complaints must be taken at full "face value" by investigators and other university officials.[32] Of particular concern, DOE-OCL mandates that colleges use the lowest possible burden of evidence in adjudicating sexual misconduct; a mere "preponderance of the evidence."[33] Prior to 2011, most institutions used a "clear and convincing" standard of proof for adjudicating misconduct cases.[34] DOE-OCR and others note that the preponderance standard is the same as is used in civil lawsuits. They fail to acknowledge that unlike institutional fact-finding, fairness in civil courts is maintained in large measure by formal rules of evidence, rights to confrontation, and unrestricted representation by qualified counsel.

Title IX does require investigations to be "adequate, reliable, impartial, and prompt from initial investigation to the final result."[35] However, neither Title IX nor Section 304 regulations require any board hearing or other fact-testing procedure (other than the report of investigation itself). Under DOE-OCR pressure, traditional

hearing boards are being scrapped in favor of the "single investigator"[36] model. This single investigator is almost always one of the aforementioned Title IX coordinators who may have little or no law enforcement or investigatory training. The single investigator model allows one person to investigate reports of sexual misconduct as well as make factual determinations of guilt or innocence. Single investigators are given broad latitude whether or not to provide respondents with an opportunity to present questions, propose witnesses, or rebut statements made by others. If and when hearing boards are retained within the school process, they are typically composed of peer students, administrative staff, and faculty with varying degrees of latitude to accept or modify the investigatory findings. While campus tribunals are not meant to replace courtrooms, Caroline Kitchens notes in the *National Review* that "English professors, librarians, and math majors across the country are determining guilt for what is generally considered the second most serious crime known to man."[37] Obviously, universities must develop programs and policies that reduce and prevent sexual assaults, but the impact of current DOE-OCR policies makes it exceedingly challenging for schools to strike a balance between preserving a positive educational climate and fairly adjudicating student complaint.

Accused students found responsible under these new regimes have turned to federal courts seeking reinstatement, money damages, and expungement of transcripts with only modest success.[38] While *Franklin v. Gwinnett County Public Schools* (1992)[39] holds that students may recover money damages and equitable relief under Title IX, the Supreme Court in *Davis v. Monroe County Board of Education*[40] held that schools are only liable if they have actual knowledge of sexual harassment or act with deliberate indifference.[41] In order to establish a claim of discrimination under Title IX, a plaintiff must show the defendant institution discriminated against him or her because of sex, that the discrimination was intentional, and that the discrimination was a "substantial or motivating" factor in the defendant's actions.[42] In most instances, courts have dismissed aggrieved student claims under Title IX because of difficulties in making a preliminary showing that, however flawed policies or procedures may have been, the school was not motivated by sex discrimination with respect to that *particular* student.[43] Nevertheless, recent cases involving students previously enrolled at Cornell, Brown University, and George Mason have yielded at least partially favorable outcomes for accused students.

Recent Case Decisions

In *Doe v. Brown University*,[44] Doe, a male former student, brought action against Brown University under Title IX for breach of covenants of good faith and fair dealing, promissory estoppel, negligence, and injunctive relief. Although the court dismissed most of Doe's common-law claims,[45] the judge did rule that Doe was entitled to proceed with discovery under an "erroneous outcome"[46] due-process standard.[47] In the opinion, Chief Judge William Smith held that "[R]equiring that a male student conclusively demonstrate, at the pleading stage, with statistical evidence and/or data analysis that female students accused of sexual assault were treated differently, is both practically impossible and inconsistent with the standard used in other discrimination contexts."[48] Doe was also allowed to proceed with a breach of contract claim because even if Brown relied upon guidance DOE-OCL in barring Doe from classes prior to his hearing, this did not absolve the school of its responsibilities to guarantee Doe's access to, and use of, Brown's academic facilities under contract theory.[49] Chief Judge Smith also noted that Doe had made at least a *prima facie* showing in his complaint that Brown University's handling of Doe's case fit within a pattern of (favorable) gender bias toward female students in cases of sexual misconduct by male students.[50]

In *Prasad v. Cornell University*,[51] the district court allowed another "erroneous outcome" claim to move forward while dismissing several other counts including breech of contact and "selective enforcement" under Title IX. In *Prasad*, the accused student was charged with nonconsensual sexual contact with an intoxicated student and was expelled solely upon the written report of investigation by a single investigator.[52] The investigator in *Prasad* was tasked "to gather evidence relating to the alleged discrimination, harassment, sexual assault/violence, or retaliation to determine whether the accused engaged in [the alleged] conduct...by a preponderance of the evidence."[53] The hearing panel composed of three faculty members simply accepted the investigator's findings and recommendation without further inquiries or testimony. The court in *Prasad* noted that a "fair reading of the evidence reveals that [the victim's] account is contradicted and inconsistent, while Prasad's account is corroborated and substantiated. Yet the burden of proof was incorrectly placed on Prasad, and his account of the events was inexplicably deemed less credible than [the victim's] account."[54]

Most recently, a male student ("Doe") at George Mason University and his female accuser engaged in a sexual relationship involving bondage, sadism, and masochism.[55] Following a panel hearing in which the accused student was found "not responsible," the purported victim appealed to the university vice-president who, in turn, immediately expelled Doe for prior (fully consensual) sexual activities. The vice president independently determining that Doe's prior consensual bondage-based sexual activities were *per se* in violation of George Mason's sexual conduct policy prohibiting the "infliction of physical harm of any kind."[56] The court ruled this type of *ad hoc* decision making violated Doe's reputational due process rights because Doe was never placed on notice that events other than those within the victim's preliminary complaint itself were an issue.[57] While pointing out that George Mason could have prevailed had they notified Doe in advance of these other matters, the court took pains to express serious concerns about several undisclosed, *ex parte* communications between the Title IX investigator and the appellate review official.[58] Finally, the court held that sexual misconduct allegations, even those confined to academic venues, "plainly call into question plaintiff's protected liberty interests in his or her good name, reputation, honor, or integrity."[59]

Effective Representation

Given the current regulatory environment, providing effective legal advice to accused client students across the four stages of campus conduct resolution (i.e. complaint, investigation, adjudication, and institutional response) may prove a formidable task. As Title IX grows more complex (and develops its own body of decisional law), counsel representing accused students at one of North Carolina's 130 accredited public or

private colleges, community colleges, or universities[60] may choose to focus most of their efforts upon ensuring institutional disciplinary processes are free of bias and meet reasonable expectations of fairness. Protecting the rights of students to minimal due process is not an attack upon any victim of sexual assault. Distressingly, under single investigator regimes, accused students have seriously curtailed opportunities to seek out and review evidence. Overbroad "stay away" orders and/or campus bars may also prevent students from contacting potential witnesses to obtain exculpatory statements, especially from fellow students or sympathetic faculty. University policies should not act to shield students from the negative consequences of their own poor decisions, especially if by doing so they result in life-long harm to innocent third parties.

As a first step, a carefully drafted representational letter to the school's Title IX coordinator (and other involved university staff or retained counsel,[61] if known) may serve to minimize any tendency towards excessive zealousness on the part of investigators. Reminding colleges of the accused student's rights under the Family Educational Rights and Privacy Act (FERPA)[62] to request, inspect, and review information or physical evidence (e.g. security camera footage) as well as training materials[63] provided to board members that could lead to unfair bias is not unreasonable. Counsel should also request (on behalf of their client) copies or summaries of *ex parte* communications, if any, made between investigating officials, board members, or the appellate reviewing authority. Reminding investigating officers, board members (if provided), and appellate administrators that the preponderance standard does not shift the burden of proof to the accused to prove himself "innocent," but must be established by a conscientious review of the entire record, could also benefit the accused person.

If an evidentiary hearing is provided, campus policies virtually always limit attorneys to the role of "advisor" only. Some schools prohibit lawyers from speaking to their clients at all during the hearing (although notes may be passed). Student parties are also normally prohibited from asking direct questions of adversarial parties, so there may be no opportunity to see or question accusers in person. Under these circumstances, counsel can assist clients in drafting proposed questions of the complainant to be "relayed" to the presiding officer.[64] Obviously, any inquiries involving victim consent, prior consensual sexual activity, or alcohol use[65] should be made with appropriate sensitivity. If there was a collateral criminal investigation involving the student that did not result in indictment or prosecution, exculpatory statements from police case files should be gathered if possible. Investigators or other witnesses can be asked to provide supporting statements to the investigator or to even testify at board hearings. Although courts have held that students have no constitutional right to review or to an appeal after a disciplinary hearing otherwise satisfying minimal due process,[66] counsel should request any summarized hearing transcripts or video recording as well as a "final chance" to submit matters in rebuttal, extenuation, or mitigation.

While it is probably easier (and cheaper) for universities to respond to a civil lawsuit from an aggrieved student than to respond to a full-on DOE-OCR investigation, this is not an excuse to deny anyone their rights. Campus sexual assaults are serious matters that should be properly investigated and fairly adjudicated. However well-intentioned, flawed or unprofessional proceedings can lead to profoundly negative consequences. All students, especially victims of sexual assault, should be treated with care, concern, honor, and dignity. Unfortunately, even the most conscientious campus tribunals are imperfect vehicles for adjudicating serious sex offenses.[67] ■

John Winn (Campbell Law 84') is currently professor of business law at the Harry F. Byrd Jr. School at Shenandoah University in Winchester, VA. Mr. Winn is also a retired army judge advocate officer. While on active duty, Winn also served as associate professor of law at the United States Military Academy (West Point) and as assistant professor of criminal law at The Judge Advocate General's Legal Center and School in Charlottesville, VA.

Endnotes

1. As used in this article, Title IX means title IX of the Education Amendments of 1972, Pub. L. 92–318, as amended by section 3 of Pub. L. 93–568, 88 Stat. 1855, except sections 904 and 906 thereof; 20 U.S.C. 1681, 1682, 1683, 1685, 1686.
2. *See Roberts v. Colorado State Board of Agriculture*, 998 F.2d 824 (10th Cir. 1993).
3. Although the Duke University Lacrosse Team cases occurred in 2006, they serve to highlight potential pitfalls for both public officials and institutions in dealing with sexual violence investigations.
4. *A Rape on Campus*, an article in *Rolling Stone Magazine* by Sabrina Erdely in November 2014, claimed to describe a group sexual assault at a University of Virginia (UVA) fraternity house. It has since been discredited and retracted by the publisher.
5. Findings of Fact, Baylor University Board of Regents, Press Release, Baylor University Homepage, May 26, 2016. bit.ly/25kbXBk. "Baylor's efforts to implement Title IX were slow, ad hoc, and hindered by a lack of institutional support and engagement by senior leadership...the university's student conduct processes were wholly inadequate to consistently provide a prompt and equitable response under Title IX."
6. Office of the Assistant Secretary, the Department of Education, Russlynn Ali, Dear Colleague Letter, April 4, 2011, Retrieved 2013-05-04. bit.ly/2iow0OM.
7. *Id.* at 1.
8. Memorandum: Issuance of OMB's Final Bulletin for

Agency Good Guidance Practices (Jan. 25, 2007). 72 Fed. Reg. 3432.

9. Department of Justice & Department of Education, University of Montana, Letter, Re: DOJ Case No. DJ 169-44-9, May 19, 2013. bit.ly/2jbSKmo.

10. United States Department of Education, Office for Civil Rights, The Assistant Secretary, Catherine E. Lhamon, Questions and Answers on Title IX and Sexual Violence, April 29, 2014. bit.ly/2jbXngp.

11. Violence Against Women Reauthorization Act of 2013 (Pub. L. 113-4, 127 Stat. 54) (VAWA 2013). VAWA 2013 reauthorizes and amends the Violence Against Women Act of 1994, as previously amended, (Title IV, sec. 40001-40703 of 103, 42 U.S.C. 13925 *et seq.*).

12. Essentially all US colleges and universities receive some form of federal funding except, most notably, Hillsdale College in Hillsdale, Michigan, and Grove City College in Grove City, Pennsylvania. *See Grove City College v. Bell*, 465 U.S. 555 (1984). *See also*, Hugh Davis Graham, *The Storm over Grove City College: Civil Rights Regulation, Higher Education, and the Reagan Administration*, History of Education Quarterly 38 (2) (Winter 1998): 407-29.

13. 34 C.F.R. 106.9.

14. 34 C.F.R. 106.8(a).

15. 34 C.F.R. 106.8(b).

16. *See generally, Title IX Investigation Models, White Paper,* National Association of College and University Attorneys, March 11-13, 2015.

17. Dear Colleague Letter, *supra* note 5 at 5.

18. Civil Rights Act of 1964, Section 7, 42 U.S.C. § 2000e *et seq.* (1964).

19. *See* US Department of Education, Office for Civil Rights, Case Processing Manual, Revised February 2015 (V1.2).

20. *See Franklin v. Gwinnett County Public Schools*, 503 US 60 (1992) and *Mercer v. Duke University*, 401 F. 3d 199, 203 (4th Cir. 2004).

21. United States Department of Education, Office for Civil Rights, webpage, Questions and Answers on OCR's Complaint Process (undated). bit.ly/2jbLhDY.

22. Department of Education, US Department of Education Finds Tufts University in Massachusetts in Violation of Title IX for Its Handling of Sexual Assault and Harassment Complaints, Press Release, April 28th, 2014. bit.ly/2iLASLK.

23. Perhaps most well-known is the matter of Emma Sulkowicz (aka "Mattress Girl") at Columbia University. Sulkowicz became a media sensation by carrying an inflatable mattress on campus to protest the exoneration of her alleged assailant. Sulkowicz carried the mattress with her during commencement as she was awarded her degree I(based upon her protest activities). *See Nungesser v. Columbia University et al.*, No. 1:2015cv03216 - Document 36 (S.D.N.Y. 2016).

24. Katherine Mangan, *As Federal Sex-Assault Investigations Multiply, Resolutions Remain Elusive.* Chronicle of Higher Education. DOE-OCR Investigations were almost evenly split between public and private institutions (121 cases at 89 public colleges and 122 cases at 97 private colleges).

25. *Id.*

26. Emily Yoffe, *The University Sexual Assault Overcorrection: How Efforts to Protect Women Have Infringed on Men's Civil Rights*, The National Post, December 8, 2014. Last updated Jan. 24 4:40 PM ET.

27. 34 C.F.R. Part 106.8.

28. *Id.* at 27.

29. Brock Allen Turner, a former Stanford swimmer, who raped an unconscious woman behind a dumpster on the campus in January 2015, received a six month jail sentence and probation. *See* Dayna Evans, *Stanford Swimmer Who Raped Unconscious Woman Gets Short Sentence Because Jail Would Have a 'Severe Impact on Him,'* NY Magazine, June 13, 2016.

30. *But see* John Krakuer, *Missoula: Rape and the Justice System in a College Town*, Anchor Books, (2015), detailing how the University of Montana, Missoula, in complying with Title IX mandates kept victim identities confidential, initiated a campus investigation, and issued a "campus safety alert." University authorities did not, however, contact local police, allowing the suspect to flee back to Saudi Arabia.

31. *See* Association for Student Conduct Administration, White Paper, Student Conduct Administration & Title IX: Gold Standard Practices for Resolution of Allegations of Sexual Misconduct on College Campuses (2014). bit.ly/2jIwAsB.

32. *See* Complaint, *John Doe v. University of Colorado Boulder*, Civ. No. 14-3027 (Nov. 5, 2014) (D. Colo.).

33. *General Order on Judicial Standards of Practice and Substance in Review of Student Discipline in Tax-Supported Institutions of Higher Education*, 45 F.R.D. 133 C.F.R. (1968).

34. Princeton University retained a "clear and convincing" standard until September 2014 before adopting the preponderance standard in a settlement agreement with the Office of Civil Rights. The DOE-OCR asserted that Princeton failed "to promptly and equitably" respond to complaints of sexual violence and for "using a higher standard of proof than what is permitted by the department." *See* Department of Education, Office of Civil Rights, Press Release, Princeton University Found in Violation of Title IX, Reaches Agreement with US Education Department to Address, Prevent Sexual Assault and Harassment of Students, November 5, 2014. bit.ly/2ikvA8U.

35. *Supra* note 9 at pp. 24-25.

36. 34 C.F.R. Part 668.46(k)(2)(ii).

37. Caroline Kitchens, *DOE Rules Kill Due Process, Sow Confusion and Red Tape—and do Nothing to Reduce Sexual Violence*, National Review, May 13, 2014.

38. Robin Wilson, *Men Accused of Sexual Assault Face Long Odds When Suing Colleges for Gender Bias*, Chronicle of Higher Education, April 28, 2015.

39. 503 U.S. 60 (1992).

40. 526 U.S. 629 (1999).

41. The Court in *Davis* held that Title IX based harassment must be "so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit." *Id.* at 633.

42. *See Doe v. Columbia Univ.*, 101 F. Supp. 3d at 367 (citing *Tolbert v. Queens College*, 242 F.3d 58, 69 (2nd Cir. 2001).

43. *See Marshall v. Ohio Univ.*, 2015 US Dist. LEXIS 31272, at *22-*23 (S.D. Ohio Mar. 13, 2015).

44. Civ. No. 1:15-cv-00144 (D.R.I. Feb. 22, 2016).

45. This article does not address possible causes of action based (in whole or in part) upon arising under the Constitution of North Carolina (NC Const.). *See generally,* J. Michael McGuiness, *The Rising Tide of North Carolina Constitutional Protection in the New Millenium*, 27 Campbell L. Rev. 223 (2005).

46. *See Yusuf v. Vassar College*, 35 F.3d 709, 714 (2d Cir. 1994) and *see also, Doe et al v. University of the South* (Sewanee), 687 F.Supp.2d 744 (E.D. Tenn. 2009) (motion to dismiss) and No. 4:2009cv00062 - Document 139 (E.D. Tenn. 2011) (memorandum and order) in which at trial, the jury awarded the plaintiff $26,500 in damages because the university negligently failed to comply with its own policies and procedures.

47. *Doe v. Brown, supra* note 41 at 29.

48. *Id.* at 30.

49. *Id.*

50. *Id.*

51. *Prasad v. Cornell University*, Civ. No. 15-cv-00322 (N.D.N.Y. Feb. 24, 2016).

52. *Id.* at 32.

53. *Id.* at 4.

54. *Id.* at 24.

55. *Doe v. George Mason University*, No. 1:15-cv-00209 (E.D. Va. Feb. 25, 2016). The court relied in part upon the Supreme Court's balancing test for due process found in *Matthews v. Eldridge*, 424 U.S. 319, 335 (1996).

56. *Id.* at 4.

57. *Id.* at 11.

58. *Id.* at 25.

59. *Id.* at 16.

60. United States Department of Education, National Center for Education Statistics, College Navigator, available at bit.ly/2jnPdPf.

61. Rule 4.2 NC Rules of Professional Conduct, Communication with Person Represented by Counsel (2003).

62. 34 C.F.R. 99.12(a).

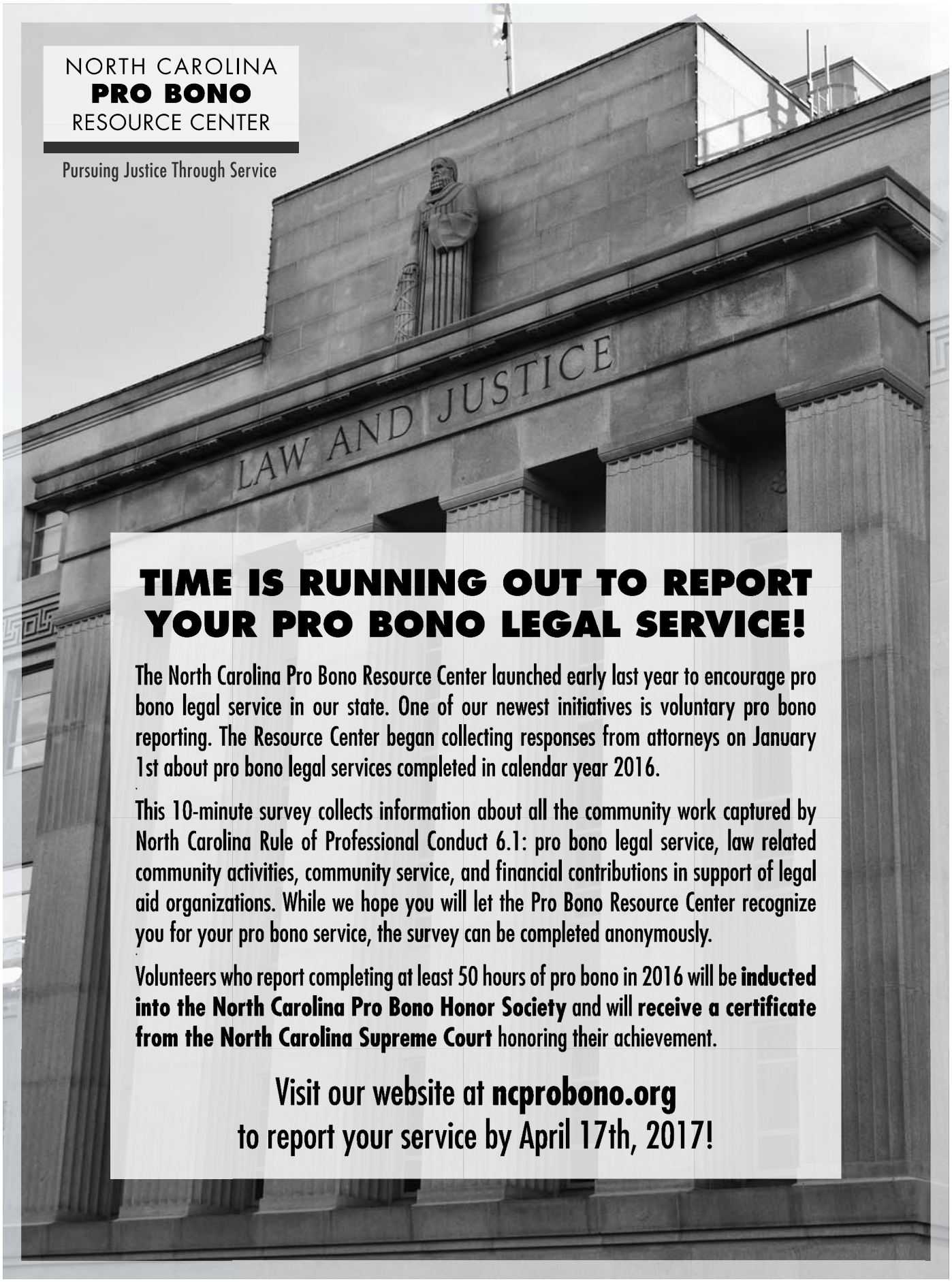
63. Most pernicious are campus training materials based upon a presumed "campus rape culture" or that seek to link male student-athletes in particular to "hyper-masculinity." *See*, in particular, Christopher P. Krebs, Ph.D.; Christine H. Lindquist, Ph.D.; Tara D. Warner, MA; Bonnie S. Fisher, Ph.D.; Sandra L. Martin, Ph.D., National Institute of Justice, *The Campus Sexual Assault (CSA) Study*, Document No.: 221153, (2007). e.g. [s]ex offenders are overwhelmingly white males; [i]n a large study of college men, 8.8% admitted rape or attempted rape; [s]ex offenders are experts in rationalizing their behavior; and, 22-57% of college men report perpetrating a form of sexually aggressive behavior. Available at bit.ly/1vYPlof. And see also teaching materials based upon research or presentations by Dr. David Lisak including (*inter alia*), *Repeat Rape and Multiple Offending Among Undetected Rapist, Violence and Victims*, Vol. 17, No.1, 2002.

64. *See Doe v. University of the Pacific* (E.D. Cal., Dec. 8, 2010, CIV. S-09-764) 2010 WL 5135360, at 4.

65. *See for example* Sheila T. Murphy, Jennifer L. Monahan, and Lynn C. Miller, *Inference Under the Influence: The Impact of Alcohol and Inhibition Conflict on Women's Sexual Decision-Making,* Pers. Soc. Bul.,May 1998, Vol. 24, No. 5 (517-528).

66. *Gomez v. University of Maine System*, 365 F.Supp.2d 6, 27 (2005). In *Gomez* the court concluded that the university disciplinary process "was not ideal and could have been better," but nevertheless affirmed the penalty imposed on two students.

67. The proposed Campus Accountability and Safety Act (S.590 - Campus Accountability and Safety Act, 114th Congress (2015-2016) would require every college enter into memoranda of understanding with local law enforcement. Institutions failing to do so could be penalized up to 1% of their total operating budget.



NORTH CAROLINA
PRO BONO
RESOURCE CENTER

Pursuing Justice Through Service

TIME IS RUNNING OUT TO REPORT YOUR PRO BONO LEGAL SERVICE!

The North Carolina Pro Bono Resource Center launched early last year to encourage pro bono legal service in our state. One of our newest initiatives is voluntary pro bono reporting. The Resource Center began collecting responses from attorneys on January 1st about pro bono legal services completed in calendar year 2016.

This 10-minute survey collects information about all the community work captured by North Carolina Rule of Professional Conduct 6.1: pro bono legal service, law related community activities, community service, and financial contributions in support of legal aid organizations. While we hope you will let the Pro Bono Resource Center recognize you for your pro bono service, the survey can be completed anonymously.

Volunteers who report completing at least 50 hours of pro bono in 2016 will be **inducted into the North Carolina Pro Bono Honor Society** and will **receive a certificate from the North Carolina Supreme Court** honoring their achievement.

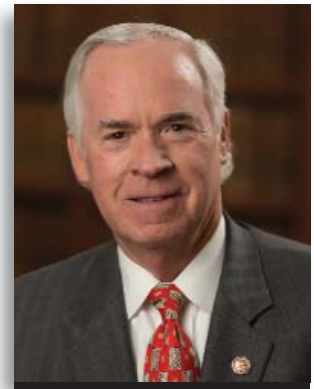
Visit our website at **ncprobono.org**
to report your service by April 17th, 2017!

Melvin F. Wright to Retire from CJCP

By Sharon Gladwell

The North Carolina Chief Justice's Commission on Professionalism (CJCP) was established in 1999 by order of the North Carolina Supreme Court. Melvin Wright Jr., who has led the CJCP since its inception, will retire in 2017.

Since its founding, the commission was charged with enhancing professionalism among North Carolina judges, lawyers, and law students through a variety of programs, projects, and publications. Above all else, the commission ensures that the practice of law remains a high calling, dedicated to the services of clients and the public good through the following:


Wright

- Law school programs on professionalism, and assisting law schools with their professional programs.
- Professionalism presentations provided throughout the state for voluntary and mandatory bar associations, legal groups, and civic organizations, as well as participation on professional boards, committees, and established programs.
- Articles on professionalism for legal, business, and educational professional publications.
- Participation on professional boards and committees in order to implement ideas that affect professionalism.
- Suggestions and lobbying for changes to the State Bar CLE requirements in order to ensure lawyers have adequate professionalism-related programs.

Wright was instrumental in establishing the commission, and carried out its mission to the law community of North Carolina. During his tenure, he served four different chief justices, including former Chief Justices Henry Frye, I. Beverly Lake Jr., and Sarah Parker, and current Chief Justice Mark Martin.

A North Carolina native, Wright was born in Pasquotank County, where he had the pleasure of being exposed to the great leaders and lawyers of Elizabeth City. "One of our local judges sat in front of me in church," Wright recalled. "So I was truly inspired by the lawyers I knew from an early age."

Wright went on to earn a bachelor's degree from the University of North Carolina at Chapel Hill. From there, he received a juris doctor degree from Wake Forest University School of Law.

Upon receiving his law degree, Wright began a 26-year career as a litigator in private practice, serving as partner at the Law Firm of Wright, Parrish, Newton & Rabil, LLP from 1980 to 1997 in Winston-Salem. Professionalism and a commitment to giving back called to him throughout his career as a litigator. In addition to upholding the utmost standard of professionalism in this role, he also volunteered and contributed in multiple ways, serving as president of the Forsyth County Bar Association and as chair of the Ethics and Grievance Committees.

While Wright was building his career in Winston-Salem in the 1990s, the legal community and consumers alike were hearing about and seeing questionable conduct among lawyers in their community. Short of an actual bar violation, there was no way to counsel or work with lawyers to ensure that conduct and work were both ethical and professional. Other leaders in the legal community were taking note as well, creating the perfect opportunity for the formation of the CJCP. Jerry Parnell of Charlotte and Bill King of Durham attended an American Bar Association (ABA) meeting, wherein they heard a session on professionalism and learned about committees on professionalism being formed in other states. Thereafter, Parnell and King convinced then Chief Justice Burley Mitchell to create the NC Chief Justice's Commission on Professionalism.

It didn't take long for news of this commission to spread across the state. One balmy August afternoon in 1999, Wright was reading the North Carolina State Bar *Journal* in his Winston-Salem office. He read an article announcing the formation of the CJCP which mentioned that they were seeking an executive director. He was interested and equally disappointed when he noticed that resumes had been due for the position on June 15, 1999. Nearly certain he had missed his chance to apply, he called the Bar and was delighted to find that the position had not yet been filled. Wright submitted his resume for the position, and after several interviews was selected to become executive director in November 1999.

"Professionalism and civility have always appealed to me as an important part of being a lawyer, and I knew people across the state were ready for a commission overseeing professionalism," said Wright. "We had an important job to do to ensure those that the public rely on to resolve conflict are held to

the highest standard of professionalism."

It was with this in mind that Wright established the office based only on a NC Supreme Court order and set of bylaws. "We immediately set out to talk to commissions in other states to find out what they were doing and how it was working. The commissions in Georgia and Florida, just to name a couple, were immensely helpful and supportive in sharing information and ideas as we formed the commission." These discussions among ABA members soon led to the formation of a consortium among directors of commissions on professionalism, and Wright served as the first chair of the ABA's Professionalism Consortium. North Carolina was the seventh state to establish such a commission and, through this consortium, went on to help other states in establishing their committees on professionalism.

Under the leadership of Wright, the support of 16 volunteer members (judges, lawyers, law school faculty, and members of the public), and the support of the legal community in North Carolina (voluntary bar associations, the State Bar, and North Carolina law schools), the commission has established key programs and initiatives including:

• **Secured Leave** (**The Three-Week Vacation Policy**) In an effort to improve quality of life for lawyers statewide, the CJCP joined with the NC Bar Association to spearhead this initiative, ensuring the vacation time for lawyers is honored by the court in scheduling.

• **Professionalism Support Initiative** (**PSI**) A confidential peer intervention program established to improve professionalism among lawyers and judges.

• **Historical Video Series** A collection of historical memoirs including video interviews with distinguished lawyers, judges, and professionals across the state that include their thoughts and positions on professionalism and how it has evolved over the years.

• **The Chief Justice's Professionalism Award** An annual award given to outstanding lawyers or judges who exhibit the principles of professionalism.

• **Judiciary Response Committee** Comprised of highly respected members of the legal community, this committee responds to unwarranted attacks by the media on the judiciary.

• **Judicial District Bar Professionalism Program** Ethics and Professionalism CLE programs provided at no cost through the CJCP, Lawyer's Mutual, and the local bar.

• **Grants** The CJCP has provided financial assistance to serve as seed funds to several entities for professionalism efforts.

• **Professionalism Materials** The CJCP has been at the helm of creating educational materials around professionalism, including video programs with accompanying materials on topics such as PSI, women in the law, social media and attorney ethics, and enhancing professionalism.

All of this professionalism leadership and programming would not have been possible without Wright's advocacy and unwavering commitment to professionalism and ethics in the legal industry.

"Having been at the helm since its inception in 1999, Mel has made the commission an important and integral part of North Carolina's legal community. Few have done more to advance the value and understanding of professionalism and civility in North Carolina. On behalf of the entire Judicial Branch, I express my sincerest thanks to him for his many years of dedication and commitment to this most noble of causes," said North Carolina Chief Justice Mark Martin.

Wright's contributions have reverberated outside the legal community itself, as the experience of anyone who walks into a courtroom in North Carolina is impacted by the professionalism of the lawyers and judges they encounter. "It's so rare and memorable for the average North Carolinian to encounter the courtroom. Oftentimes, it's for a very important and decisive issue in their life," said Wright. "As lawyers and judges, we have to respect that and treat every single case with the utmost care and professionalism."

Wright has also been a fierce advocate for giving back in other areas. He serves as an adjunct professor of professional responsibility at the University of North Carolina School of Law and Norman Adrian Wiggins School of Law, Campbell University. He also currently serves as a member of the National Legal Mentoring Consortium, the North Carolina Bar Association and the Wake County Bar Association Professionalism Committees, the North Carolina Bar Association Transitioning Lawyer Commission, and the advisory committee for the National High School Mock Trial Championship. He is a member of the Wake County, North Carolina, and American Bar Associations, the American Bar Association Center for Professional Responsibility, and the North Carolina Advocates for Justice. Wright has been awarded the Bronze Star and Air Medal for his service in Vietnam, the Order of the Long Leaf Pine, the Wake County Bar Association Professionalism Award, the Chief Justice's Professionalism Award, and the Robinson O. Everett Professionalism Award from the Campbell University School of Law. He has also received the Martindale Hubbell AV Rating.

As Wright looks forward to his eventual retirement, he does so with excitement, as he knows the next CJCP executive director and entire legal community of North Carolina will carry the torch forward for professionalism and ethics for lawyers and judges. "The accomplishments of CJCP have been the accomplishments of the entire North Carolina legal community," said Wright. "We could not have gotten where we are without the support of the volunteers who serve on our board, my assistant/paralegal Dori Dejong, the countless associations and organizations that promote professionalism, and the lawyers and judges themselves who advocate unequivocally for professionalism every day. I'm proud of everything we've done, but even more excited to see the next generation of lawyers and commission members enhance professionalism throughout the North Carolina legal system." ■

Sharon Gladwell is the communications officer for the NC judicial branch. She began working with the NCAOC in June 2007 and oversees brand and identity, media relations, publications, the speakers bureau, websites, and web applications.

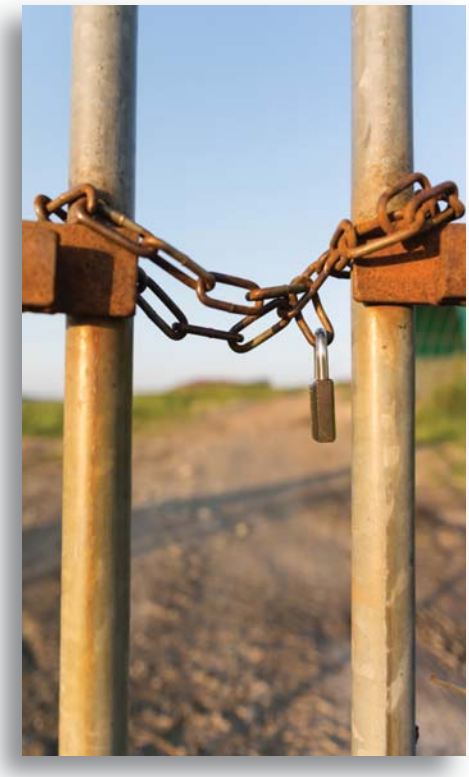
New Executive Director for CJCP Sought

A search committee is being established to hire the next executive director of the NC Commission on Professionalism. When open, the position will be announced on the Careers section of NCcourts.org.

Landlocked Parcels and Common Law Implied Easements by Necessity

By David T. Buckingham

How does a practitioner respond to a frantic call from a client that an adjoining property owner is claiming an easement across the client's property? The practitioner applies some triage and does some "hand holding." The client is concerned that the claimed easement may interfere with the client's use of the property, ongoing construction or otherwise have a deleterious effect on the value and enjoyment of the client's property.



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At the same time, another practitioner may receive a call from an equally frantic client (the first caller's neighbor) complaining that the property owned by the client is landlocked and has no access to a public right of way. The client complains further that the property is unmarketable and cannot be used or enjoyed by the client. Surprisingly, the problem of landlocked parcels is all too frequent in North Carolina. Landlocked parcels sometimes result from condemnation actions, estate divisions, conveyancing oversights, or accretion along a river, sound, estuary, or other body of water. Landlocked parcels probably occur more frequently in rural areas, but the case law shows landlocked parcels being litigated in densely populated counties and even in some cities. North Carolina jurisprudence offers numerous theories of common law-implied easements and statutory easements to address the problem of landlocked parcels: easements by necessity, easements implied from prior use or quasi-easements (also referred to as doctrine of visible easements), easements by estoppel, easements by prescription, implied dedications of easement, "neighborhood public roads" under N.C.G.S. Section 136-67, necessary church roads, and easements under N.C.G.S. Section 136-71 and statutory cartways under N.C.G.S. Sections 136-68 to 136-70. Each of these theories has different applications and requirements, many of which are difficult to satisfy. This article will focus on one theory of easement, the common law-implied easement by necessity or sometimes referred to as a way of necessity.

Generally, Difficult to Establish

Claims for easements by necessity are typically highly factually specific and oftentimes difficult to establish. Fifty-five years ago, the Supreme Court of North Carolina noted that it had found no decision where a plaintiff by action in the superior court had established a

right to a way of necessity. *Pritchard v. Scott*, 254 NC 277, 283 (1961). Easements by necessity oftentimes arise in the context of declaratory judgment actions, actions for injunctive relief, and trespass actions. The parties in dispute are typically adjoining property owners. Therefore, there is always a "neighborhood component" to these controversies and sometimes an "emotional charge" from disgruntled heirs of an estate, perhaps involving several generations of adjoining property owners in a property and estate dispute simmering for generations. These factors complicate a negotiated solution to an access problem.

Easily Triggered by Common Ownership at One Time in the Past

A claim for an implied easement by necessity is easily triggered. The essential requirement is that at one point in the past, the two tracts had common ownership. Of course, most adjoining parcels have had common ownership at one point. One recent case originating in Johnston County involved common ownership of two tracts dating back almost 190 years to sometime between the 1820s and 1840s when the parcels in question were purchased as part of a plantation comprised of more than 1,500 acres. *Barbour v. Pate*, 229 NC App. 1 (2013).

Purpose of This Article

The purpose of this article is to equip the practitioner with the tools to analyze a claim for implied easement by necessity. These claims are typically highly factually specific and have many "moving parts." This article is written for the benefit of the practitioner representing the owner of the putative servient estate (that's "easement talk" for the property owner whose property will be burdened by the easement by necessity) as well as the owner of the putative dominant estate (again this is "easement talk" for the owner of the tract benefitting from the easement by necessity). This article discusses recent North Carolina case law adjudicating easements by necessity, examines the elements of this cause of action and related principles, and offers practical strategies for defending or pursuing a claim for an easement by necessity.

Surprising Origin: Shipwrecks Off North Carolina's Treacherous Coast!

According to one commentator, easements by necessity had a surprising origin in North Carolina. They arose in the context of a statutory procedure designed to redress the problem of shipwrecks off North Carolina's treacherous coast. The statutory procedure provided that state officials would salvage the cargo of the shipwrecked vessel, sell the cargo, and deliver the proceeds of the sale to the ship owners. *See* Glenn, *Implied Easements in the North Carolina Courts: An Essay on the Meaning of "Necessary,"* 58 NC L. Rev. 223, 236 (1980) (citing *Hetfield v. Baum*, 35 N.C. 394 (1852)). In *Hetfield*, a property owner on "the banks" (i.e. the Outer Banks) sued state officials for trespass in exercising their statutory duties to remove a wrecked ship's cargo and sell its contents at a public sale. The Supreme Court of North Carolina noted that the sovereign has a right to wrecks, and in many countries this right is exercised to generate considerable revenue; however, North Carolina, with its long and dangerous coastline, has more wrecks than most other states and has enacted a "humane, liberal, and enlightened policy" with respect to wrecks as reflected in the statute noted above. *Hetfield*, 135 NC at 396. The Supreme Court of North Carolina declared an easement by "necessary implication" to allow authorized

persons access to the wrecked ships across the plaintiff's land to discharge their statutory duties. *Id.* at 398.

Most Recent Decision by the North Carolina Supreme Court

Oliver v. Ernul, 277 N..591 (1971), was the first in the more modern line of cases that squarely addressed ways of necessity or easements by necessity. Earlier, more modern Supreme Court cases addressing easements by necessity did so by way of *dicta*. *See, e.g., Smith v. Moore*, 254 NC 186, 190 (1961); and *Pritchard*, 254 NC at 282-285 (1961).

Underlying Rationale—In *Oliver*, the Supreme Court of North Carolina explained that the implied easement of necessity arises when a grantor grants land to another surrounded by the land of the grantor without the benefit of access to a public right-of-way for the grantee. The Court reasoned that an easement by necessity is "an incident to purchaser's occupation and enjoyment of the grant" resulting when one part of a commonly owned tract is dependent on the other for some use. *Id.* at 599.

Elements of the Easement by Necessity—The Court then set forth the elements of the easement by necessity. It required (a) common ownership at one time in the past, and (b) a necessity sufficient to show such physical conditions and use as would reasonably lead one to believe that the grantor intended the grantee should have the right of access. *Id.*

Location of the Easement by Necessity—According to the Supreme Court, the owner of the servient estate selects the location of the easement, subject to it being exercised in a reasonable manner with respect to convenience, suitability, and rights of the owner of the dominant estate, with deference given to any visible way known and used by the parties unless it is not a reasonable and convenient way for both parties. *Id.* at 600.

Overview of *Oliver*—Grantor's intent can be difficult to satisfy. *See, e.g., Schwartz & Schwartz, LLC v. Caldwell County Railroad Co.*, 197 NC App. 609 (2009) (*review denied* 363 NC 856 (2010)) (easement by necessity denied); *Woodring v. Swieter*, 180 NC App. 362 (2006) (easement by necessity denied); *CDC Pineville, LLC v. UDRT of North Carolina, LLC*, 174 NC App. 644 (2005) (*review denied* 360 NC 478 (2006)) (easement by necessity denied); *Tedder v. Afford*, 128 NC App. 27 (1997) (*review denied* 348 NC 290 (1998)) (easement by necessity denied); *Wiggins v. Short*, 122 NC App. 322 (1996) (easement by necessity denied).

Recent Treatment by the North Carolina Court of Appeals

Since 1971, when the Supreme Court last addressed easements by necessity, there have been more than a dozen cases decided by the North Carolina Court of Appeals adjudicating easements by necessity. Several of the more significant cases are examined below.

Ascertain the Intention of the Grantor at the Time of Severance from Common Ownership—In *Broyhill v. Coppage*, 79 NC App. 221 (1986), the court of appeals required that the intention of the grantor in granting an easement by necessity must be ascertained at the time of severance of the parcels from common ownership. *Id.* at 226. The court declared: "the easement must arise, if at all, at the time of the conveyance from common ownership." *Id.* The court then applied this test to ascertain the intention of the grantor at the time of the severance from common ownership, more than 50 years earlier. *Id.* at 226-227.

Permissive Right to Access Public Road Will Not Defeat Claim for Easement by Necessity—In *Whitfield v. Todd*, 116 NC App. 335 (1994) (*review denied*, 338 NC 524 (1994)), the plaintiff had permissive access to a public road, but such permissive access was not a legally enforceable right. The court upheld the trial court's judgment granting an easement by necessity. *Id.* at 339. Therefore, the existence of a license or other permission to use an access route generally will not defeat a claim for an easement by necessity. *See also Jernigan v. McLamb*, 192 NC App. 523 (2008).

Access by a Navigable Waterway May Be Sufficient Access to Defeat an Easement by Necessity—*Wiggins* illustrates the difficulty in establishing an easement by necessity. In this case, the common owner, in 1946, conveyed a portion of her property to Mr. Wiggins. Mr. Wiggins' property was in Edenton along Pembroke Creek and had no access to a public road. Mr. Wiggins filled in a portion of the property extending into Pembroke Creek and placed on it a lighthouse from the Roanoke River. In 1991 the common owner's successor-in-title blocked access across the common owner's property connecting Mr. Wiggins' property to a public road. Mr. Wiggins sought an injunction to remove the gate.

The North Carolina Court of Appeals set out the elements of an easement by necessity: "(1) the claimed dominant parcel and the claimed servient parcel were held in a common ownership which was ended by a transfer of part of the land; and (2) as a result of the land transfer, it became 'necessary' for the claimant to have the easement." *Wiggins*, 122 NC App. at 331. The court stated that to prove necessity, it is sufficient "to show physical conditions and use 'which would reasonably lead one to believe that the grantor intended the grantee to have a right of access.'" *Id.* at 331 (citing *Oliver*). The court required that the right must be necessary to the beneficial use of the property as it existed at the time of the severance. *Wiggins*, 122 NC App. at 331. The court upheld the denial of the easement by necessity on the basis that Pembroke Creek is a navigable waterway and is available as a means of access to and from Mr. Wiggins' property in the same way it was in 1946 (50 years before the decision), when he acquired the property.

Easements for Underground Utilities—Two cases decided by the court of appeals have applied the doctrine of easements by necessity to easements for underground utilities, but have not found an easement by necessity to have arisen for underground utilities. In *CDC Pineville*, the defendant claimed an affirmative defense of easement by necessity with respect to a waterline that was located on the adjoining property owned by the plaintiff. The court of appeals determined that there was insufficient evidence to show that the common grantor intended to use the plaintiff's parcel for the benefit of the defendant's parcel. 174 NC App. at 653. Furthermore, the court upheld the trial court's findings that there was no necessity for the pipe to be located on the plaintiff's property. *Id. See also Woodring*, 180 NC App at 374 (denial of easement for necessity for a waterline on the basis that because the waterline was not installed until 60 years after the transfer of the land, the waterline could not have been intended by the parties when common ownership was ended or necessary for the convenient and comfortable use of the putative dominant tract).

Temporary in Nature—In *Joines v. Herman*, 89 NC App. 507 (1988), the party claiming an easement by necessity also had an express easement to a public road across a tract not owned by the defendants against whom the easement by necessity was sought. The court of appeals affirmed the trial court's

denial of the easement by necessity on the basis that easements by necessity are temporary in nature, and the need for the easement by necessity in this case terminated when the plaintiffs obtained a recorded easement granting them access to a public road. *Id.* at 509.

Laches—Because the time period between the time of severance from common ownership and the assertion of the claim of the easement by necessity may span decades, the parties involved in the dispute must consider whether the doctrine of laches bars the claim. If the claimant has failed to prosecute the claim in a timely fashion and there is now a change in condition, then the doctrine of laches may bar the claim. *See Taylor v. City of Raleigh*, 290 NC 608, 622 (1976) (laches applies "where lapse of time has resulted in some change in the condition of the property or in the relations of the parties which would make it unjust to permit the prosecution of the claim..."). *See also Cieszko v. Clark*, 92 NC App. 290, 297-298 (1988) (for laches to bar the claim, the delay must be unreasonable and injurious or prejudicial to the party asserting the defense, and the court must consider whether the claimant knew of the existence of the grounds for the claim and whether the defendant had knowledge of the claim).

Easements by Necessity Benefitting the Grantor?

What happens when a grantor conveys the parcel surrounding the property retained by the grantor, thereby landlocking the grantor in so that the grantor has no access to a public road? Is there an implied reservation of an easement across the land of the grantee to benefit the grantor? According to a line of older cases decided by the North Carolina Supreme Court, a grantor generally cannot impose a reservation on land conveyed by the grantor in favor of other land retained by the grantor without an express reservation. In *Goldstein v. Wachovia Bank & Trust Company*, 241 NC 583, 588 (1955), the North Carolina Supreme Court declared: "there is a distinction between a grant and a reservation by implication." *Id.* It reasoned: "[o]rdinarily, a grantor can impose no reservation on the land he conveys in favor of other land retained by him in derogation of his grant without an express reservation to that effect, except as 'ways of strict or imperious necessity.'" *Id. See also Roper Lumber Co. v Richmond Cedar Works*, 158 NC 161, 168 (1911) (a way of necessity "arises only by implication in favor of grantees. Since the way is founded on a grant, it can arise only between grantor and grantee..."); and *Wilson v. Smith*, 18 NC App. 414, 417 (1973) (*writ of cert. denied* 284 N.C. 125 (1973)) [(an easement by necessity "arises only by implication in favor of a grantee and his privies as against a grantor and his privies")].

Webster's Real Estate Law of North Carolina (Sixth Edition) (Webster's) agrees that there is a distinction between a grantor making a conveyance without reserving an access easement and thereby "landlocking" himself or herself, and a grantor making a conveyance to another in which the property of the grantee is "landlocked" by the grantor's land. Section 15.12(2) of Webster's states in part: "[i]n general, an easement [of necessity] in favor of the grantor will not be implied." This section of Webster's states that North Carolina may be moving away from the general rule. According to Webster's, however, it is reasonable to conclude that "if and when our courts agree to imply an easement by necessity in favor of a grantor, or the grantor's successor[s] in interest, the degree of necessity will be some form of 'strict necessity.' After all, it is the grantor's own deed which created the problem." *Id.*

In its discussion of North Carolina's movement from this general rule, Webster's cites only to *Cieszko*. In this case, the court of appeals held that "under the appropriate circumstances, the law of this state will imply an easement by necessity in favor of a grantor." 92 NC App. at 296. Accordingly, there is some tension in North Carolina law regarding whether an easement by necessity may benefit a grantor. (Webster's seems to waiting for a case decided by the North Carolina Supreme Court confirming the "trend.")

Practical Strategies

Set forth below are practical strategies in analyzing a claim for an easement by necessity.

Title Insurance—If the owner of the putative servient estate has a policy of title insurance, the owner must review its terms to determine if there are any exclusions for implied easements and, if not, comply with the terms of the policy once the owner becomes aware of the claim for the easement by necessity, including notifying the title company of any claim.

Title Examination—The parties must conduct a title examination of the two tracts in question from the present to the date of severance from common ownership. If the party claiming the easement by necessity is the successor-in-title to the parcel retained by the grantor, then it may be difficult to proceed with the claim. *See infra* Section 5.

Proof of Necessity: Testimony, Aerial Photographs, Other Access Routes on Other Adjoining Parcels—The parties must gather proof of the grantor's intention to burden one parcel for the benefit of the other, including the evidence of the use and the physical conditions of the property at the time of severance. Because common ownership can extend decades or more into the past, proof of the grantor's intention may be difficult. Interviews of descendants or relatives of the grantor or his or her neighbors should be conducted. Additionally, the parties should ascertain if there are any aerial photographs of the parcels in question at the time of severance. Aerial photographs should be closely examined to determine the size and location of any buildings or other structures to determine if they (or their absence) evidence the intention of the grantor to grant an easement by necessity. There are many governmental and private sector sources of aerial photographs, including US Geological Survey of the Department of the Interior and Google Earth as well as state agencies. Aerial photographs may also be used to determine the existence of other access routes, which may have a bearing on the necessity requirement of easements by necessity. The parties should consult the county online records to determine if there are images of the tracts in question that show the adjoining tracts and the location of any roads. Again, this may impact the question of necessity.

Cost of Construction of Access Road, Surveying Costs, Costs of Plats, and Other Governmental Approvals; Agreement—If the parties are seeking a negotiated solution, they should obtain an estimate for the cost of the construction of the access road, the surveying costs, and the costs for any governmental approvals required for the construction of a road, and consider the use of an agreement to provide for such construction, the escrow of funds for completion of the road, and delivery of approvals. ■

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On Jerks

By F. Lane Williamson

There is a framed newspaper article hanging on the wall of my law school classmate Tom Garlitz's office with a group photograph of the 19 members of the Charlotte Bar Association taken in 1887.


Mecklenburg Bar Has Long History

arlotte Bar association made in 1887 on the porch of the Law building which stood in the rear of the Selwyn hotel ... General Robert D. Johnston, Col. Hamilton C. Jones, Mr. George E. Wilson, Mr. Joseph Harvey Wilson, Squire D. G. ... H. Bailey, Mr. E. T. Cansler, Judge Armistead Burwell, Mr. J. W. Keerans, Judge Heriot Clarkson, Lawyer ... unidentified, Squire C. L. Hunter, Calvin E. Grier, Hugh W. Harris, unidentified, Richard Bailey, Charles H. Duls, ...

They are a scruffy looking bunch, and of course all are white men. At least several of them are Confederate veterans who are identified by rank, including General Robert D. Johnston and Colonel Hamilton C. Jones.

I would be willing to bet that almost 130 years ago, the older lawyers were bemoaning a loss of civility among their younger brethren and pining for some imagined Edenic age when punctilious courtliness was the order of the day. Never mind that such an era would have encompassed such societal rudeness as slavery, the Civil War, and Reconstruction.

'Twas ever thus. Ever since I've been a lawyer, the assumption is that we lawyers used to act a lot nicer with each other than we do now. One hears a great deal about a "loss of civility"—never a word acknowledging a "gain" in civility.

In my opinion that's wrong. I think, at present, the level of civility among the Bar is as high as it has ever been, and there is reason to expect that this trend will become even more pronounced among our younger lawyers. I also feel that after nearly 40 years of practicing primarily litigation and having served in such positions as chair of the local Grievance Committee, chair of the Disciplinary Hearing Commission, superior court judge, and youth soccer coach, I have the knowledge and experience to qualify as an expert under Rule of Evidence 702 to offer an opinion on the identification and typology of jerks—specifically lawyers who are jerks.

First, let's be lawyerly and define the terms we are talking about. By "civility" I mean the ordinary dictionary meaning of "polite, reasonable, and respectful behavior." That is encompassed by, but narrower than, the term "professionalism," a word whose meaning now embraces so many attributes as almost to defy succinct definition. By "jerk" I mean the informal definition of "a contemptibly obnoxious person." A jerk is to be distinguished from a person who actually lies, cheats, or steals. That sort of lawyer is by definition unethical and merits a stronger epithet, usually in the vernacular form of a synecdoche referring to some bodily organ having an excretory and/or procreative function. (The English majors among you will recognize that a synecdoche is a figure of speech where a part is meant to stand as the whole.)

My thesis is that, while the number of jerks in the lawyer population per capita may be fairly constant, the severity of the jerkiness

has been ameliorated, and the essential nature of it has evolved into a form that is largely curable. It's true that there isn't any reliable empirical data to support this notion. Rather, I have to rely on anecdotal evidence. So here are some anecdotes.

One of my favorite movie lines is from *Pulp Fiction* where "The Wolf," played by Harvey Keitel, says, "Just because you are a character doesn't mean that you have character." (The English majors among you will recognize that figure of speech as an example of antanaclasis, a figure of speech where there is repetition of a word with a different meaning each time.)

When I started with my first firm out of law school in 1978, there were quite a number of characters in the Mecklenburg County Bar. Consider that one does not usually get a reputation as a "character" by being a nice guy. More often than not it's by being a jerk, preferably a jerk with a certain flair, but still a jerk. Most of these characters/jerks were senior lawyers who grew up during the Great Depression. Most also served in World War II or the Korean War. As a result of these formative experiences, they often played with the rules rather than by the rules.

One of those characters who was more of an eccentric than a jerk was the senior partner in the firm where I had my first job (obtained primarily through a recommendation from a member of my mother's bridge club who was a secretary there—hey, whatever works). He dressed beyond flamboyantly, usually sporting a homburg hat, a ruffled shirt, cufflinks the size of half dollars, a clown school tie, spats, two-toned shoes, an engraved walking stick, and a custom suit that looked like it was made from leftover drapery material from the set of *Gone with the Wind*. He also had what to me seemed to be the coolest and weirdest duty ever in World War II: piloting an anti-submarine blimp that patrolled the Panama Canal.

While fundamentally he was actually pretty likable so long as you did not work for him or oppose him as a lawyer, within the realm of law practice he was simply impossible to deal with. In litigation matters, no discovery request was ever actually answered but with multiple objections. In transactional matters, dead horses were beaten so severely as to be rendered into glue. He ultimately got into some trouble in a lawsuit over his handling of an estate when it was determined that he had on occasion billed for more than 24 hours in one day. Years later his secretary, who started on the same day with the firm as I did, reminded me of what I had said to her as I stopped by her desk after having my orientation session with him: "Ms. Byers, what have we gotten ourselves into?"

Moving further along the spectrum toward pure jerkdom, consider the legendary Elbert Foster. Elbert was an insufferable old coot who in his pre-law career had been a court reporter for hearings on the Teapot Dome scandal during the administration of Warren Harding. It was virtually a rite of passage for a new lawyer to be sent to meet with Mr. Foster at his office in the Law Building. He would inevitably end up yelling at you and kicking you out of his office, even if you had brought along a settlement check for his client's entire demand, plus attorney fees, and maybe even a fruit basket.

Everybody who encountered Elbert probably has a story about him. James E. "Bill" Walker, a great lawyer, father of my law partner Nancy Walker, and my predecessor as bar president exactly 50 years ago, told me that he once was arguing a domestic case against Elbert. Things got a bit heated until the judge warned both of them to, "Sit down and shut up. The next one of you who says a word is gonna be held in contempt." Bill and Elbert duly took their seats while the judge looked down and read something from the file. Bill leaned over to Elbert and whispered to him, "Kiss my ass." Elbert immediately shot out of his chair, foaming with rage and loudly protesting Bill's unprovoked verbal assault against him. The judge summarily held Elbert in contempt for being "the next one who said a word," and ordered the sheriff to take him to lockup. Bill just sat there and grinned.

I mention Elbert Foster by name without fear of repercussion because: (1) you can't libel the dead; (2) even so, truth is a complete defense; and (3) I'm relying upon an official

The School of Government has launched "Beyond the Bench," an interview-based podcast about the North Carolina legal system. Guests on the show include judges, lawyers, professors, and citizens who have participated in court proceedings.

The podcast is organized by season, with each season focused on a particular area of the law. Season one focuses on criminal law and is hosted by faculty member Jeff Welty, director of the North Carolina Judicial College at the School of Government. Episode one features an interview with North Carolina Superior Court Judge Mary Ann Tally, who got her start as the first woman chief public defender in the state, and an in-depth analysis of the law of distracted driving.

"Beyond the Bench" is produced by the Judicial College and available on iTunes and Stitcher.

court document—his 1988 Mecklenburg County Bar Memorial Resolution, publicly available online.

As described by the presenter, David H. Henderson, a true gentleman and father of my contemporary David L. Henderson:

> Against an opponent, he was a yellow jacket, or perhaps a whole swarm. He would sting you to death with depositions, interrogatories, verbal attacks, and was even known on occasion to swing a left hook....He adopted in to the position of his client, and no man ever fought harder for the clients' rights. Unafraid of the devil or the Supreme Court, he pressed interminably, sometimes ad nauseam, his strategies until some judge would threaten contempt charges. But he was never known to back away, and his clients loved it.

"No man ever fought harder for the clients' rights"—that statement embodies the lawyer's rationale that singular devotion to the client's cause justifies otherwise contemptible behavior. The classic formulation of this credo dates back to 1820 by Lord Henry Brougham in his defense of Queen Caroline in the House of Lords against charges of adultery by her husband, King George IV:

> An advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, amongst them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others.

Less verbosely, it is more often the notion of "zealous" advocacy that is used to justify incivility. The "Z" words of zeal, zealous, and zealously connote fanaticism and are in tension with standards of civility. Although zeal has historically been enshrined in attorney rules of professional conduct, zealous representation has over recent years receded in emphasis. For example, ABA Model Rule 1.3 used to read that it's a lawyer's duty "to represent his clients zealously within the bounds of the law." The Model Rule, as well as North Carolina's Rule 1.3, now reads that "(A) lawyer shall act with reasonable diligence and promptness in representing a client." Although Z words can still be found in the comment to North Carolina's Rule 1.3 and in the preamble to our Rules ("A lawyer...should provide zealous but honorable representation without resorting to unfair or offensive tactics"), clearly we have dialed back on emphasizing zealousness. Some jurisdictions have even gone so far as to purge all of the Z words from their ethical rules.

So why the change, and does it correspond with any general change in lawyer behavior? It seems to me that it parallels the increased emphasis on professionalism and the promotion of alternative dispute resolution that took off in the '90s. Law schools now teach professionalism courses, and practicing lawyers are required to attend professionalism and ethics programs. More cases are resolved at mediation (where being a jerk is decidedly counterproductive) now than at trial. Furthermore, clients have less tolerance today than previously for the expense and delay that accompany scorched earth litigation tactics. They want problem solvers rather than siege warriors. Finally, the profession has taken note that lawyers not only have a duty to their clients, but also duties to opposing counsel, third parties, and the courts that have to be balanced against the primacy of the interests of clients.

Getting back to those young lawyers. New admittees to the Bar have already been inculcated with notions of professionalism during law school. They also—for the most part—are Millennials, defined by the US Bureau of Labor Statistics as that generation born between 1980 and 2001. As a parent of two of them, I can attest that Millennials really are different from Baby Boomers like me.

While this is a gross generalization, Millennials are team players, constant learners, diverse, socially conscious, and achievement oriented. They seek flexibility in the workplace, expect frequent feedback, are comfortable with technology, and are uncomfortable with rigid hierarchy in the workplace. They are likely to have networks outside of their employers, and therefore may change jobs frequently. Those who are burdened by high student debt of necessity pursue high compensation in their careers.

Baby Boomers and Gen-Xers, in contrast, are more likely to take an individualistic "cowboy" approach to life and work. Such an attitude naturally gives one more freedom to be an obnoxious jerk than a collaborator, who cannot be an effective team player if he or she is constantly alienating others.

Back in the day, lawyers like Elbert Foster and his ilk knew exactly what they were doing and adopted offensive tactics as a conscious stratagem to achieve an advantage. Maybe I'm naïve, but I just haven't seen much of that among the young lawyers I've encountered as a judge and a lawyer. In contrast, young lawyers who act like jerks now tend to do so more out of cluelessness. They may have had to go solo and have little or no access to mentors or other lawyers to coach them in the norms of expected lawyer behavior—the sorts of things they still don't teach in law school.

Elbert Foster (and a lot of other lawyers both living and dead who shall remain nameless, but each of you readers probably has your own list) was set in his ways and chose to be a jerk because it worked for him. He wouldn't have it any other way. On the other hand, for those new admittees who want to learn how to behave with civility, the Mecklenburg County Bar has a program. As described on the Bar's website, "Linking Lawyers is an avenue for mentors and mentees to network, provide and receive guidance on issues of professional conduct, and gain insight into diverse practice areas through mentorship." This is a great initiative and is always seeking new volunteers to serve as mentors, and young lawyers as mentees. You can find out more about this program by checking out "Linking Lawyers: Mentoring" under the "Get Involved" tab at MeckBar.org.

I truly think the Bar has made gains in civility, and am optimistic that civility in law practice will continue on an upward trend. And one more thing about that 1887 group of Charlotte lawyers: the youngest of them at age 24 was Heriot Clarkson, who following a long and distinguished career as a private lawyer served almost 20 years as an associate justice of the North Carolina Supreme Court until his death in 1942. So young lawyers really can turn out all right. 'Twas ever thus. ■

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The Public Defender System in North Carolina—Its History and Future

By Susan E. Brooks and Rachel Raimondi

Public defender offices have existed in North Carolina since 1970, evolving into a system serving approximately a third of the state, complemented by a system of private assigned counsel (PAC) and contract attorneys. While public defender offices have many recognized benefits, institution of public defender offices has proceeded in a piecemeal fashion.

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However, the recent recommendation of the Criminal Investigation and Adjudication Committee of the North Carolina Commission on the Administration of Law and Justice (NCCALJ) to establish a more comprehensive system of public defender offices may reinvigorate the expansion process and foster implementation of a cohesive plan. This article describes the history of public defender offices in the state, their challenges and advantages, and the potential for their growth.

The Slow March from *Gideon*

In 1963, in *Gideon v. Wainwright*, the United States Supreme Court recognized a constitutional right to the appointment of counsel for felony charges in state courts,[1] and later Supreme Court decisions extended the right to counsel.[2] Immediately following the *Gideon* ruling, the state of Florida, from whence *Gideon* arose, moved to create a statewide public defender system to safeguard this important right.

North Carolina, which had joined Florida in opposing the requirement to provide counsel in an *amicus* brief, soon enacted a law providing for the appointment of counsel for indigent defendants charged with felonies and, at the judge's discretion, misdemeanors,[3] and the state Senate directed the Legislative Council to study, investigate, and report on the advisability of implementing a public defender system. The council's committee on the subject examined the PAC system in the state at the time and noted support for PAC, but also concerns about attorneys' available time and resources, experience, and timely appointment, as well as the system's effect on the length of defendants' pretrial detention and the undue burden on attorneys who appeared in court-appointed cases for "miserly sums."[4] The committee ultimately left it to the full General Assembly whether to draft legislation to institute a public defender system, but it made recommendations as to what such legislation should contain if enacted, including a

statewide system "in keeping with the uniform System of Courts now being developed for the state."[5]

The developing "uniform system" referred to a contemporaneous effort to overhaul North Carolina's hodgepodge lower court system. To address the problem of inconsistency in courts across the state, in 1955 the North Carolina Bar Association (NCBA) created the Bell Commission, which made its recommendations for overhauling and unifying the court system in 1958, leading to North Carolina voters' passing a constitutional amendment allowing for the system in 1962.

In 1963 the General Assembly created the North Carolina Courts Commission to prepare and draft legislation to reconstruct the court system by January 1, 1971. In June 1967, the commission was further mandated by the state Senate to study the feasibility of establishing a public defender system in the state.[6]

The Courts Commission report in 1969 followed the road map of the Legislative Council's study. The commission first looked at the assigned counsel system in light of federal court rulings and a recent North Carolina case conferring the right to counsel more broadly than *Gideon,* and concluded that North Carolina should expand its coverage accordingly.[7] The Courts Commission's criticisms of the assigned counsel system echoed those of the Legislative Council as to lack of uniformity, low fees placing an undue burden on PAC, and disparities between attorneys' experience and the seriousness of the cases to which they were assigned. Conversely, the commission identified the advantages of a public defender system as providing experienced, competent counsel through specialization and decreasing costs in large, populous jurisdictions. The commission dismissed the main concern that public defenders might be less zealous or independent than they should be, and recommended that public defender offices be created in five mostly single-county, metropolitan districts—Mecklenburg, Guilford, Forsyth, Wake, and Cumberland/Hoke (which at the time comprised the 12th Judicial District)—and for "experimental purposes" two more rural, multi-county districts—the 25th and 7th Judicial Districts.

Only two of the Courts Commissions' recommended sites were selected as pilot projects.[8] In 1969 the General Assembly established public defender offices in the 12th and 18th Judicial Districts as of January 1, 1970.[9] Wallace C. (Wally) Harrelson took the oath in Guilford County on that date as North Carolina's first chief public defender, and Sol. G. Cherry started a month later in District 12. In addition to Harrelson, the Guilford office employed two assistant public defenders, a legal assistant, and an investigator. The Guilford office at that time handled cases involving felonies, misdemeanors carrying more than six months' punishment or fines greater than $500, juvenile delinquency, post-conviction proceedings, and all appeals to the North Carolina and United States Supreme Courts. The Cumberland/Hoke office was similarly small and operated out of a trailer until 1975.[10]

As part of a 1971 study of public defender systems, a review by the Virginia State Bar Board of Governors of the new North Carolina public defender offices revealed positive impacts. The board heard favorable comments from judges and others involved with the public defender system. Those interviewed included two of Harrelson's former clients, who praised his work on their cases and the interest he showed in them, and one maintained that "nobody, not even the best retained attorney, could have done a better job."[11] The board further found in a limited comparison to non-public defender districts that the offices achieved lower costs while getting better outcomes, including greater rates of dismissals, convictions resulting in probation and suspended sentences, and terminated trials.

Defender office expansion continued in the years that followed, albeit slowly and not very steadily. According to former Cumberland County public defender, now Superior Court judge, Mary Ann Tally, the reason for the slow progress was that the process of creating a public defender office was treated like a local bill, instigated at the behest of an individual legislator to benefit his or her district, without much broader consideration as to whether public defenders might efficiently and cost-effectively serve other areas.[12]

In 1973, a public defender office was instituted in Buncombe County, with the chief public defender appointed by the senior resident superior court judge.[13] The following year, the Office of Special Counsel was established to represent respondents in involuntary commitment proceedings.[14]

Legislation creating public defender offices in Judicial Districts 26 and 27 (later 27A, Gaston County) was passed in 1975, designating the governor as the appointing authority.[15] That year, the first Public Defender Conference was held in Atlantic Beach in a hotel room with the speakers addressing attendees from between the beds.[16]

Not until 1981 was another public defender office created, the then-District 3 Public Defender Office (later the Pitt and Carteret County Offices).[17] Spurred by Tally and others,[18] that year the legislature also created the Office of the Appellate Defender.[19] From 1983 to 1990, four other offices followed in Districts 15B (Orange and Chatham Counties),[20] 16A (Scotland and Hoke),[21] 16B (Robeson),[22] and 14 (Durham).[23] Meanwhile, reportedly related to the election of a Republican governor, in 1985 appointment authority for all chief public defenders was vested in their senior resident superior court judges.[24] However, an exception was made in 1987, when appointment authority for the 16B public defender was conferred on the "other" resident superior court judge,[25] who retained that power until 1997, when Senior Resident Superior Court Judge Joe Freeman Britt had left the bench and appointment authority was transferred to the new senior resident.[26]

In 1991 the General Assembly required the Administrative Office of the Courts (AOC) to compare the expenditures on PAC in Districts 4A, 5, and 10 between May 1991 and April 1992 to what it would have cost to have public defender offices there, with the explicit legislative intent of implementing an office in any of those jurisdictions where it would save money.[27] The AOC was also to report on an analysis of the cost-effectiveness of the existing public defender offices. The AOC found that almost all of the existing

offices were cost-effective under at least one of three methods of comparison to PAC spending.[28] As to the three districts under consideration, the AOC concluded that public defender offices would not have produced cost savings because, in an effort to prevent the creation of new offices, the three districts had each undertaken short-lived cost-cutting measures such as flat-fee and reduced attorney payment schemes as well as more efficient court structuring.[29] In light of these underwhelming results, the only other defender office established in the 1990s was the Office of the Capital Defender, initiated in 1999 as a pilot program within the Office of the Appellate Defender.[30]

In 2000 the Commission on Indigent Defense Services and the Office of Indigent Defense Services (collectively referred to as "IDS") were established and given responsibility for the provision of indigent representation, including defender offices.[31] Since IDS began operating fully in 2001, it has overseen the implementation of five new legislatively created public defender offices covering Districts 21 (Forsyth),[32] 1 (Camden, Chowan, Currituck, Dare, Pasquotank, and Perquimans),[33] 10 (Wake),[34] 29B (Henderson, Polk, and Transylvania),[35] and 5 (New Hanover).[36] IDS has additionally separated the Office of the Capital Defender into its own entity and, at the request of local officials, expanded the First District Public Defender Office to cover the Second District as a regional office. Although IDS has encouraged the creation of additional public defender offices where it would be more cost-efficient than paying private counsel to handle the cases, institution of new offices in IDS's tenure has often been at the instigation of local actors. Moreover, IDS is statutorily required to consider public comment on whether creating or expanding an office is advisable and welcomed. Ultimately, enabling legislation for new offices is required and is generally left up to the area's legislative delegation, making the current process not dissimilar from the pseudo-local bill method of the past.

Notwithstanding this incremental approach, in addition to the statewide defender offices, 16 public defender offices presently serve 31 counties in 17 judicial districts. The offices employ slightly over 275 assistant public defenders and handle around a third of the indigent cases in the state, covering a variety of case types including adult criminal capital and non-capital; juvenile delinquency; abuse, neglect, dependency, and termination of parental rights; involuntary commitment; child support contempt; specialized treatment courts; and others. Because public defender offices cannot handle all of the cases they cover due to conflict of interest and workload considerations, PAC and/or contract attorneys receive overflow cases via assignment systems that the offices manage. Such a mixture of public defenders and private counsel working with a coordinated appointment process is endorsed by the American Bar Association (ABA).[37]

Public Defender Office Challenges and Benefits

In addition to the constraints on proliferation of public defender offices caused by the pseudo-local bill approach and the continued measured process of creating offices, other challenges may have contributed to public defender offices' not taking deeper root in the state. Early concerns about public defenders included the ideas that defenders might not fight for their clients or that they would be too "friendly" with the prosecution.[38] While these fears do not appear to have been realized, they implicate a much bigger problem of public defenders being worn down by years of low pay, overwork, and lack of resources,[39] which could lead over time to the defenders' leaving to pursue other career paths.

From a broader standpoint, opening a public defender office may not make economic sense in certain areas. Although the costs of operating a public defender system are more predictable than costs for PAC, it is difficult for public defender offices to achieve cost savings given the extremely low current hourly rates for PAC. Particularly where court caseloads are low, providing representation through public defenders at a higher cost that includes overhead is less justifiable than paying private counsel. Similarly, the lack of flexibility inherent in having an institution handle cases can make fluctuations in case volume problematic. Starting an office requires initial outlays by the state and the affected county or counties, as the latter are responsible by statute for providing office space.[40] Moreover, hearkening back to the Courts Commission's concerns about zealousness and independence, appointment of chief public defenders by their local senior resident superior court judges can create the appearance that a public defender may be beholden to the judge and that the office might thus restrain its advocacy. Considerations like these have led the ABA to emphasize the importance that the defense be wholly independent of the bench.[41]

Despite these challenges, public defender offices offer many benefits. The Courts Commission recognized the ability to specialize as one of the main strengths of public defender offices, as did many former chief public defenders (now judges and a district attorney) interviewed for this article. In fact, public defenders now not only specialize in the practice of criminal law, but have also developed in-house concentrations on areas such as DWIs, forensics, immigration, and drug trafficking. The former public defenders additionally cited increased opportunities for training and in-house support as virtues of public defender offices. For example, Superior Court Judge Jesse Caldwell stated that the abilities "to concentrate and focus, and to get resources and training from the [UNC] School of Government, are major advantages of a public defender," leading to better skills and more expertise.[42] District Attorney Andy Womble noted, "When you are surrounded by an office and support, cases get resolved quicker and in the manner they should without having to reinvent the wheel."[43] Offices can provide environments of *esprit de corps* to rally attorneys, and having "a place of refuge with colleagues who can understand, help, and give support is so important," according to Tally.[44]

In terms of administrative support, public defender offices can provide not only legal assistants, but also investigators and other staff that private attorneys would have to request (and not necessarily get) from the court. Public defender offices are able to supervise and mentor attorneys to ensure quality and to foster development, and, when needed, to provide remediation such as training or addressing problems with attorneys. Many also run internship programs that serve the dual purposes of assisting attorneys and of training and tapping future public defenders. Furthermore, public defender attorneys are available to each other for brainstorming and help on cases. Many offices offer opportunities for second-chairing. Public defenders often maintain repositories of information such as brief and

motion banks and collections of transcripts and research.

Public defender offices also support the private bar by answering questions, sharing resources, and hosting training. Through their institutional presence, they can provide an organized counterweight to district attorney offices, and thus can influence on a broad scale how cases are processed. Both Womble and Superior Court Judge Bryan Collins believe the advent of public defender offices in their districts elevated the overall level of criminal practice,[45] and Collins added that a public defender can be "the point person for the criminal defense perspective," affording the defense a seat at the table with other court system institutions.[46]

As the agency dedicated to keeping an eye on the overall local indigent defense system that has a constant presence in court, public defenders can recognize and address trends that negatively impact clients. Being courtroom mainstays also allows public defenders to achieve efficiency in handling cases, which can lead not only to expedited case resolution, but also to better case outcomes for clients. In fact, recent research by IDS's Systems Evaluation Project suggests that, on average, the public defender system excels at certain key performance indicators such as avoiding felony convictions and convictions of the highest charged offenses.[47] Moreover, sheriffs have noticed positive impacts on the size of jail populations from having public defenders.[48]

Aside from achieving good results in individual cases, public defender offices can concentrate efforts to improve clients' overall situations. Offices have been laboratories of experimentation and innovation by creating job banks for clients, providing consistent representation at first appearance court, promoting institution of specialized courts, and leading in systemic reform efforts including the elimination of racial and ethnic inequities. Offices have engaged in community outreach like having staff serve on local criminal justice and other boards, making rights advisement cards, assisting with mock courts, participating in veteran stand down events, and volunteering for events serving the homeless and others in need. In their free time, individual public defender staffs have taken unique outreach paths such as leading yoga classes for jail detainees and assisting with local basic law enforcement training.

Communities may also benefit from public defenders' subjection to scrutiny and the public's ability to hold them accountable for uniform, quality services. Public defender offices maintain employee hierarchies, which provides a clear outlet for clients, their families, and other concerned citizens to voice concerns about the quality of services provided. Further, public defenders are uniquely positioned to safeguard ABA values. Under several national standards, defense attorneys should not assume excessive caseloads that would inhibit client representation.[49] While extremely high volume can at times humble a public defender office, its managing attorneys may be able to change their case and administrative assignment practices to accommodate fluctuating caseloads.

The ABA also calls for defenders to be "supervised and systematically reviewed for quality and efficiency according to nationally and locally adopted standards," and for "parity between defense counsel and the prosecution with respect to resources."[50] Public defender offices are able to collect and analyze data and to advocate for appropriate funding of indigent defense in their communities, and may further capitalize on their community relations to expand their research capacity and to implement systemic change, such as by partnering with larger institutions and agencies.

Perhaps the highest praise for public defender offices was related by Womble. As he put it, when officials from the Second Judicial District were considering how to make their system run better, they realized "the missing piece of the fair and efficient administration of justice was a public defender office."[51] Womble continued, "When an office is operating well and [the attorneys] care about their work, every citizen can have faith in the outcome."[52]

The Future of Public Defender Offices

As noted above, the 1965 Legislative Council report envisioned a statewide public defender system. However, despite being a re-emerging topic of discussion over the years, statewide expansion of public defender offices has never been realized. In the late 1970s and in 1980, several state leaders expressed interest in an expanded public defender system.[53] As in the 1960s, the main arguments for this proposition were assumed cost savings and development of expertise. Accepting the call of Governor Jim Hunt, the Courts Commission looked into the issue and found that the five existing public defender offices were working satisfactorily,[54] but stopped short of endorsing statewide expansion, instead recommending that further study be made of extending public defender offices into 13 additional districts and limiting their caseloads to ensure the continued vitality of the private bar.[55] As recently as 2011, the North Carolina House of Representatives proposed a statewide defender system,[56] but this provision did not make it into the final budget bill.

Still, the idea is not dead. In May 2015, in one of his first acts as Supreme Court of North Carolina chief justice, Mark Martin convened a commission in the tradition of the Bell Commission in the 1950s and the

Medlin Commission in the 1990s to evaluate the court system and to make recommendations for improvement. The NCCALJ began meeting in September 2015 and established as one of its five committees the Criminal Investigation and Adjudication Committee, which further categorized its work and focused the assessment of the current indigent defense system in a subcommittee. The subcommittee issued a comprehensive, evidence-based report, which the committee largely adopted in October 2016. The report expressed a preference for public defender offices and recommended the establishment of a statewide public defender system for the reasons that public defender offices confer internal and external oversight, supervision, and support of counsel providing indigent representation; are supported by both local stakeholders and national standards; and, on average, can provide better, more efficient, and timelier services.[57]

It remains to be seen whether the General Assembly will act on the committee's recommendation of a statewide public defender system, and whether sufficient funds will be allocated to make it practical. If so, it will mean a significant change for the state, its court system, and its indigent accused. In light of the experience in the state with public defender offices thus far, the evidence suggests that the change will be positive. ■

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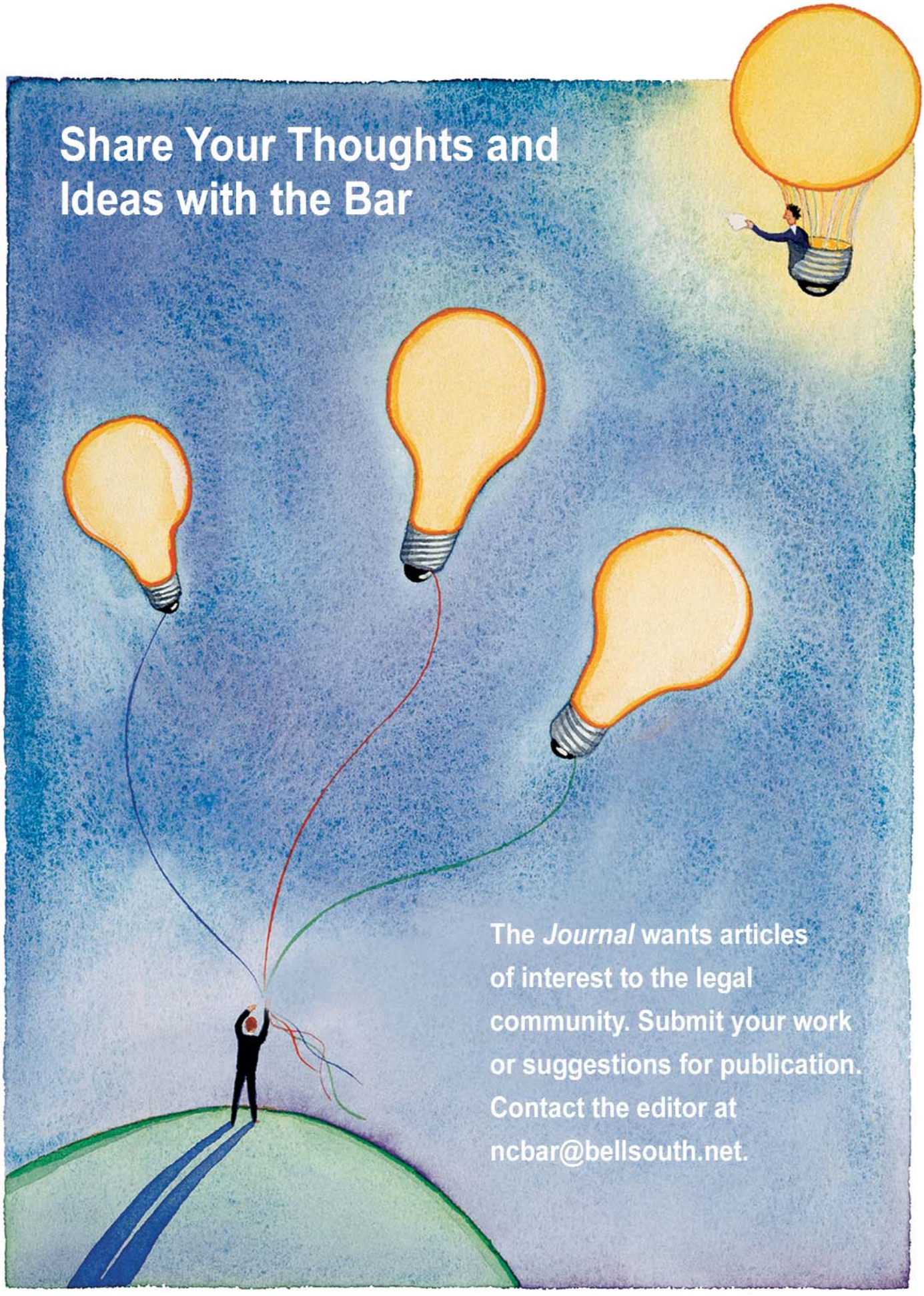
Rachel Raimondi is a third-year student at Wake Forest University School of Law. She has dedicated much of her work to the service of indigent North Carolinians, and has interned with the Guilford County Public Defender's Office and Legal Aid of North Carolina. She holds a bachelor of arts in communication from the University at Buffalo.

Endnotes

1. 372 US 335 (1963).
2. *See, e.g., In re Gault*, 387 US 1 (1967) (right to counsel in juvenile delinquency cases); *US v. Wade*, 388 US 218 (1967) (right to counsel at critical stages); *Argersinger v. Hamlin*, 407 US 25 (1972) (right to counsel if facing actual imprisonment).
3. Act of June 21, 1963, ch. 1080, 1963 NC Sess. Laws 1410.
4. Final Report of the Leg. Council Comm. for the Study of the Advisability of a Public Defender System in North Carolina (Jan. 1965), at 6, 8 [hereinafter Leg. Council Report].
5. *Id.* at 14.
6. Report of the Courts Commission to the North Carolina General Assembly of 1969, at 2, available at bit.ly/2jHuHJc [hereinafter 1969 Cts. Comm'n Report].
7. *Id.* at 4.
8. For more details of the early days of the public defender system in North Carolina, *see generally* Wallace C. Harrelson, Interview for Chief Justice's Commission on Professionalism Historic Video Series (Nov. 1998) [hereinafter Harrelson Interview], available at bit.ly/2iLUaDa, and Stan Swofford, *Public Defender System: The Verdict is Out*, NC Insight, Spring 1980, at 27, available at bit.ly/2j6q8ra.
9. Act of July 1, 1969, ch. 1013, 1969 NC Sess. Laws 1154.
10. Telephone Interview with Mary Ann Tally, resident superior court judge, Judicial District 12 (Jan. 7, 2015).
11. Bd. of Governors, Va. State Bar, A Study of the Defense of Indigents in Virginia and the Feasibility of a Public Defender System, 28 (Dec. 1971).
12. Tally Interview, *supra* n. 10.
13. Act of May 24, 1973, ch. 799, 1973 NC Sess. Laws 1175.
14. Act of Apr. 12, 1974, ch. 1408, 1973 NC Sess. Laws 783, 788.
15. Act of June 26, 1975, ch. 956, 1975 NC Sess. Laws 1405, 1408.
16. Tally Interview, *supra* n. 10.
17. Act of June 25, 1980, ch. 1284, 1979 NC Sess. Laws 205.
18. Telephone Interview with Adam Stein, former appellate defender (Jan. 12, 2015); Tally interview, *supra* n. 10.
19. Act of July 10, 1981, ch. 964, 1981 NC Sess. Laws 1484, 1489.
20. Act of June 22, 1982, ch. 1282, 1981 NC Sess. Laws 185, 220.
21. Act of July 6, 1988, ch. 1056, 1987 NC Sess. Laws 442, 451.
22. *Id.*
23. Act of July 28, 1990, ch. 1066, 1989 NC Sess. Laws 748, 864.
24. Act of July 11, 1985, ch. 698, 1985 NC Sess. Laws 911, 920.
25. Act of July 6, 1988, ch. 1056 *supra* n. 21.
26. Act of June 12, 1997, ch. 175, 1997 NC Sess. Laws 320.
27. Act of July 13, 1991, ch. 689, 1991 NC Sess. Laws 1894, 1972.
28. NC Admin. Office of the Cts., Estimates of the Cost-Effectiveness of Public Defender Offices (May 1992).
29. NC Admin. Office of the Cts., Cost Estimates for Establishing Public Defender Offices in Districts 4A, 5, and 10 (Final Report May 1992).
30. Act of June 30, 1999, ch. 237, 1999 NC Sess. Laws 576, 786.
31. Act of Aug. 2, 2000, ch. 144, 2000 NC Sess. Laws 835.
32. Act of Sept. 30, 2002, ch. 126, 2002 NC Sess. Laws 291, 424.
33. Act of July 20, 2004, ch. 124, 2004 NC Sess. Laws 164, 297.
34. *Id.*
35. Act of July 31, 2007, ch. 323, 2007 NC Sess. Laws 616, 811.
36. *Id.*
37. ABA, Ten Principles of a Public Defense Delivery System, Principle 2 (2002) ("Where the caseload is sufficiently high, the public defense delivery system consists of both a defender office and the active participation of the private bar.") [hereinafter ABA Ten Principles].
38. Harrelson Interview, *supra* n. 8.
39. *See* NC Office of Indigent Defense Services, State Defender Survey Results: Impact of Budget Constraints (Nov. 2015) (reporting results of a 2015 survey of state defenders).
40. N.C.G.S. § 7A-302.
41. ABA Ten Principles, *supra* n. 37, Principle 1 (2002) ("The public defense function, including the selection, funding, and payment of defense counsel, is independent").
42. Telephone Interview with Jesse Caldwell, senior resident superior court judge, Judicial District 27A (Jan. 15 2015).
43. Telephone Interview with Robert A. (Andy) Womble, district attorney, Judicial District 1 (Jan. 13, 2015).
44. Tally Interview, *supra* n. 10.
45. Womble Interview, *supra* n. 43; Telephone Interview with G. Bryan Collins, resident superior court judge, Judicial District 10 (Feb. 5, 2015).
46. Collins Interview, *id.*
47. *See* Margaret Gressens, *Indigent Defense Milestone: A Comparison of Delivery Systems in North Carolina* (May 2016) (PowerPoint presentation on file with author Brooks).
48. *See, e.g.*, NC Office of Indigent Defense Services, FY10 North Carolina Public Defender and Private Assigned Counsel Cost Analysis 5 (Feb. 2011) (implementation of a public defender office in New Hanover County reduced the average daily jail population from 550 to 429 and saved $3,446,080 in annual costs for the jail).
49. *See* ABA Standing Committee on Legal Aid and Indigent Defendants, Gideon's Broken Promise: America's Continuing Quest for Equal Justice, 17 (2004).
50. ABA Ten Principles, *supra* n. 37, Principles 10, 8 (2002).
51. Womble Interview, *supra* n. 43.
52. *Id.*
53. Swofford, *supra* n. 8, at 26.
54. Report of the Courts Commission to the North Carolina General Assembly 24 (1981).
55. Supplemental Report of the North Carolina Courts Commission to the 1983 General Assembly (Apr. 6, 1983).
56. H.B. 300, § 15.16(d), 2011 Gen. Assemb., 2011-12 Sess. (N. 2011), available at bit.ly/2k22ZKV.
57. Indigent Defense Subcommittee of the Criminal Investigation and Adjudication Committee, NC Comm'n on the Administration of Law and Justice, Improving Indigent Defense in North Carolina 33-34 (October 2016).

Share Your Thoughts and Ideas with the Bar



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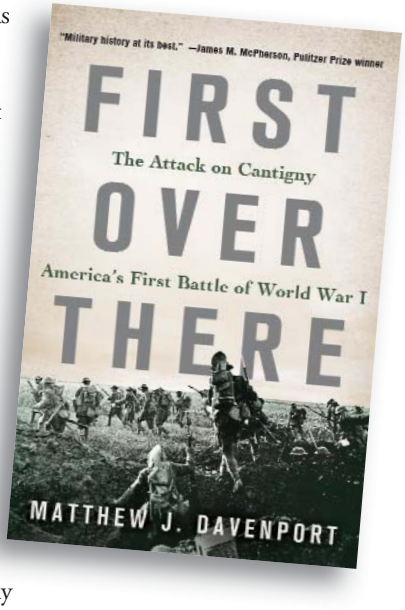
Book Review—*First Over There: The Attack on Cantigny, America's First Battle of World War I*

By Darrin D. Jordan

The story of a town no one has ever heard of, which was the site of a battle nobody knows about, in a war that most people have forgotten are all brought to life in the book *First Over There: The Attack on Cantigny, America's First Battle of World War I* written by Greenville criminal defense attorney, Matthew Davenport. With a busy law practice in eastern North Carolina, a young family that includes two young boys, one has to ask; why would you spend all your spare time writing about a topic that nobody seems to care about?



Davenport's personal story begins in a small town about 30 minutes from St. Louis, Missouri, home of his beloved St. Louis Cardinals and St. Louis Blues. As a young boy, Davenport's interest in history was nurtured by his two grandfathers and two uncles who all served in World War II. Along with the stories and experiences these men shared, Davenport was exposed to other veterans of American wars and conflicts when he accompanied his grandfathers and uncles to local veteran organizations.

Of particular importance to Davenport's story was his great Uncle Johnny who was active in the St. Louis chapter of the Big Red One Society, a group of veterans who served in the 1st Infantry Division. His Uncle Johnny had served with the 1st Infantry Division in WWII and had been wounded at the Battle of the Bulge, a battle that Davenport had learned about in history classes. Understanding Davenport's interest in history, Uncle Johnny began taking Davenport with him to a few of their meetings, which were ordinarily held at the home of a man who came to be known as Mr. Dacus. He learned that Mr. Dacus had served with the 1st Infantry Division in the First World War, and whenever Davenport saw Mr. Dacus, he would hold his pointer finger up and say "I was first of the FIRST," which Davenport later learned meant that he was a member of the 1st Infantry Division of World War I. On the cap he wore to these meetings was stitched the words, "Cantigny - Soissons - Meuse-Argonne," names that Davenport later found out were significant not only to the 1st Infantry Division, but to the United States Army.

During his middle and high school years, Davenport's family moved from Missouri, to Illinois, to Florida, and then finally landed in

North Carolina where he enlisted in the United States Army and later attended undergraduate and law school at Campbell University. Shortly after graduating from law school, Davenport read a book written by John Eisenhower called *Yanks*, a story about the American experience in World War I. While reading *Yanks*, he came across a chapter about Cantigny, which he learned was a village in France and happened to be the location of America's first battle and victory of the war. He immediately thought of Mr. Dacus, someone who had actually been a part of this battle. Naturally, Davenport became curious about the rest of the story.

After a futile attempt to find books written about this town that no one had ever heard of, which was the site of a battle nobody knew about, in a war that most people had forgotten, Davenport found himself at the National Archives in Washington, DC, where he was overwhelmed by the volume of materials on the subject. Located in the National Archives were boxes and boxes of maps and reports from the battle of Cantigny, with reports and documents having the signature of "G.C. Marshall, LTC, Operations Officer"— George Marshall Jr., the man who not only led the United States Army in World War II, but who planned the attack of Cantigny, the battle that had captured Davenport's attention.

If that discovery wasn't enough to keep his interest, Davenport then stumbled upon other famous names of soldiers who fought during this battle, names of individuals like Private Sam Ervin, the future US Senator from North Carolina and chair of the Watergate Committee; Major Theodore Roosevelt Jr., son of the former president; and Captain Clarence Huebner, the man who commanded the 1st Infantry Division at Omaha Beach on D-Day 26 years later. These discoveries led Davenport to the homes of family members of the soldiers who fought in this battle, where he found letters, photos, and other memorabilia that helped bring this story to paper in a vivid way.

Davenport tells not only the story of the actual battle in a way that allows the reader to hear the artillery and smell the gunpowder that lingered in the air over the battlefield, he also provides more for the reader to consider. First, the Americans were a group of immigrants trying to be true Americans and in some way shed their identities as Italians, English, Polish, etc. Second, even the privileged citizens felt the obligation to serve without question—the "Plattsburgers," a group of private citizens who privately trained for military service, included Theodore Roosevelt Jr. and other well-heeled individuals. Third, even though "no battle plan survives contact with the enemy" (attributed to a famous German officer), the preparation and planning of the American troops not only survived contact with the enemy, but conquered the enemy. Fourth, Davenport personalized the American soldiers, especially those who lost their lives during this battle by telling the reader about where and how they came to be in this great battle, or how they died and where they were laid to rest or memorialized. Davenport's style is one of class. Finally the service of Sen. Sam Ervin and Teddy Roosevelt Jr. was inspiring, especially the loss of rank that Sen. Ervin accepted to be in the operation that seized Cantigny.

First Over There, Davenport's first book, was published by MacMillan/St. Martin's Press. It was a finalist for Guggenheim-Lehrman Prize in Military History at the New-York Historical Society in March of 2016, and has received glowing reviews from the *Library Journal*, *Washington Times*, and Pulitzer-winner James McPherson. Matt has made three appearances on BookTV on CSPAN.

Writing about history is a passion of Davenport's, but is truly just a hobby—obviously one at which he is very good. He owns, operates, and is the only attorney in his office, the Law Office of Matthew J. Davenport, P.A., and he handles mainly criminal cases with an emphasis on driving while impaired and traffic charges. He was an assistant district attorney in the Pitt County District Attorney's Office prior to starting his own law practice. He has also been a featured speaker at numerous continuing legal education seminars across the state, and has been an active member of the North Carolina Advocates for Justice.

Matt Davenport's efforts in bringing the story of the Battle of Cantigny to his readers is truly an A+ effort and has left them waiting for his next book, which is about the 1906 San Francisco Earthquake. Davenport is looking forward to the many trips to San Francisco with his wife and two boys as he begins his research. You can learn more about Davenport and his book at facebook.com/firstoverthere. ■

Jordan is a partner at the law firm of Whitley & Jordan, PA in Salisbury, and is the State Bar councilor representing Judicial District 19C (Rowan County). He is a Board Certified Specialist in state criminal law, and practices both state and federal criminal law.

President's Message (cont.)

penalties to finance their operations. The Missouri Bar also helped provide free legal services to victims of the violence and the looting that took place, and attempted to establish dialogue in communities that had been torn apart by strife. The Atlanta Bar has played an active role in fostering better relationships between the police and residents. Lawyers have the training and ability to assist people in finding common ground. This is precisely the kind of conduct our Preamble references when it instructs lawyers to "provide civic leadership."

In his "Argument in Defense of the Soldiers in the Boston Massacre Trial," John Adams stated, "Facts are stubborn things; and whatever may be our wishes, our inclinations, or the dictates of our passions, they cannot alter the state of facts and evidence." If facts are "stubborn things," then lawyers should be stubborn about the facts. That requires us to read widely, to listen to diverse viewpoints, to reject the politics of division, and to appreciate that our personal beliefs—no matter how strongly held—may not always be tied to the facts. At some level, the respect for the rule of law and the benefits of the ordered liberty that we enjoy, cannot rest on fake news, internet falsehoods, and appeals to raw emotion. Facts still matter. The truth still matters. Let's prove *The Independent* wrong. ■

Mark W. Merritt began serving as vice chancellor and general counsel at UNC-Chapel Hill in September 2016. Prior to that time, he practiced law in Charlotte as a litigator at Robinson Bradshaw. He is an alumnus of UNC-Chapel Hill and the University of Virginia School of Law.

Profiles in Specialization

By Lanice Heidbrink, Executive Assistant for the Specialization Program


Albright


Bennington


Black


Morgenstern

I recently had the pleasure of interviewing four family law specialists, at different stages of their careers, from the law firm of Black, Slaughter, Black in Greensboro. While each of these accomplished lawyers is the same in that the majority of their practice is dedicated to family law, when in their career they decided to pursue certification, and their reasons for doing so, are very different.

Carole Albright has been certified in family law since 2015. She earned her law degree from Wake Forest Law School in 1995. While a law student, Albright was honored with the E. McGruder Faris Memorial Award for extraordinary character, leadership and scholarship. She has been named to *Business North Carolina* magazine's Legal Elite.

In addition to practicing family law full time, Albright dedicates an extraordinary amount of time to higher education. She was a professor for Concord Law, an online law school. Albright has also served in several capacities, from department chair to instructor, with Guildford Community College. She was awarded the institution's Excellence in Teaching Award in 2000. She has been an adjunct family law professor with the college's paralegal program since 2011.

Ashley Bennington has also been certified since 2015. She earned a bachelor's of social work from Campbell University before earning her law degree from Wake Forest Law School in 2009. Bennington has dedicated a vast amount of her time to several outreach organizations including Junior League of Greensboro and Junior Achievement, and recently served as the site co-chair of the North Carolina Bar Association 4-All Statewide Service Day. She is a member of the Family Law Sections of both the North Carolina Bar Association and Greensboro Bar Association. Bennington has also participated in Elon Law School's Preceptor's Program, mentoring and working primarily with first-year students, but also second- and third-year law students and law school alumni.

Keith Black earned his law degree from the University of North Carolina Law School in 1984. He was certified in family law in 2015. While Black devotes a large portion of his practice to domestic law matters (he has extensive experience with trials in alimony, custody, and child support), he also practices civil litigation, commercial collections, real estate, and personal injury.

Black generously volunteers his time with several organizations, most notably as an attorney for the Triad Health Project, an organization which provides valuable support and education to the HIV/AIDS Triad community. Black was honored with the *Pro Bono* Achievement Award in 1990.

Barbara Morgenstern has been a family law specialist since 1991. She earned her law degree from UNC Law School in 1986. Morgenstern served on the Family Law Specialty Committee from 2009 to 2016 and was committee chair from 2015-2016. She is currently listed in the Best Lawyers of America, NC SuperLawyers, Legal Elite, and is a fellow in the American Academy of Matrimonial Lawyers. She has been an adjunct professor teaching advanced family law at Elon University since 2008. She joined the firm of Black, Slaughter, Black after running her own law firm for 23 years.

Q: Why did you pursue certification?

Carole Albright (CA): I knew it would force me to sit down and study the statutes and case law in a more focused manner than I am able to in the midst of a busy practice.

Keith Black (KB): After 32 years of practicing a wide variety of law, I realized that the greatest portion of my time was being spent on domestic matters. I believed that I could better serve my clients if I "went back to school" and made sure that I had a strong foundation of understanding of the basics and the current law. And besides, Carole Albright made me do it with the help of Barbara Morgenstern.

Ashley Bennington (AB): My practice has been limited to family law since I started practicing in 2009. I was motivated to become a specialist because many of the influential attorneys in my practice have been specialists, and I was excited to become one of them.

Barbara Morgenstern (BM): I pursued specialization at the earliest possible date so I could distinguish myself from many of the lawyers practicing family law in Greensboro. I thought it would allow me to attract more clients and would provide my firm with the prestige of having a family law specialist working for them. I took the specialization exam after practicing a little over five years to improve my practice, and to let the public know that I had qualifications over and above most of the family lawyers practicing in Greensboro at that time.

Q: How did you prepare for the examination?

CA: I read the NCBA's Family Law Section newsletter, *Family Law Forums,* regularly; around May I started reading cases

from the previous four to five years, and I studied all of the relevant statutes. I am a big fan of flashcards, so I created an outline and then flashcards. I also outlined the *NC Trial Judges' Bench Book District Court, Volume One, Family Law (Family Law Bench Book)*.

AB: I started by talking to other attorneys who recently took the specialist exam to find out what they found to be most helpful in preparing for it. A number of attorneys in Greensboro had taken the exam the year before, and they were extremely generous in providing me with their study materials. I also participated in a CLE intended to assist in preparing for the exam, which was extremely helpful.

KB: I took the CLE reviewing the changes and updates in the law, I studied the statutes extensively, and also looked at the *Family Law Bench Book*.

BM: I studied for over 50 hours, reading all the statutes and the annotations, and focusing on the cases that were important over the prior three years.

Q: Was the certification process (exam, references, and application) valuable to you in any way?

CA: The examination process was very valuable, and it was nice to know I have colleagues who were willing to write references!

AB: Absolutely. It was a great opportunity to discuss the process and what being certified meant to other attorneys I work with when I asked them for a reference. It was also extremely valuable to review and learn additional aspects of family law that we may not encounter on a daily basis in our family law cases.

KB: Yes, the process of studying refreshed and updated my knowledge and understanding of the law and how it was being applied in the district, appellate, and supreme courts of North Carolina.

BM: Absolutely! It was the best refresher course I could have taken. It was nice to know that my peers thought highly enough of me to recommend me to sit for the exam after only being a lawyer for less than six years.

Q: Has certification been helpful to your practice? In what ways?

CA: Mainly it has increased knowledge and confidence and referrals.

AB: It has. It has allowed me to be recognized amongst my peers as someone who is dedicated to the practice of family law and learns about new developments as they come. It has also encouraged my peers to seek my opinion on their cases, which always provides a learning opportunity.

KB: I believe it allows me to market myself through word of mouth and recognition by the State Bar. As a certified specialist, the client has a deeper appreciation of my opinions, which aids in resolution of cases.

BM: I believe it has. The public now researches lawyers online. To attract the best clients, you almost have to be a specialist. Moreover, lawyer referrals are often based on the fact that I am listed amongst the specialists in Greensboro. As a result of specialization, I was elected a fellow in the American Academy of Matrimonial Lawyers—if you are a North Carolina lawyer, you are not eligible to be a fellow absent that designation. I also teach family law at Elon Law School and believe the school would not have hired me if I were not a specialist.

Q: Who are your best referral sources?

CA: Former clients.

AB: Former and/or currently clients and other attorneys.

KB: Other lawyers and former clients.

BM: Lawyers and former clients.

Q: How does your certification benefit your clients?

CA: Specialists in an area of law are like specialists in medicine—a family law specialist has a more comprehensive knowledge of this area of law, and generally has more experience representing family law clients and appearing in court for those clients, thus obtaining better results for clients.

AB: I believe it assists me in being influential with peers and the court because it keeps me abreast of developments in the area of family law.

KB: Well I hope it benefits my clients since, in theory, I know the law well and am able to advise them of the law and how it will most likely affect them.

BM: Clients hire a lawyer with expertise in the field. They can be confident that the lawyer they hire is competent and respected by his or her peers.

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

CA: Same sex marriage, alienation of affections, alimony, and the possibility of alimony "guidelines."

AB: Same sex marriage and adoption, alienation of affections, and there is still a lot of discussion about creating alimony "guidelines".

KB: Same sex marriage, divorce, custody, and equitable distribution.

BM: I think arbitration is a hot topic, and same sex marriage has brought a new dimension to the practice, both with regard to premarital agreements and divorce on the other end.

Q: How does your certification relate to those?

CA: By reading the recent cases and getting more up to speed on the trends, it helps in advising clients on the law and the current temperament of the court on those issues.

AB: The process of preparing for the examination served as a beneficial exercise to become more familiar with the particulars of the topics.

KB: The certification does not relate to the items above; however, as a result of studying for the test and keeping up with current case law, I have a better understanding and grasp of the trends in the laws and how judges will most likely rule.

BM: Many separation agreements that I draft include a provision that if a dispute arises as to the interpretation and enforcement of the agreement, and if mediation is not successful, then the parties agree to arbitrate the issue with a family law specialist. Absent specialization, I would not be doing as much arbitration.

Q: How do you stay current in your field?

CA: Reading the *Family Law Forums* and case law, and talking with colleagues.

AB: I read the appellate opinions each time they are published, and I try to review as much material as is available.

KB: I review *Lawyers Weekly*, routinely look at listserv issues and questions, and meet and talk with other lawyers who practice family law.

BM: I attend family law CLE offered by the NCBA, the family law specialists, and the AAML. I read *Lawyers Weekly* and look up the family law cases digested in the publication. I teach family law at Elon Law, which forces me to stay current.

Q: Is certification important in your practice area? How?

CA: Family law encompasses a large body of law and affects lots of people given the high divorce rate, so having specialized knowledge on family law issues makes for more thorough representation.

AB: I believe it is important because it shows a dedication to the practice area. There are many general practice attorneys who dip their toes in the family law pool from time to time, but certification shows that this is a primary focus for me.

KB: I believe the certification process helped me stay current with the law, which means I can give my clients the best advice possible. Clients are becoming more sophisticated and as a result, having the certifications is helpful as a marketing tool and selling point of my services. It gives me a certain amount of credibility that I might not otherwise have with the client and other lawyers.

BM: Yes, because so many lawyers in Greensboro are becoming specialists, the clients are looking to hire a specialist in the area of law in which they need help, just as they hire a medical specialist to handle medical issues.

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

CA: If you plan to focus your practice in a certain area and want to increase your knowledge and confidence in that area, pursue certification.

KB: Decide if you want to really pursue it, and then talk to someone who is certified and ask them how they prepared for the exam.

BM: I would encourage them to take the opportunity to review the law thoroughly in order to market themselves as a specialist. Specialization is a great opportunity to meet other experienced family lawyers from across the state and create new referral sources. It is an opportunity to take advantage of the best CLE offered in the state on family law—the Intensive Seminar at the annual specialists meeting.

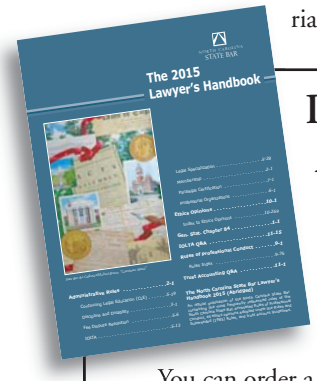
Q: What piece of advice would you give lawyers who are interested in pursuing certification?

CA: Start early, read the statutes carefully, and focus on the "big" cases that came out during the previous four to five years

AB: That it is definitely worth it. It opens doors to more specialized CLEs and provides more opportunities to meet other specialists in the state.

BM: Study! The exam is not easy and is very comprehensive. Attend as much CLE as possible. ■

For more information about becoming a board certified specialist, please visit nclawspecialists.gov or call our office at 919-828-4620.



Preorder the 2017 *Lawyer's Handbook*

You can order a hard copy by submitting an order form (found on the State Bar's website at bit.ly/2ejzJwD) by March 17, 2017. The digital version will still be available for download and is free of charge.

Stairway to Paperless Heaven

By Jacqueline King

On a daily basis paralegals are tasked with an endless amount of work. Remember Mount Correspondenceville? A whole chain of work mountains await you each day. One nervous breakdown at a time. Calendars, tasks, and deadlines, oh my! Not only do paralegals climb mountains, but we perform miracles, too. Like finding that one random document with the snap of a finger. You know, that one document from opposing counsel two years ago buried in the midst of 20,000 plus documents. Now, not tomorrow. No problem! Ten years ago I would have said taking a picture of air would be easier. But alas, we live in the 21st century. Although it isn't quite like Marty McFly predicted, we are now light years ahead in the technology game.

Technology in the legal field has changed. Dramatically. In the not so distant past all you had to work with was the chicken scratch your boss called writing or a twangy dictation you had to translate. That's fun. Ever worked for a southerner? Ever tried to decipher what they say? I know, I am one. Most people cannot understand me. I cannot understand myself half the time. In addition, file management was done by a paralegal's bestie, the Post-it Note. Everything went on Post-it Notes: appointments, tasks, deadlines, phone messages, lunch orders, and random thoughts. We loved the Post-it Notes! Some still do. Every desk had a paper calendar with Post-its littered throughout the calendar. How else were you to know what date the complaint had to be filed, when the answer was due, or who had court and where? More importantly you could count down the days to vacation. Lucky for you (and your boss) we now have far superior ways to keep your supervisors organized. But more importantly, technology keeps you sane and employed.

Let me preface this by saying: Go paperless! Now. It is important to your well-being and your job. Achieving a paperless office will be hard. Convincing your boss, harder. It will test every ounce of patience you have and you will question your sanity. You may look around and think it is not possible, but I have lived to tell the tale. It really is possible. Now that I've convinced you of that, here are my choices for top programs you need to manage your rock-star paralegal life. Tell your boss to hand you the credit card. While they are at it, give you that raise for being a paralegal genius.

File Management

Worldox. Remember that name. It is the best thing since the invention of the World Wide Web. Two short years ago I had everything on a shared drive that the entire firm could access. You thought you loved Post-it Notes. My love for a folder on the shared drive knew no bounds. I had folders for everything. Pleadings, discovery, and depositions. I broke these folders down by party, date, witness, favorite color, etc. Okay, maybe not that bad, but you get the picture. When I look back I cannot for the life of me understand how I found anything.

Worldox prides itself on being an effortless document and email management system. Yes, you read that right, a two-for-one deal. Email is now our primary form of communication. Remember when no one but you could see your emails? Now imagine you can see every email in a particular file. You no longer have to wonder if your attorney sent an email or if that same email received a response. It's there, all at the tips of your perfectly manicured nails. The file management gods have shined upon us with Worldox. A file is meticulously maintained, categorized to your liking, and searchable. Oh, the search feature! The search feature is something dreams are made of. Ladies and gentlemen, you really can find a document in 2.5 seconds. I am able to spend more time working—or filing my nails, according to my boss—and less time hunting for a mythical document. If you do nothing else I say, convince your boss you both need Worldox in your life.

Worldox is your document management and **Amicus** is your file management system. There are several programs on the market, but Amicus so far has given our firm the most bang for our buck. Amicus gives your firm calendaring, time keeping, contacts, file assignments, and task management all in one. The key to Amicus is utilizing all of its features. Since our firm implemented the use of all features, our work flow is easy like Sunday mornings. The most important feature you will use is task management. One of the worst things we could ever hear as a paralegal is that we missed a statute of limitations. Someone has to take the fall, and who do you think that someone will be? You may as well volunteer as a tribute. May the odds be ever in your favor. I promise missing a deadline won't be pretty. Amicus has several ways to make sure this doesn't happen, but using the task feature and learning how to set precedents for each file will make sure you don't miss a statute, ever.

General Software

Now that you can manage your files, you will need to have the proper programs to generate the work. First and foremost, get an updated version of **Microsoft Office**. Although you can still use your old version, each version has a life cycle. There will be no new updates, and if you start having problems with it, who you gonna call? Not Microsoft.

Next, spend the extra money and get **Adobe Pro**. The extra features pay for themselves. Remember, you're paperless. Why

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Grievance Committee and DHC Actions

Disbarments

Peter F. Chastain of Greensboro misappropriated entrusted funds, did not maintain proper trust account records, and did not respond to the Grievance Committee. He was disbarred by the DHC.

Christopher Greene of Charlotte surrendered his license and was disbarred by the Wake County Superior Court. Greene engaged in sexual relationships with and had sexually inappropriate communications with multiple immigration clients.

R. Alfred Patrick of Greenville misappropriated entrusted funds. He was disbarred by the DHC.

Michael C. Stamey of Jamestown misappropriated entrusted funds, abandoned his law practice, did not communicate with and did not act diligently and competently in representing clients, did not maintain proper trust account records, and did not respond to the Grievance Committee. He was disbarred by the DHC.

Suspensions & Stayed Suspensions

Nicholas Ackerman of Greensboro did not communicate with a client and did not participate in the fee dispute resolution program. The DHC suspended him for one year. The suspension is stayed for two years upon compliance with enumerated conditions.

Michael C. Casey of Nags Head did not perform quarterly reconciliations of his trust account, did not escheat funds from an unknown source that were mistakenly wired to his trust account, did not promptly disburse entrusted funds he held in *de minimis* amounts, disbursed to his firm entrusted funds he held in *de minimis* amounts, and disbursed funds for clients in excess of the amounts those clients had on deposit in the trust account. He was suspended by the DHC for two years. The suspension is stayed for two years upon compliance with enumerated conditions.

The chair of the Grievance Committee entered an order of reciprocal discipline suspending **Joel F. Geer** of Greenville, South Carolina, until he is reinstated from an interim suspension imposed by the South Carolina Supreme Court.

Shaun L. Hayes of Asheboro submitted to the Grievance Committee a document bearing a false signature. Hayes intended to falsely represent the signature as true. The DHC suspended him for two years. After serving one year of active suspension, Hayes will be eligible to petition for a stay of the balance upon demonstrating compliance with enumerated conditions.

Peter R. Henry of Arden did not communicate with clients and made inaccurate statements to a client about work purportedly performed. He was suspended by the DHC for three years. The suspension is stayed for three years upon compliance with enumerated conditions.

Andrew C. Jackson Jr. of West Jefferson did not supervise his assistant and did not adequately monitor his trust account. His assistant misappropriated entrusted funds. The DHC suspended Jackson for three years. The suspension is stayed for four years upon compliance with enumerated conditions.

Georgia S. Nixon of High Point engaged in conduct prejudicial to the administration of justice by making frivolous claims and misleading statements in two criminal cases. The DHC suspended her for one year. The suspension is stayed for two years upon compliance with enumerated conditions.

Darryl G. Smith of Wilson had repeated random audit deficiencies and mismanaged his trust account. The DHC suspended him for three years. The suspension is stayed for three years upon compliance with enumerated conditions.

Michael Williamson of Goldsboro mismanaged his trust account. The DHC suspended him for three years. The suspension is stayed for three years upon compliance with enumerated conditions.

Clarke K. Wittstruck of Buncombe County practiced law while his license was suspended, neglected a client's case, did not respond to the State Bar, and did not timely file estate accountings. The DHC suspended him for two years, effective upon expiration of the five year suspension imposed in 2015.

Motions to Show Cause

In April 2016 the DHC suspended the law license of **John Monte Holmes** of Raleigh for three years, but stayed the suspension upon compliance with extensive conditions, including participation in real-time alcohol monitoring requiring him to submit to multiple daily breathalyzer tests. The State Bar initiated a show cause proceeding because, during the first three and a half months following entry of the DHC order, Holmes missed at least 45 days worth of testing. The DHC activated Holmes's suspension, but he will be eligible to petition for another stay after three months if he demonstrates compliance with numerous conditions.

In April 2012 the DHC suspended the law license of **Dennis H. Sullivan Jr.** of Wilmington for three years. The DHC stayed the suspension for five years upon compliance with enumerated conditions, including complying with all tax laws and providing the State Bar with all correspondence between Sullivan and tax authorities. The State Bar initiated a show cause proceeding because Sullivan did not pay employee withholding taxes and did not notify the State Bar of his correspondence with the IRS and of additional tax liens that were filed against him. The DHC activated Sullivan's suspension, but he will be eligible to petition for another stay after one year if he demonstrates compliance with numerous conditions.

Censures

The Grievance Committee censured **Mo Idlibby** of Charlotte. At a May 2014 press conference and on a listserv for immigration lawyers, Idlibby accused an immigration judge of misconduct, including obstructing justice, tainting evidence, and engaging in

"numerous unethical *ex parte* communications." The statements were made with reckless disregard as to their truth or falsity. In a separate matter, Idlibby misrepresented to the court that he had notified a client's prior counsel that he filed a motion for appropriate relief and asserted that the original trial transcript was unavailable when he had not personally made an attempt to obtain the transcript.

Steven B. Wright of Wilmington was censured by the Grievance Committee. While his license was administratively suspended, Wright accepted two checks as payment for representation and allowed his website to continue advertising his services. He did not timely respond to the Grievance Committee and falsely represented that he was admitted to the Vermont Bar although his license there has been suspended since 2014.

Reprimands

Bryan Gates of Winston-Salem was reprimanded by the Grievance Committee. Gates was appointed to represent indigent clients in appeals of their criminal convictions. He took no action to pursue the cases, thereby jeopardizing his clients' right to appellate review.

The Grievance Committee issued two reprimands to **Mo Idlibby** of Charlotte. The committee found that he charged excessive fees to clients in several immigration cases, did not communicate promptly or adequately with one client, did not timely respond to the State Bar fee dispute facilitator, and submitted late responses in the resulting grievances despite multiple extensions of time. The committee considered the significant adversity in Idlibby's personal life as a mitigating factor.

The Grievance Committee reprimanded **Kimberly Moore** of Oak Island. Moore recorded 11 deeds of trust for her client, but failed to inform her client that four of the deeds of trust were not in first lien position. Moore was evasive when responding to the State Bar.

Daniel Nash of High Point was reprimanded by the Grievance Committee. While representing an estate, Nash did not timely file inventories and accounts with the court and did not respond to the clerk's requests for documents. The clerk issued an order for Nash to show cause why he should not be held in contempt. Nash also did not comply with the Grievance Committee's subpoena to appear.

The Grievance Committee reprimanded **William Shell** of Wilmington. Shell continued to practice of law and hold out to others as an actively licensed attorney while he was administratively suspended.

Reinstatements

Michael L. Yopp surrendered his license to the council and was disbarred on July 19, 2002. Yopp admitted that he misappropriated the entrusted funds of multiple clients. After a hearing on September 7, 2016, the DHC recommended that the council reinstate Yopp. The council reinstated Yopp at its January meeting.

Jeffrey R. Baker of Wilmington signed clients' names to a verification without both clients' permission to do so, notarized his own signatures of the clients' names, and filed the verification with the court. He also returned a client file by taping it to his exterior office door, did not communicate with clients, and was not diligent. In November 2015 the DHC suspended him for one year. He was reinstated by the secretary on December 1, 2016.

Notice of Intent to Seek Reinstatement

Notice is hereby given that **Theophilus O. Stokes III** of Greensboro intends to file a petition for reinstatement before the Disciplinary Hearing Commission of The North Carolina State Bar. Stokes was disbarred effective January 12, 2011, and surrendered his license on February 27, 2012, for a plea and finding of guilty to two misdemeanor offenses of receiving stolen goods in the Guilford County Superior Court on December 9, 2010.

Individuals who wish to note their concurrence with or opposition to this petition should file written notice with the secretary of the North Carolina State Bar, PO Box 25908, Raleigh, NC, 27611, before May 1, 2017. ■

Paralegal Certification (cont.)

should you print a letter, have your boss sign it, scan it and then email it? I'm a huge proponent of working smarter, not harder. Plus, we can save a few trees along the way. With Adobe Pro, you can draft your letter, convert it, and have your boss digitally sign it. You just saved two steps and ten minutes work. Also, how happy will your client be when you start saving them money?

Speaking of working smarter, remember when we had to Bates number documents with a stamp? I would rather watch *Frozen* on repeat—for days—than hear the sound of the Bates stamper on thousands of documents. Step away from the stamp and let it go, let it go! Adobe Pro allows you to Bates number in seconds. Also, when your boss decides to rearrange the production at the last minute (because does that ever not happen?), you can change the Bates number without feeling like you are in the movie *Groundhog Day*.

The programs above are essential for any law firm to be well run and well maintained. Our clients pay us to get them through traumatic times in their lives. They should not be paying us to manage their files in an archaic manner. The North Carolina Rules of Professional Conduct require attorneys to maintain competence, including in the technology field. Technology isn't going anywhere. You can either get on board or get left behind. So, take the lead and help relieve some of that added pressure from your boss' everyday workload. And while you're at it, raise your glass for being the rockstar paralegal that you are. ■

Jacqueline "Jackie" King is a North Carolina State Bar Certified Paralegal for Rose Harrison & Gilreath, PC, in Kill Devil Hills, North Carolina. Jackie is a 2005 graduate of Halifax Community College with an associate of paralegal technology, a 2014 graduate of Pennsylvania State University with a bachelor of law & society, and a current student at West Virginia University where she is working to earn her masters in legal studies. Jackie's current workload includes federal and state litigation, estate planning, and estate administration.

How Early Trauma Can Affect Us Today

By Tina Dayton

The surprising part of living with alcoholism or other dysfunction when growing up—for many of us in the late 1970s and early 1980s—was the discovery we made that even when we left home, we carried home inside of us. That whatever had happened to us growing up was not left behind, but followed us into our adult relationships. And that our emotional and psychological development had wrapped itself around an alcoholic or dysfunctional core. This is the awareness that began the Adult Children of Alcoholics (ACOA) movement and, following it, codependency.

Most of us would agree that living with addiction is a traumatizing experience for all concerned. But we are still wrapping our minds around why trauma in childhood can have such pervasive and long-term effects on our personalities and the way we live our lives. Recent research in neuroscience is helping us to decode this mystery. Trauma—whether it be a one time, catastrophic event or the cumulative trauma that is part of most any alcoholic family—affects both the limbic and the nervous systems. The effects of living with intense fear, pain, and resentment can seep into our brain/body, causing emotional deregulation. When we experience childhood abuse, it can actually affect our hardwiring throughout life.

We arrive in life only partly hardwired by nature. It is nurture that finishes the job. Each tiny interaction between child and caretaker actually lays down the neural wiring that becomes part of the brain/body network. This is how our early experiences inscribe themselves onto our nervous systems. It is how our environment shapes our emotional being and our limbic system. The limbic system is responsible for such wide-ranging functions as appetite and sleep cycles, mood, and emotional tone. Problems in the limbic system can cause long-term effects in our ability to self-regulate and maintain emotional and psychosocial balance.

Early Attachment and Self-Regulation

Our nervous systems are not self-contained; they link with those of people close to us in a silent rhythm that helps regulate our physiology. Children require ongoing neural synchrony from parents in order for their natural capacity for self-directedness to emerge. In other words, it is through successful relationships that we achieve a healthy sense of autonomy. Thomas Lewis, MD, one author of *A General Theory of Love*, describes limbic or emotional regulation as a mutually synchronizing hormonal exchange between mother and child that serves to regulate vital rhythms. He explains that human physiology does not direct all of its own functions; it is interdependent. It must be steadied and stabilized by the physical presence of another to maintain both physical and emotional health. "Limbic regulation mandates interdependence for social mammals of all ages," says Lewis, "but young mammals are in special need of its guidance: their neural systems are not only immature, but also growing and changing. One of the physiologic processes that limbic regulation directs, in other words, is the development of the brain itself, and that means attachment determines the ultimate nature of a child's mind." Children internalize the ability to self-regulate through being in a relationship with a parent who, slowly and over time, teaches and models self-regulation.

The Link Between the ACOA/Codependent and Childhood Trauma

Alongside the ACOA movement and intertwined with it is the codependency movement. Codependency was a term that emerged, initially, in 12-Step rooms. The

codependent, or the co-addict, like the ACOA, was that person who got sick through living with the distorted, unregulated, and out of balance thinking, feeling, and behaviors that surround addiction. Fear is a driving factor in terms of survival. Human beings have built-in defensive strategies that are designed to keep us out of harm's way, commonly known as fight/flight/freeze responses. When we're frightened, stress chemicals such as adrenaline spurt through our bodies, so that we'll have the energy necessary to flee for safety or stand and fight. These get mobilized when we sense danger, whether we're facing a saber-toothed tiger, an oncoming truck, or an irate parent.

But this isn't all that happens. There are a few other interesting body/mind phenomena that occur when we're feeling frozen with fear that affect the way we make sense of and remember frightening events. For example, when the survival part of our brain—often referred to as the "animal brain"—becomes aroused, the language part of the brain partially shuts down (van der Kolk 2002). Our cortex—the part of our brain responsible for logical thinking and long-range planning—freezes up when we're in fight/flight mode. We lose some of our left brain functioning or the ability to organize our thoughts, integrate them into a coherent context, and communicate them to others.

What doesn't freeze up, however, is the emotional scanning system in our right brains. This means that, even when frightened, we retain our ability to scan our environment and those in it for signs of threat or danger (van der Kolk 2002). In alcoholic homes, this may consist of attempting to read the emotions and define the intentions of those around us. Both ACOAs and codependents may learn a lesson that can lead to problems later in life—that they can fend off trouble by remaining hypervigilant, reading the moods of those around them.

Family Dynamics that Can Lead to Emotional Deregulation

Alcoholic homes are often unpredictable, characterized by broad swings from one extreme to the other. This lack of balance becomes, over time, highly stressful to the brain/body. The kind of trauma we experience within the alcoholic family occurs slowly and over time; it is cumulative. For this reason, it affects emotional and psychological development.

Repair is an important deterrent to relationship problems, having lasting and repeating effects. But repair in alcoholic systems is not necessarily forthcoming, and if there is repair, it does not necessarily last. Repair allows our shame/pain response, for example, to become part of personal growth. We see that something went wrong and we learn ways of setting it right, of mending what was broken or restoring a lost sense of connection. This process, which occurs in the context of a relationship, actually creates new learning and, hence, new neural wiring in the child. When we cannot repair, our feelings of shame, pain, fear, and confusion go underground and can affect the way we function in intimate relationships.

The ability to escape perceived or real danger is one of the factors that determines whether or not one develops Post Traumatic Stress Disorder. For the child in an alcoholic home, escape is often not possible. For this reason, ACOA issues oftentimes surface in adulthood as post-traumatic stress reaction. That is, the symptoms that stem from childhood pain and abuse surface after the fact in adulthood. When ACOAs attempt to have their own families, the intensity and vulnerability of intimacy may trigger unresolved childhood pain.

Recovery

I am constantly hearing clients say things like, "Why isn't this over yet?" or "I know I should be past this." But we don't leave our bodies behind when we grow up. We bring them with us into adulthood. We live in them, sleep in them, eat in them, and love in them. Our bodies contain a sort of neurological map that informs and guides us, a flesh-and-bones root system from which we flower into life. Changing neural wiring which has been laid down over a period of years doesn't happen overnight.

It is not only insight that produces healing. We need to log the hours in healing activities and relationships that will help us to rewire and rebalance our nervous systems. And that takes time. A lot of it. That's what a new recovery network and a new design for living is all about. We create the life that will give us a new body to live in, a new neural network that allows us to tolerate painful or uncomfortable feelings without blowing up, freezing/withdrawing, acting out, or picking up a drink or drug. Mammals have the capacity to limbically balance each other. That's why 12-Step meetings can have such a calming effect: we're limbically resonating with other people's nervous systems and bringing our own into balance.

Sometimes in recovery we get black and white, a dynamic we learned in our alcoholic families. We cycle back and forth between extremes. Instead of fixating relentlessly on others, we fixate relentlessly on ourselves, for example. If focusing on others is the new "bad," then focusing on ourselves must be the new "good." But intimacy often asks us to learn to balance our needs with those of others, so that each person can have a sense of autonomy alongside a sense of connection. The recent research on attachment is showing us that we develop autonomy a day at a time and through successful attachment experiences that teach us slowly, over time, what it feels like to be an autonomous individual while in connection with another person. Being in healthy connection with others allows us a kind of freedom to move into our own being, knowing that we have a secure base—a safe harbor—from which to move in and out. ■

Tian Dayton, PhD, TEP, is a fellow of the American Society of Group Psychotherapy and Psychodrama (ASGPP), and winner of their Scholar's Award. She is executive editor of the Psychodrama Academic Journal *and sits on the Professional Standards Committee. She is director of The New York Psychodrama Training Institute at Caron, with a private practice in Manhattan. She is author of* The Living Stage: A Step-by-Step Guide to Psychodrama; Sociometry and Group Psychotherapy; Trauma and Addiction; Daily Affirmations for Forgiving and Moving On; Modern Mothering, *and ten other titles.* *This article is reprinted with permission and originally appeared in Afterwards, a newsletter from Sierra Tucson.*

The North Carolina Lawyer Assistance Program is a confidential program of assistance for all North Carolina lawyers, judges, and law students, which helps address problems of stress, depression, alcoholism, addiction, or other problems that may impair a lawyer's ability to practice. If you would like more information, go to nclap.org or call: Cathy Killian (for Charlotte and areas west) at 704-910-2310, Towanda Garner (in the Piedmont area) at 919-719-9290, or Nicole Ellington (for Raleigh and down east) at 919-719-9267.

Reference Guide to Trust Account Ethics Opinions

By Peter Bolac, Trust Account Compliance Counsel

Deposits and Fees

Guidelines for **advanced fees:** 08 FEO 10 *(survey of different types of advanced fees).*

Advance payments of **costs:** RPC 51, 13 FEO 3 *(when lawyer receives a lump sum payment which is inclusive of costs, the portion representing costs must be held in the trust account).*

Deposit of **mixed funds:** RPC 158 *(lawyer may collect a payment from client that represents both criminal fines and legal fees even if lawyer is not completely sure what fines will be, under certain conditions).*

Nonrefundable retainer fees: RPC 50, RPC 106, 97 FEO 4, 00 FEO 5 *(opinions track evolution of "nonrefundable" fees).*

Trust accounting for **small sums:** RPC 47 *(there are no* de minimis *amounts in trust accounting).*

Payment of legal fees by **third parties:** 05 FEO 12 *(explains lawyer's duty to refund third parties under certain circumstances).*

Disbursement

Disbursement in reliance on **bank's funding schedule:** 06 FEO 8 *(lawyers may rely upon a bank's historic funding schedule under certain conditions).*

Conditional delivery of trust account checks before depositing loan proceeds: RPC 78 *(no conditional delivery of trust account checks before depositing proceeds into trust account).*

Conditional delivery of settlement proceeds: RPC 127 *(releasing settlement proceeds before satisfying settlement conditions is dishonest and unethical).*

Settlement funds, **disbursement without consent** of client prohibited: RPC 75 *(lawyer may not pay his or her fees from excess funds unless previously authorized by the client).*

Disbursement of tort claim settlement upon deposit of **provisionally credited** funds: 01 FEO 3 *(applies RPC 191 to all disbursements, not just real estate; lawyer may endorse settlement check directly to client without depositing in trust account).*

Credit Cards/Online Banking

Disbursement against funds credited to trust account by **ACH transfer** or electronic funds transfer: 13 FEO 13 *(lawyer may disburse upon ACH deposits immediately, but must immediately act to protect client funds upon learning of ACH reversal).*

Business account, linking for purpose of determining interest or service charges: RPC 150 *(may not link trust and business accounts together if the arrangement will cause trust account funds to pay service charges for business account).*

Credit card, accepting fees paid by: RPC 247, 97 FEO 9, 09 FEO 4 *(lawyers may collect entrusted funds via credit card provided the lawyer addresses risks such as chargebacks and commingling).*

Cashing check for client/Purchasing **money order** for client: RPC 4 *(rules do not prohibit lawyer from performing services for incarcerated client).*

Online banking: 11 FEO 7 *(law firm may use online banking to manage a trust account provided the lawyers are regularly educated on security risks associated with account and can follow recordkeeping requirements).*

Recordkeeping/Abandoned Funds

Abandoned funds: RPC 89, RPC 149, RPC 226 *(abandoned funds must be held for five years from the date of last activity of the funds; must be escheated to the state, not donated to charity; if firm receives a check that is not identified as client funds, it may conclude, after investigation, that funds belong to firm).*

Retaining CD-ROM with **digital images** of trust account checks: 01 FEO 14 *(retaining check images on CD satisfies recordkeeping requirement). See also* Rule 1.15-3(j).

Dormancy fee on unclaimed funds: 06 FEO 15 *(lawyer may charge a reasonable dormancy fee on unclaimed funds if statutorily permitted and client agrees in advance).*

Disputes

Application of trust funds to **client's fee obligation:** RPC 37 *(lawyer may not pay his or her fees from entrusted funds unless previously authorized by the client).*

Retaining funds in trust account to pay **disputed legal fee:** 11 FEO 13 *(lawyer may not, absent client consent, retain funds in trust account in order to obtain legal fee if funds were*

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NC IOLTA Maintains Grant Making and Plans for Transition

Income

All IOLTA income earned in 2016 will not be received until after this edition of the *Journal* goes to press. However, we can report that though we are no longer seeing the dramatic monthly declines in income from IOLTA accounts, we were still down 3% in the first three quarters over that period last year. We received only one cy pres award in 2016, but it was an award of $96,000. We remain hopeful that a rise in interest rates and perhaps further funds from other sources will bring income levels back to more normal levels.

Grants

As previously reported, the IOLTA trustees dramatically reduced the number of grants beginning in 2010 as we dealt with a significantly changed income environment due to the economic downturn, which has seen unprecedented low interest rates being paid on lower principal balances in the accounts. The trustees decided to focus grant-making on organizations providing core legal aid services. Even with that change, IOLTA grants have dramatically decreased by over 50% from their highest level of just over $4 million in 2008 and 2009. During this downturn in income from IOLTA accounts, we have relied heavily on cy pres and other court awards designated for the provision of civil legal aid to the poor.

Receiving our portion of the first funding distribution for IOLTA programs included in the settlement with Bank of America ($842,896) was crucial to our ability to make grants for both 2016 and 2017. The IOLTA trustees decided to use half the Bank of America settlement funds for 2016 grants, leaving half to remain invested to use in 2017, as otherwise our reserve was just under $250,000. We were able to make just over a 3% increase in the individual grants, and to bring total grants back to $2 million for 2016. In 2017, grantees will receive at least a 4% increase in funding.

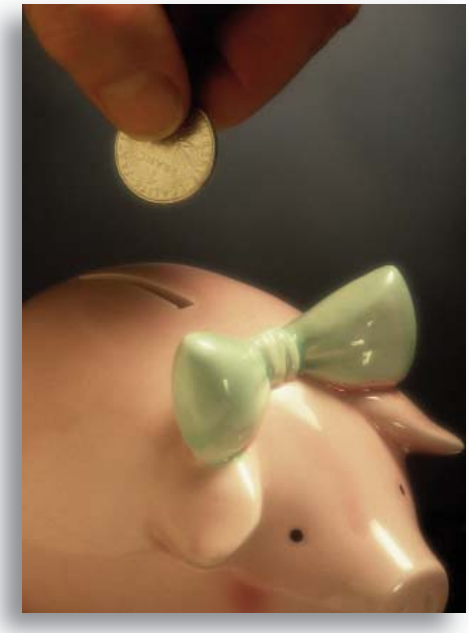
These funds are in addition to the funds granted in a separate grant cycle using some of the additional Bank of America (BoA) settlement funds ($12 million) received in 2016. Total grants of ~$5.7 million over three years were made. That total includes a grant award of $750,000 made to the legal aid collaborative working on foreclosure prevention for 2016-17, and just under $5 million in funds allocated for new and creative multi-year community redevelopment projects. Given the large amount of funds received in the second BoA settlement distribution and the time required for some community redevelopment projects, it is expected that these restricted funds will be granted over a number of years.

State Funds

In addition to its own funds, NC IOLTA administers the state funding for legal aid on behalf of the NC State Bar. Total state funding distributed for the 2013-14 fiscal year was $3.5 million. The state budget adjustments beginning in 2014-15 eliminated the appropriation for legal aid work ($671,250 at that time). Total state funding distributed for the 2014-15 fiscal year from filing fees alone was just under $2.8 million for that year and just over $2.7 million for 2015-16. For 2016-17, the General Assembly did make a nonrecurring appropriation of $100,000 to Pisgah Legal Services in Asheville to support civil legal representation of veterans. The Equal Access to Justice Commission and the NC Bar Association continue to work to sustain and improve the funding for legal aid.

IOLTA Transition Plans

Evelyn Pursley will complete her 20th year as executive director of NC IOLTA in the summer of 2017. The IOLTA Board of Trustees has planned for transition as she has set her retirement for the end of August. In 2014, NC IOLTA decided to forego administrative support in order to employ a recent law school graduate on a part-time basis, and Mary Irvine began working with IOLTA, the Equal Justice Alliance, and the Equal Access to Justice Commission. Irvine brought significant experience in access to justice and philanthropy issues having served as a program associate for both the UNC Center on Poverty, Work, and Opportunity and the NC Network of Grantmakers. The trustees were delighted to learn that Mary Irvine is interested in moving to the IOLTA directorship upon Evelyn Pursley's retirement. They believe that the opportunity she has had to learn IOLTA from the ground up and to establish relationships with IOLTA grantees, trustees, and with other bar leaders will be invaluable to her and to the program as she moves into this position. ■



Lawyers May Advertise Using a Text Message Service, Committee Opines

Council Actions

At its meeting on January 27, 2017, the State Bar Council adopted the ethics opinions summarized below:

2016 Formal Ethics Opinion 3

Negotiating Private Employment with Opposing Counsel

Opinion rules that a lawyer may not negotiate for employment with another firm if the firm represents a party adverse to the lawyer's client unless both clients give informed consent.

2016 Formal Ethics Opinion 4

Disclosing Confidential Information to Execute on a Judgment for Unpaid Legal Fees

Opinion rules that lawyer may not disclose financial information obtained during the representation of a former client to assist the sheriff with the execution on a judgment for unpaid legal fees.

Ethics Committee Actions

At its meeting on January 26, 2017, the Ethics Committee voted to continue to table proposed 2016 Formal Ethics Opinion 1, Contesting Opposing Counsel's Fee Request to Industrial Commission, pending the conclusion of appellate action on cases relevant to the proposed opinion. The committee also voted to publish a new proposed opinion which appears below.

The comments of readers on proposed opinions are welcomed. Comments received by April 10, 2017, will be considered at the next meeting of the Ethics Committee. Comments may be emailed to ethicsadvice@ncbar.gov.

Proposed 2017 Formal Ethics Opinion 1
Text Message Advertising
January 26, 2017

Proposed opinion rules that lawyers may advertise through a text message service that allows the user to initiate live telephone communication.

Background:

ABC Texting is a Short Message Service (SMS) that provides a free subscriber-based text messaging service. Subscribers go to the ABC Texting website and register by providing a cell phone number and zip code. No other information is provided. Once registered, subscribers receive text messages from ABC Texting for various products and services, including, but not limited to, messages from lawyers offering legal services in the subscriber's specific zip code. Subscribers can unsubscribe at any time. ABC Texting earns revenue by selling text message advertising to businesses and professional service providers that wish to advertise to subscribers in a specified zip code.

Inquiry #1:

Lawyer represents clients in workers' compensation matters and would like to purchase advertising with ABC Texting. Lawyer's advertisements would be sent via text message to ABC Texting subscribers. The text message advertisement will state, "Injured at work? We can help." The text message will also include a link to Lawyer's website. The subscriber will have the option to click on the link or delete the text message. If the subscriber chooses to click on the link, he will be directed to Lawyer's website. The website provides information about Lawyer's firm, including areas of practice, location, contact information, and Lawyer's profile.

May Lawyer advertise through this text message service?

Opinion #1:

Yes, provided the text message advertising complies with Rules 7.1, 7.2, and 7.3 and all applicable federal and state laws, rules, and regulations.

Rule 7.1 requires all communications about a lawyer and the lawyer's services to be truthful and not misleading. Rule 7.2(a) permits a lawyer to advertise services through written, recorded, or electronic communications subject to the requirements of Rule 7.1 and Rule 7.3. Rule 7.2(b) permits a lawyer to pay the reasonable costs of advertisement or communications permitted by the rule. Rule 7.2(c) requires that any communication about the lawyer or the lawyer's services include the name and office address of at least one lawyer or law firm responsible for the advertisement. Rule 7.3 limits direct contact with potential clients for the purpose of soliciting business.

Advertising through the ABC Texting service is an electronic communication about Lawyer's services. However, it is not a solicitation that requires the extra precautionary measures set out in Rule 7.3(c) governing targeted communications.[1] Comment [1] to Rule 7.3 provides,

> A solicitation is a communication initiated by the lawyer that is directed to a specific person and that offers to provide, or can reasonably be understood as offering to provide, legal services. In contrast, a lawyer's communication typically does not constitute a solicitation if it is directed to the general public, such as through a billboard, an Internet banner advertisement, a website, or a television commercial, or if it is in response to a request for information or is automatically generated in response to Internet searches.

Public Information

The Ethics Committee's meetings are public, and materials submitted for consideration are generally NOT held in confidence. Persons submitting requests for advice are cautioned that inquiries should not disclose client confidences or sensitive information that is not necessary to the resolution of the ethical questions presented.

Text message advertising as described herein is akin to billboard or banner advertisement directed to the general public. Therefore, Lawyer may advertise through ABC Texting. However, before Lawyer can allow ABC Texting to send his advertisement to subscribers, the advertisement must be revised to comply with Rule 7.2(c). The advertisement must include Lawyer's name (or law firm name) and office address, or a website address wherein the lawyer's office address can be found.

Inquiry #2:

If the answer to Inquiry # 1 is yes, may Lawyer use text message advertising if the subscriber has the option to reply to the text message as follows:

> ABC Texting: Have you or someone you know been injured at work? If so, type YES.
>
> Subscriber: YES
>
> ABC Texting: Lawyer can help. May we contact you at this number? If so, type YES.
>
> Subscriber: YES
>
> ABC Texting: Thank you. A representative will contact you soon.

If the subscriber replies YES to both questions, ABC Texting provides the subscriber's cell phone number to Lawyer. Lawyer will then contact subscriber directly.

Opinion #2:

Yes. The communication as described above is not a prohibited live telephone or real time electronic contact.

Rule 7.3(a) provides that, "[a] lawyer shall not by in-person, live telephone, or real-time electronic contact solicit professional employment from a potential client when a significant motive of the lawyer's doing so is the lawyer's pecuniary gain." Comment [2] explains the prohibition as follows:

> There is a potential for abuse when a solicitation involves direct in-person, live telephone, or real-time electronic contact by a lawyer with someone known to need legal services. These forms of contact subject a person to the private importuning of the trained advocate in a direct interpersonal encounter. The person, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult fully to evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer's presence and insistence upon being retained immediately. The situation is fraught with the possibility of undue influence, intimidation, and over-reaching.

In the context of autodialed recorded telephone advertising, the Ethics Committee opined in 2006 FEO 17 that,

> [A]lthough it appears that recorded telephone advertising messages are permitted by the Rules of Professional Conduct, Rule 7.3(a) and the comment to the rule do not contemplate that a recorded message will lead to an interpersonal encounter with a lawyer (or the lawyer's agent) at the push of a button on the telephone key pad. To avoid the risks of undue influence, intimidation, and over-reaching, a potential client must be given an opportunity to contemplate the information about legal services received in a recorded telephone solicitation. This cannot occur if a brief, unexpected, and unsolicited telephone call leads to an in-person encounter with a lawyer, even if the recipient of the phone call must choose to push a number to be connected with the lawyer.

However, in 2006 FEO 17, the legal advertisement at issue was an unsolicited communication about a lawyer's services and required an immediate response from the potential client.

2011 FEO 8 addresses utilizing live chat support service on law firm websites. The opinion concludes that lawyers may use a live chat support service on the lawyer's website even though a live chat communication constitutes a real-time electronic contact. In the opinion, the website visitor made the initial contact with the firm. Similar to the ABC Texting service, the website visitor described in 2011 FEO 8 chose to visit the law firm's website and has the ability to ignore the live chat button or to indicate with a click that he or she wishes to participate in a live chat session.

In the instant scenario, the subscriber voluntarily registered with ABC Texting expecting to receive various advertisements from various service providers, including lawyers. In addition, the subscriber is given the opportunity to accept or decline Lawyer's offer to contact the subscriber. "It is important to note that the prohibition in Rule 7.3(a) applies only to lawyer-initiated contact. Rule 7.3 does not prohibit real-time electronic contact that is initiated by a potential client." 2001 FEO 8. The potential for abuse that Rule 7.3 is intended to guard against is not present. Therefore, because the subscriber consents to a phone call, Lawyer may call subscriber and offer legal services.

Inquiry #3:

Does the answer to Inquiry #2 change if the second text message from ABC Texting includes Lawyer's phone number and an invitation to call Lawyer?

Opinion #3:

No. ■

Endnote

1. The assumption in this inquiry is that this is not a targeted communication to someone known to be in need of legal services in a particular matter. Such communications must comply with Rule 7.3(c).

Speakers Bureau Now Available

Speakers on topics relative to the North Carolina State Bar's regulatory mission are available at no charge for presentations in North Carolina to lawyers and to members of the public. Topics include the State Bar's role in the regulation of the legal profession; the State Bar's disciplinary process; how the State Bar provides ethical guidance to lawyers; the Lawyer Assistance Program of the State Bar; the Client Security Fund; IOLTA: Advancing Justice for more than 20 Years; LegalZoom, HB 436, and updating concepts of the practice of law; and anti-trust questions for the regulation of the practice of law in North Carolina. Requests for speakers on other relevant topics are welcomed. For more information, call or email Lanice Heidbrink at the State Bar: 919-828-4630 or lheidbrink@ncbar.gov.

The purpose of the Speakers Bureau is to provide information about the State Bar's regulatory functions to members of the Bar and members of the public. Speakers will not be asked to satisfy the requirements for CLE accreditation; therefore, sponsors of CLE programs are encouraged to look elsewhere for presenters.

Amendments Pending Approval of the Supreme Court

At its meeting on January 27, 2017, the council of the North Carolina State Bar voted to adopt the following rule amendments for transmission to the North Carolina Supreme Court for approval (for the complete text of the proposed rule amendments see the Winter 2016 edition of the *Journal*):

Proposed Amendments to the Rule on Judicial District Bar Dues

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

The proposed amendments shorten the time that district bars have to report delinquent district bar dues from 12 months to six months after the delinquency date.

Proposed Amendments to the Rule on Formal Hearings Before the DHC

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

The proposed amendments to the rule on formal hearings before the Disciplinary Hearing Commission (DHC) allow media coverage of DHC hearings subject to the following conditions: absent a showing of good cause, the media will be permitted to broadcast and photograph formal DHC hearings; the chair of a hearing panel who denies a request for such access must make findings of fact supporting that decision; a request for media access must be filed no less than 48 hours before the hearing is scheduled to begin; the chair of the hearing panel must rule on such motion no less than 24 hours before the hearing is scheduled to begin; and, except as set forth in the rule, Rule 15 of the General Rules of Practice for the Superior and District Courts will apply to electronic media coverage of DHC hearings.

Proposed Amendment to the Certification Standards for the Criminal Law Specialty

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

The proposed amendment to the standards for board certification in criminal law changes the requirements relative to peer review from opposing counsel and judges in cases recently tried by the applicant.

Proposed Amendments to the Regulations for PCs and PLLCs

27 N.C.A.C. 1E, Section .0100, Regulations for Organizations Practicing Law

The proposed amendments eliminate the requirement that a notice to show cause be issued to a professional corporation or professional limited liability company for failure to apply for renewal of a certificate of registration. The applicable statutes, N.C. Gen. Stat. §§55B-11 and 55B-13, do not require such notice prior to the suspension or revocation of a certificate of registration.

Proposed Amendments to the Rules of Professional Conduct

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

Proposed amendments to two Rules of Professional Conduct require a prosecutor or a lawyer to disclose post-conviction information or evidence that may exonerate a convicted defendant. The proposed amendments to Rule 3.8, Special Responsibilities of a Prosecutor, set forth specific disclosure requirements for a prosecutor who comes into possession of new, credible information or evidence creating a reasonable likelihood that a defendant was wrongfully convicted. Proposed new Rule 8.6, Information About a Possible Wrongful Conviction, sets forth comparable requirements for all other members of the Bar. In addition, the comment to Rule 1.6, Confidentiality, is amended to add a proposed cross-reference to new Rule 8.6.

At the time of adoption by the council, corrections were made to proposed new Rule 8.6(b)(2) and (3) to simplify that a lawyer may not disclose information if the disclosure would harm the interests of a former client as well as a current client.

Highlights

· Council sends to NC Supreme Court for approval amendments to the Rules of Professional Conduct specifying a lawyer's duties when in receipt of information about a wrongful conviction.
· Council approves the publication of rules creating a new specialty in privacy and information security law.
· Four Rules of Professional Conduct are amended by the Council and published for comment.

The Process

Proposed amendments to the Rules of the North Carolina State Bar are published for comment in the *Journal*. They are considered for adoption by the council at the succeeding quarterly meeting. If adopted, they are submitted to the North Carolina Supreme Court for approval. Amendments become effective upon approval by the Court. **Unless otherwise noted, proposed additions to rules are printed in bold and underlined; deletions are interlined.**

Comments

The State Bar welcomes your comments regarding proposed amendments to the rules. Please send your written comments to L. Thomas Lunsford II, The North Carolina State Bar, PO Box 25908, Raleigh, NC 27611.

Proposed Amendments

At its meeting on January 27, 2017, the council voted to publish the following proposed rule amendments for comment from the members of the Bar:

Proposed Amendments to the Rule on Prehearing Procedure in Proceedings Before the Disciplinary Hearing Commission

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

The proposed amendments require a settlement conference with the parties before a DHC panel may reject a proposed settlement agreement.

.0115 Proceedings Before the Disciplinary Hearing Commission: Pleadings and Prehearing Procedure

(a) **Complaint and Service - ...**

(i) **Settlement** - The parties may meet by mutual consent prior to the hearing to discuss the possibility of settlement of the case or the stipulation of any issues, facts, or matters of law. Any proposed settlement of the case will be subject to the approval of the hearing panel. **The hearing panel may reject a proposed settlement agreement but only after conducting a conference with the parties. The chairperson of the hearing panel will notify the counsel and the defendant of the date, time, and venue (e.g., in person, telephone, videoconference) of the conference.** If**, after the conference,** the **first hearing** panel rejects a proposed settlement, another hearing panel must be empanelled to try the case, unless all parties consent to proceed with the original **hearing** panel. The parties may submit a proposed settlement to a second hearing panel **and may, upon the agreement of both parties, request a conference with the panel,** but the parties shall not have the right to request a third hearing panel if the proposed settlement is rejected by the second hearing panel. The second hearing panel shall either accept the settlement proposal or hold a hearing upon the allegations of the complaint.

(j) Settlement Conference - ...

Proposed Amendment to IOLTA's Fiscal Responsibility Rule

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

The proposed amendment clarifies that the funds of IOLTA may only be used for the purposes specified in the IOLTA rules.

.1313 Fiscal Responsibility

All funds of the board shall be considered funds of the North Carolina State Bar, with the beneficial interest in those funds being vested in the board for grants to qualified applicants in the public interest, less administrative costs. These funds shall be administered and disbursed by the board in accordance with rules or policies developed by the North Carolina State Bar and approved by the North Carolina Supreme Court. The funds shall be used **only** to pay the administrative costs of the IOLTA program and to fund grants approved by the board under the four categories approved by the North Carolina Supreme Court as outlined above.

(a) Maintenance of Accounts: Audit - ...

Proposed Amendment to the Rule on Uses of the Client Security Fund

27 N.C.A.C. 1D, Section .1400, Rules Governing the Administration of the Client Security Fund of the North Carolina State Bar

The proposed amendment clarifies that the Client Security Fund may only be used for the purposes specified in the rule.

.1416 Appropriate Uses of the Client Security Fund

(a) The board may use or employ the Fund for ~~any of~~ **only** the following purposes within the scope of the board's objectives as heretofore outlined:

(1) to make reimbursements on approved applications as herein provided;

(2) to purchase insurance to cover such losses in whole or in part as is deemed appropriate;

(3) to invest such portions of the Fund as may not be needed currently to reimburse losses, in such investments as are permitted to fiduciaries by the General Statutes of North Carolina;

(4) to pay the administrative expenses of the board, including employment of counsel to prosecute subrogation claims.

(b) ...

Proposed New Inactive Status Rule in The Plan of Legal Specialization

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

The proposed new rule enables certified specialists with special circumstances to be placed on inactive status for a period of time and to regain their status as certified specialists upon satisfying certain conditions.

.1727 Inactive Status

(a) Petition for Inactive Status. The board may transfer a certified specialist to inactive status upon receipt of a petition, on a form approved by the board, demonstrating that the petitioner satisfies the following conditions:

(1) Certified for five years or more;

(2) Special circumstances unique to the specialist constituting undue hardship or other reasonable basis for exempting the specialist from the substantial involvement standard for continued certification; including, but not limited to, marriage to active-duty military personnel requiring frequent relocation, active duty in the military reserves, disability lasting a total of six months or more over a 12-month period of time, and illness of an immediate family member requiring leaves of absence from work in excess of six months or more over a 12-month period of time; and

(3) Discontinuation of all representations of specialist certification in all communications about the lawyer's practice.

(b) Duration of Inactive Status. If the petitioner qualifies, inactive status shall be granted by the board for a period of not more than one year at a time. No more than three years of inactive status, whether consecutive or periodic, shall be granted to any certified specialist.

(c) Designation During Inactive Status. During the period of inactive status, the certified specialist shall be listed in the board's records as inactive. An inactive specialist shall not represent that he or she is certified during any period of inactive status; however, an inactive specialist may advertise or communicate prior dates of certification (e.g., Board Certified Specialist in Family Law 1987-2003).

(d) Annual Requirements. During the period of inactive status, the specialist shall not be required to satisfy the substantial involvement standard for continued certification in the specialty or to pay any fees; however, the specialist shall be required to satisfy the continuing legal education (CLE) standard for continued certification in the specialty. If a five-year period of certification ends during a year of inactive status, application for continued certification pursuant to Rule .1721 of this subchapter shall be deferred until return to active status.

(e) Return to Active Status. To return to active status as a certified specialist, an inactive specialist shall petition the board on a form approved by the board. The inactive specialist shall be reinstated to active status upon demonstration that he or she satisfied the CLE standard for continued certification in the specialty and the recommendation of the specialty committee. Passage of a written examination in the specialty shall not be required unless the inactive specialist failed to satisfy the CLE standard for continued certification during the period of inactivity.

(f) The right to petition for inactive status pursuant to this rule is in addition to the right to request a waiver of substantial involvement allowed by Rule .1721(c) of this subchapter.

Proposed Standards for New Specialty in Privacy and Information Security Law

27 N.C.A.C. 1D, Section .3300, Certification Standards for the Privacy and Information Security Law Specialty

The proposed new section of the specialization rules creates a specialty in privacy and information security law and establishes the standards for certification in that specialty.

.3301 Establishment of Specialty Field

The North Carolina State Bar Board of Legal Specialization (the board) hereby designates privacy and information security law as a specialty for which certification of specialists under the North Carolina Plan of Legal Specialization (see Section .1700 of this subchapter) is permitted.

.3302 Definition of Specialty

The specialty of privacy and information security law encompasses the laws that regulate the collection, storage, sharing, monetization, security, disposal, and permissible uses of personal or confidential information about individuals, businesses, and organizations, and the security of information regarding individuals and the information systems of businesses and organizations. The specialty also includes legal requirements and risks related to cyber incidents, such as external intrusions into computer systems, and cyber threats, such as governmental information sharing programs.

.3303 Recognition as a Specialist in Privacy and Information Security Law

If a lawyer qualifies as a specialist in privacy and information security law by meeting the standards set for the specialty, the lawyer shall be entitled to represent that he or she is a "Board Certified Specialist in Privacy and Information Security Law."

.3304 Applicability of Provisions of the North Carolina Plan of Legal Specialization

Certification and continued certification of specialists in privacy and information security law shall be governed by the provisions of the North Carolina Plan of Legal Specialization (see Section .1700 of this subchapter) as supplemented by these standards for certification.

.3305 Standards for Certification as a Specialist in Privacy and Information Security Law

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

(a) Licensure and Practice - An applicant shall be licensed and in good standing to practice law in North Carolina as of the date of application. An applicant shall continue to be licensed and in good standing to practice law in North Carolina during the period of certification.

(b) Substantial Involvement - An applicant shall affirm to the board that the applicant has experience through substantial involvement in privacy and information security law.

(1) Substantial involvement shall mean that during the five years immediately preceding the application, the applicant devoted an average of at least 400 hours a year to the practice of privacy and information security law but not less than 300 hours in any one year.

(2) Practice shall mean substantive legal work in privacy and information security law done primarily for the purpose of providing legal advice or representation, including the activities described in paragraph (3), or a practice equivalent as described in paragraph (4).

(3) Substantive legal work in privacy and information security law includes, but is not limited to, representation on compliance, transactions and litigation relative to the laws that regulate the collection, storage, sharing, monetization, security, disposal, and permissible uses of personal or confidential information about individuals, businesses, and organizations. Practice in this specialty requires the application of information technology principles including current data security concepts and best practices. Legal work in the specialty includes, but is not limited to, knowledge and application of the following: data breach response laws, data security laws, and data disposal laws; unauthorized access to information systems, such as password theft, hacking, and wiretapping, including the Stored Communications Act, the Wiretap Act, and other anti-interception laws; cyber security mandates; website privacy policies and practices, including the Children's Online Privacy Protection Act (COPPA); electronic signatures and records, including the Electronic Signatures in Global and National Commerce Act (E-SIGN Act) and the Uniform Electronic Transactions Act (UETA); e-commerce laws and contractual legal frameworks related to privacy and data security such as Payment Card Industry Data Security Standards (PCI-DSS) and the NACHA rules; direct marketing, including the CAN-SPAM Act, Do-Not-Call, and Do-Not-Fax laws; international privacy compliance, including the European Union data protection requirements; social media policies and regulatory enforcement of privacy-related concerns pertaining to the same; financial privacy, including the Gramm-Leach-Bliley Act, the Financial Privacy Act, the Bank Secrecy Act, and other federal and state financial laws, and the regulations of the federal financial regulators including the SEC, CFPB, and FinCEN; unauthorized transaction and fraudulent funds transfer laws, including the Electronic

Funds Transfer Act and Regulation E, as well as the Uniform Commercial Code; credit reporting laws and other "background check" laws, including the Fair Credit Reporting Act; identity theft laws, including the North Carolina Identity Theft Protection Act and the Federal Trade Commission's "Red Flags" regulations; health information privacy, including the Health Information Portability and Accountability Act (HIPAA); educational privacy, including the Family Educational Rights and Privacy Act (FERPA) and state laws governing student privacy and education technology; employment privacy law; and privacy torts.

(4) "Practice equivalent" shall mean:

(A) Full-time employment as a compliance officer for a business or organization for one year or more during the five years prior to application may be substituted for an equivalent number of the years of experience necessary to meet the five-year requirement set forth in Rule .3305(b)(1) if at least 25% of the applicant's work was devoted to privacy and information security implementation.

(B) Service as a law professor concentrating in the teaching of privacy and information security law for one year or more during the five years prior to application may be substituted for an equivalent number of years of experience necessary to meet the five-year requirement set forth in Rule .3305(b)(1);

(c) Continuing Legal Education - To be certified as a specialist in privacy and information security law, an applicant must have earned no less than 36 hours of accredited continuing legal education credits in privacy and information security law and related fields during the three years preceding application. The 36 hours must include at least 18 hours in privacy and information security law; the remaining 18 hours may be in related-field CLE or technical (non-legal) continuing education (CE). At least six credits each year must be earned in privacy and information security law. Privacy and information security law CLE includes but is not limited to courses on the subjects identified in Rule .3302 and Rule .3305(b)(3) of this subchapter. A list of the topics that qualify as related-field CLE and technical CE shall be maintained by the board on its official website.

(d) Peer Review - An applicant must make a satisfactory showing of qualification through peer review. An applicant must provide the names of ten lawyers or judges who are familiar with the competence and qualification of the applicant in the specialty field to serve as references for the applicant. Completed peer reference forms must be received from at least five of the references. All references must be licensed and in good standing to practice law in North Carolina or another jurisdiction in the United States; however, no more than five references may be licensed in another jurisdiction. References with legal or judicial experience in privacy and information security law are preferred. An applicant consents to confidential inquiry by the board or the specialty committee to the submitted references and other persons concerning the applicant's competence and qualification.

(1) A reference may not be related by blood or marriage to the applicant nor may the reference be a colleague at the applicant's place of employment at the time of the application. A lawyer who is in-house counsel for an entity that is the applicant's client may serve as a reference.

(2) Peer review shall be given on standardized forms mailed by the board to each reference. These forms shall be returned to the board and forwarded by the board to the specialty committee.

(e) Examination - An applicant must pass a written examination designed to demonstrate sufficient knowledge, skills, and proficiency in the field of privacy and information security law to justify the representation of special competence to the legal profession and the public.

(1) Terms - The examination shall be given at least once a year in written form and shall be administered and graded uniformly by the specialty committee or by an organization determined by the board to be qualified to test applicants in privacy and information security law.

(2) Subject Matter - The examination shall test the applicant's knowledge and application of privacy and information security law.

.3306 Standards for Continued Certification as a Specialist

The period of certification is five years. Prior to the expiration of the certification period, a certified specialist who desires continued certification must apply for continued certification within the time limit described in Rule .3306(d) below. No examination will be required for continued certification. However, each applicant for continued certification as a specialist shall comply with the specific requirements set forth below in addition to any general standards required by the board of all applicants for continued certification.

(a) Substantial Involvement - The specialist must demonstrate that, for each of the five years preceding application for continuing certification, he or she has had substantial involvement in the specialty as defined in Rule .3305(b) of this subchapter.

(b) Continuing Legal Education - The specialist must earn no less than 60 hours of accredited CLE credits in privacy and information security law and related fields during the five years preceding application for continuing certification. Of the 60 hours of CLE, at least 30 hours shall be in privacy and information security law, and the balance of 30 hours may be in related field CLE or technical (non-legal) CE. At least six credits each year must be earned in privacy and information security law. A list of the topics that qualify as related-field CLE and technical CE shall be maintained by the board on its official website.

(c) Peer Review - The specialist must comply with the requirements of Rule .3305(d) of this subchapter.

(d) Time for Application - Application for continued certification shall be made not more than 180 days, nor less than 90 days, prior to the expiration of the prior period of certification.

(e) Lapse of Certification - Failure of a specialist to apply for continued certification in a timely fashion will result in a lapse of certification. Following such a lapse, recertification will require compliance with all requirements of Rule .3305 of this subchapter, including the examination.

(f) Suspension or Revocation of Certification - If an applicant's certification was suspended or revoked during a period of certification, the application shall be treated as if it were for initial certification under Rule .3305 of this subchapter.

.3307 Applicability of Other Requirements

The specific standards set forth herein for certification of specialists in privacy and information security law are subject to any general requirement, standard, or procedure adopted by the board applicable to all applicants for certification or continued certification.

Proposed New Retired Status Rule in The Plan for Certification of Paralegals

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

The proposed new rule creates a retired status for certified paralegals subject to certain conditions.

.0124 Retired Certified Paralegal Status

(a) Petition for Status Change - The board shall transfer a certified paralegal to Retired Certified Paralegal status upon receipt of a petition, on a form approved by the board, demonstrating that the petitioner has satisfied the following conditions:

(1) Certified for five years or more;

(2) At least 55 years of age or older;

(3) Discontinued all work as a paralegal;

(4) Paid all fees owed to the board at the time of filing the petition; and

(5) The prohibitions on certification specified in Rule .0119(c) of this subchapter are not applicable to or formally alleged against the petitioner.

(b) Designation During Retired Status - During a period of retired status, the certified paralegal may represent that he or she is a "North Carolina State Bar Retired Certified Paralegal" or an appropriate variation thereof.

(c) No Annual Requirements - During a period of retired status, the paralegal shall not be required to file an annual renewal application pursuant to Rule .0120 of this subchapter, to pay an annual renewal fee, or to satisfy the annual continuing education requirements set forth in Rule .0120.

(d) Termination of Status - Retired certified paralegal status may continue for a period of time not to exceed a total of five years (or 60 months). At the end of five years (or 60 months) of retired status, certification will lapse and, to become a certified paralegal, the paralegal must satisfy all requirements for initial certification set forth in Rule .0119(a). A certified paralegal's status may be changed from active to retired multiple times provided the five-year (60 months) period of retired status is not exceeded.

(e) Return to Active Status - A retired certified paralegal may return to active status at any time during the five-year period set forth in paragraph (d). To reactivate the "certified paralegal" credential, the certified paralegal shall file a petition with the board, on a form approved by the board, and shall pay a reactivation fee of $50. Upon transfer to active status by the board, the certified paralegal may hold herself or himself out as a "North Carolina State Bar Certified Paralegal" or an appropriate variation thereof. Thereafter, the certified paralegal shall complete continuing education and file annual renewal applications as required by Rule .0120 of this subchapter.

(f) Return to Work as Paralegal - A retired certified paralegal must file a petition for return to active status within 30 days of returning to work as a paralegal. Failure to do so will result in revocation of certification.

Proposed Amendments to the Rules of Professional Conduct

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

Proposed amendments to Rule 1.3, Diligence, and Rule 8.4, Misconduct, of the Rules of Professional Conduct clarify the standards for imposition of professional discipline under each rule. The proposed amendments to Rule 7.2, Advertising, and Rule 7.3, Direct Contact with Potential Clients, explain the terms "electronic communication(s)" and "real-time electronic contact" as used in the rules and alert lawyers to state and federal regulation of electronic communications.

Rule 1.3 Diligence

A lawyer shall act with reasonable diligence and promptness in representing a client.

Comment

[1] ...

...

Distinguishing Professional Negligence

[6] ...

[7] Conduct ~~sufficient to warrant the imposition of~~ **warranting the imposition of** professional discipline **under the rule** is ~~typically~~ characterized by the element of intent ~~or scienter~~ manifested when a lawyer knowingly or recklessly disregards his or her obligations. Breach of the duty of diligence sufficient to warrant professional discipline occurs when a lawyer consistently fails to carry out the obligations that the lawyer has assumed for his or her clients. A pattern of delay, procrastination, carelessness, and forgetfulness regarding client matters indicates a knowing or reckless disregard for the lawyer's professional duties. For example, a lawyer who habitually misses filing deadlines and court dates is not taking his or her professional responsibilities seriously. A pattern of negligent conduct is not excused by a burdensome case load or inadequate office procedures.

Rule 7.2 Advertising

(a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through written, recorded or electronic communication, including public media.

(b) ...

Comment

[1] ...

[5] "Electronic communication(s)," as used in Section 7 of the Rules of Professional Conduct, refers to the transfer of writing, signals, data, sounds, images, signs or intelligence via an electronic device or over any electronic medium. Examples of electric communications include, but are not limited to, websites, email, text messages, social media messaging and image sharing. A lawyer who sends electronic communications to advertise or market the lawyer's professional services must comply with these Rules and with any state or federal restrictions on such communications. *See, e.g.*, N.C. Gen. Stat. §75-104; Telephone Consumer Protection Act, 47 U.S.C. §227; and 47 CFR 64.

~~[5]~~ **[6]** ...

[Renumbering remaining paragraphs.]

Rule 7.3 Direct Contact With Potential Clients

(a) A lawyer shall not by in-person, live telephone, or real-time electronic contact solicit professional employment from a potential client when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted:

(1) is a lawyer; or

(2) has a family, close personal, or prior professional relationship with the lawyer.

(b) ...

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

(1) Written Communications. ...

(2) Electronic Communications. The advertising notice shall appear in the "in reference" or subject box of the address or header section of the communication. No

other statement shall appear in this block. The advertising notice shall also appear at the beginning and ending of the electronic communication, in a font as large as or larger than any other printing in the body of the communication or in any masthead on the communication. If more than one color or type of font is used in the electronic communication, then the font of the advertising notice shall match in color, type, and size the largest and widest of the fonts. Nothing in the electronic communication shall be more conspicuous than the advertising notice.

(3) Recorded Communications. ...

(d) ...

Comment

[1] ...

[9] See Rule 7.2, cmt. [5] for the definition of "electronic communication(s)" as used in paragraph (c)(2) of this rule. A lawyer may not send electronic or recorded communications if prohibited by law. *See, e.g.*, N.C. Gen. Stat. §75-104; Telephone Consumer Protection Act 47 U.S.C. §227; and 47 CFR 64. "Real-time electronic contact" as used in paragraph (a) of this rule is distinct from the types of electronic communication identified in Rule 7.2, cmt. [5]. Real-time electronic contact includes, for example, video telephony (e.g., FaceTime) during which a potential client cannot ignore or delay responding to a communication from a lawyer.

~~[9]~~ **[10]** ...

Rule 8.4 Misconduct

It is professional misconduct for a lawyer to:

(a) ...

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation **that reflects adversely on the lawyer's fitness as a lawyer**;

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

(e) ...

Comment

[1] ...

[2] ...A lawyer's dishonesty, fraud, deceit, or misrepresentation is not mitigated by virtue of the fact that the victim may be the lawyer's partner or law firm. A lawyer who steals funds, for instance, is guilty of ~~the most a~~ serious disciplinary violation regardless of whether the victim is the lawyer's employer, partner, law firm, client, or a third party.

[3] ...

[4] A showing of actual prejudice to the administration of justice is not required to establish a violation of paragraph (d). Rather, it must only be shown that the act had a reasonable likelihood of prejudicing the administration of justice. For example, in *State Bar v. DuMont*, 52 N.C. App. 1, 277 S.E.2d 827 (1981), modified on other grounds, 304 N.C. 627, 286 S.E.2d 89 (1982), the defendant was disciplined for advising a witness to give false testimony in a deposition even though the witness corrected his statement prior to trial. **Conduct warranting the imposition of professional discipline under paragraph (d) is characterized by the element of intent or some other aggravating circumstance.** The phrase "conduct prejudicial to the administration of justice" in paragraph (d) should be read broadly to proscribe a wide variety of conduct, including conduct that occurs outside the scope of judicial proceedings. In *State Bar v. Jerry Wilson*, 82 DHC 1, for example, a lawyer was disciplined for conduct prejudicial to the administration of justice after forging another individual's name to a guarantee agreement, inducing his wife to notarize the forged agreement, and using the agreement to obtain funds.

[5] ... ■

Trust Accounting (cont.)

not entrusted for the payment of legal fees).

Division of fee with former firm: 03 FEO 11, 08 FEO 8 *(lawyer must act honestly with former firm; employment agreements on division of fees must be reasonable and not penalize withdrawing lawyer).*

Disbursement to **medical providers** in absence of lien: 01 FEO 11 *(lawyer owes duty to client, but may not unilaterally decide a dispute between client and medical provider in the absence of a lien).*

Transfer of disputed fees from trust account to lawyer upon certain conditions: 06 FEO 16 *(under certain circumstances, lawyer may consider a dispute with client resolved and transfer fees out of trust account).*

Real Estate

Audit of real estate trust account by title insurer: 08 FEO 13 *(audit is permissible with certain conditions).*

Disbursements incident to real property **closings:** RPC 86 *(discusses earnest money paid outside of closing and representation of the seller after closing).*

E-recording, interim account for costs of: 05 FEO 11 *Note: N.C.G.S. 45A has since been amended to allow disbursement of recording costs to e-recording company before recording.*

Real estate closing, disbursement against **provisional credit:** RPC 191 *(may disburse on provisional credit if deposit instrument is listed in Good Funds Settlement Act, with certain conditions).*

Depositing client's funds for **recording costs:** RPC 47 *(there are no* de minimis *amounts in trust accounting).*

Lawyer as Escrow Agent

Dispute over disbursement, representation of one party pursuant to waiver of future conflict: 99 FEO 8 *(lawyer may represent both parties in a residential real estate transaction and subsequently only one party in an escrow dispute under certain conditions).*

Duties as **escrow agent:** 98 FEO 11 *(lawyer as escrow agent owes fiduciary duties to both parties and cannot advocate for either party until the fiduciary duty ends).*

Disbursement of **escrowed funds, dispute** over: RPC 66 *(lawyer acting as escrow agent may not disburse funds in a manner not contemplated by escrow agreement without consent of both parties).*

Miscellaneous

Financing litigation: 00 FEO 04 *(lawyer may acknowledge finance company's interest in settlement under certain circumstances).*

Out-of-state trust accounts: RPC 96 *(must obtain client consent to deposit client funds in out-of-state trust account; see also requirement that funds must be held in NC IOLTA accounts).*

Nonprofit **public interest law** corporation, legal fees collected by: 13 FEO 9 *(public interest law organizations must still follow trust accounting rules).*

Stolen trust account funds, duty when third party responsible: 15 FEO 6 *(lawyer may have a duty to replenish stolen funds under certain circumstances).*

The complete text of these ethics opinions can be found at online at ncbar.gov. ■

Client Security Fund Reimburses Victims

At its January 26, 2017, meeting, the North Carolina State Bar Client Security Fund Board of Trustees approved payments of $287,272.88 to ten applicants who suffered financial losses due to the misconduct of North Carolina lawyers.

The payments authorized were:

1. An award of $13,000 to a former client of Garey M. Ballance of Warrenton. The board determined that Ballance was retained to handle a client's personal injury claim for injuries suffered when the client was assaulted by a law enforcement officer while being taken into custody. Because he was enjoined from handling clients' funds prior to being retained, Ballance associated another attorney who could deposit any settlement obtained in the matter. Ballance obtained a settlement which was deposited into the other attorney's trust account. That attorney subsequently wrote checks to Ballance that included funds that should have been disbursed to the client's medical providers with the balance to be paid to the client. Ballance failed to make all the proper disbursements of the funds. Ballance was disbarred on November 13, 2015. The board previously reimbursed 12 other Ballance clients a total of $6,806.

2. An award of $100,000 to a trust that suffered a loss caused by Thomas F. Foster of High Point. The board determined that Foster was appointed successor trustee of a marital trust. Foster embezzled from the trust. Foster was disbarred on April 17, 2015. The board previously reimbursed one other Foster client a total of $63,706.

3. An award of $7,000 to former clients of Clifton J. Gray III of Lucama. The board determined that Gray was retained to represent a couple on criminal charges. Gray failed to provide any valuable legal services in either case for the fees paid. Gray was suspended on December 15, 2016.

4. An award of $7,900 to a former client of Clifton J. Gray III. The board determined that Gray was retained to represent a client on criminal charges. Gray failed to provide any valuable legal services for the fee paid.

5. An award of $12,300 to a former client of Clifton J. Gray III. The board determined that Gray was retained to represent a client of criminal charges. Gray failed to provide any valuable legal service for the fee paid.

6. An award of $1,000 to a former client of Clifton J. Gray III. The board determined that Gray was retained to represent a client on a criminal charge. Gray failed to provide any valuable legal service for the fee paid.

7. An award of $15,000 to a former client of Thomas S. Hicks of Wilmington. The board determined that Hicks was retained to file a motion for appropriate relief for a client convicted of a criminal charge. Hicks failed to provide any valuable legal service for the fee paid. Hicks was suspended on May 4, 2016. The board previously reimbursed two other Hicks clients a total of $3,800.

8. An award of $100,000 to a former client of Don Sam Neill of Hendersonville. The board determined that Neill became the personal representative of an estate for which the client and her husband were beneficiaries. Neill filed three annual accountings showing distributions to the couple. The couple received a portion of the funds, and Neill talked the couple into leaving the remainder with him for him to invest for them. Neill never invested the funds as instructed. Neill used the funds for his own benefit. Neill was disbarred on June 17, 2011. The board previously reimbursed two other clients a total of $200,000.

9. An award of $26,072.88 to a former client of R. Alfred Patrick of Winterville. The board determined that Patrick was retained by a client to handle a personal injury claim. Patrick settled the matter, but failed to make any of the proper disbursements from the settlement proceeds. Due to misappropriation, Patrick's trust account balance is insufficient to pay all his client obligations. Patrick was suspended on June 22, 2016. The board previously reimbursed one other Patrick client a total of $32,644.33.

10. An award of $5,000 to a former client of Alfreda Williamson of Sims. The board determined that Williamson was retained by a client to seek a sentence reduction. Williamson failed to provide any valuable legal services for the fee paid prior to being disbarred. Williamson was disbarred on October 16, 2003. The board previously reimbursed two other Williamson clients a total of $3,725. ■

Law School Briefs

Campbell University School of Law

Ben and Patrice Thompson endow Achievement Scholarship—With a generous gift of $100,000, Ben and Patrice Thompson have guaranteed the future availability of the recently created Achievement Scholarship. A Double Camel and law school charter class member, Thompson has previously served as the Campbell University Board of Trustees chair and a member of the Campbell Law Board of Visitors.

Beginning with the 2016-17 academic year, The Ben & Patrice Thompson Achievement Scholarship will be offered annually to one high-achieving student who has overcome significant obstacles in life, such as socioeconomic or educational hardships, disabilities, or other major challenges. The scholarship will be automatically renewable each year provided the student remains in good academic standing. It marks one of Campbell Law's four competitive full-tuition scholarships.

Taylor joins Campbell Law as director of the Career & Professional Development Center—Campbell Law Dean J. Rich Leonard has announced the addition of Kala Taylor to the law school's senior staff. Taylor will serve Campbell Law students and alums as the new director of the Career & Professional Development Center. She boasts nearly ten years of career and professional development experience, including performing in a variety of capacities at The University of North Carolina at Greensboro since 2013. She most recently served as the associate director of career development at UNCG. Additionally, Taylor spends considerable time as a purpose coach for individuals managing career transitions.

Campbell Law sponsors First Lady's Luncheon for Kristin Cooper (L '82)—Campbell Law School served as the event sponsor for the 2017 First Lady's Luncheon in honor of Kristin Cooper, wife of newly elected North Carolina Governor Roy Cooper, on Friday, January 6 at the North Carolina State Bar in downtown Raleigh. The new first lady of North Carolina graduated from Campbell Law in 1982.

Charlotte School of Law

Members of the CharlotteLaw SBA and Student Ambassadors organizations sprang into action upon hearing about the devastation left behind on the island of Haiti after Hurricane Matthew made landfall on October 4th. The student groups conducted a school-wide donation drive and collected over 600 lbs. of clothing, water, and non-perishable food items for residents of the southern regions of the country who were severely impacted by the monster storm. The donations were shipped to CharlotteLaw partners Attorney Ludwig LeBlanc and the Ceant nonprofit "dwa poi tout moun" for proper distribution.

Prior to the Thanksgiving holiday, the CharlotteLaw Trial Team made its first trek ever to upstate New York to compete in the Buffalo-Niagara Mock Trial Competition. The CharlotteLaw team beat out 32 teams and was one of four teams that advanced to the semi-final rounds. While the team did not move on to the final round, junior team member Kyle Watson, who had never competed before, brought home the best advocate award in the area of direct examination.

Choices and Champions is a free legal clinic offered to cancer patients by Novant Health along with the assistance of attorneys from Womble Carlyle Sandridge & Rice (WCSR) and Charlotte School of Law *Pro Bono* Program students. Womble Carlyle attorneys and CSL law students assist cancer patients by helping explain and prepare two very important estate planning legal documents—a health care power of attorney and a living will. Recently, Choices and Champions received the Mecklenburg County Bar's 2016 Extraordinary *Pro Bono* Service Award for Outstanding Collaborative Project.

Duke Law School

New faculty books—Several Duke Law scholars have released new works on such matters as well-being, business strategy, genetic resources, racial justice, and corporate crime. These are:

- *Capital Offenses: Business Crime and Punishment in America's Corporate Age* (W.W. Norton & Co., 2016) by Professor Samuel Buell, an expert in criminal law and the regulatory system, and a former federal prosecutor;
- *The Oxford Handbook of Well-Being and Public Policy* (Oxford University Press, 2016) co-edited by Professor Matthew Adler, director of the Duke Center for Law, Economics, and Public Policy;
- *Governing Digitally Integrated Genetic Resources, Data, and Literature: Global Intellectual Property Strategies for a Redesigned Microbial Research Commons* (Cambridge University Press, 2016) co-authored by Professor Jerome Reichman, a renowned scholar of intellectual property law;
- *Strategy Beyond Markets* (Emerald Publishing Group, 2016) a special issue in the "Advances in Strategic Management" series, co-edited by Professor John de Figueiredo who helped pioneer "beyond-market" business strategy as a field of study in the 1990s; and
- *Racial Justice and Law, Cases and Materials* (Foundation Press, 2016) co-authored by Professor Guy-Uriel Charles, the founding director of the Duke Center on Law, Race and Politics.

Sachs elected to American Law Institute—Professor Stephen E. Sachs has been elected to membership in the American Law Institute (ALI). Sachs, a scholar of civil procedure, constitutional law, Anglo-American legal history, and conflict of laws, is one of 58 individuals whose election to membership was announced by the ALI on January 9.

ALI members are distinguished lawyers, judges, and legal academics who produce scholarly work to improve the law through publication of the highly influential Restatements of the Law, model statutes, and principles of law.

Elon University School of Law

Residencies-in-practice shape student knowledge—Elon Law's first-of-its-kind resi-

dency program is sending second-year students around the world this year to learn how law is practiced and applied in courts, private firms, government agencies, nonprofits, corporations, and other law offices. The first two dozen students in Elon Law's Class of December 2017 completed their residencies over the fall trimester in cities that included Washington, Charlotte, Richmond, and Raleigh, as well as communities throughout North Carolina's Triad region. Contact the Office of Career & Student Development to learn more about hosting a resident in 2017-18: 336-279-9316 or lawcareers@elon.edu.

A milestone achievement for Elon Law alumna—A member of Elon Law's charter class made school history this month when she was sworn in as a North Carolina District Court judge. The Hon. Carrie F. Vickery (L '09), who had spent nearly eight years practicing family law for Holton Law Firm in Winston-Salem, took her oath of office on January 5 in a packed courtroom of the Forsyth County Justice Center. Vickery is the first Elon Law alum in the school's decade of existence to be elected to serve as a district court judge.

In Memory of Michael L. Rich—The Elon Law community mourned the death of Mike Rich in December when the popular professor died following a three-year fight against metastatic kidney cancer. Rich, 41, was Elon Law's Maurice Jennings Emerging Scholar and focused his research on the intersection of emerging technologies and criminal law with a particular interest in the way those technologies prevent criminal conduct. He is survived by his wife, Amy Minardo, and two young daughters.

In Memoriam

Jasper B. Allen Jr.
Burlington, NC

Edwin B. Aycock Jr.
Greenville, NC

Samuel E. Aycock
Morganton, NC

Paul Buckner Bell
Charlotte, NC

Ronald Gene Braswell
Goldsboro, NC

E. Maurice Braswell
Fayetteville, NC

Max Sanderlin Busby
Edenton, NC

Wayne Everett Crumwell
Reidsville, NC

Fred Folger Jr.
Mount Airy, NC

Robert Louis Fuerst
Raleigh, NC

Thomas Albee Fulton Jr.
Pittsboro, NC

John Walter Gambill
Wilkesboro, NC

Joseph Williams Hart
Winston-Salem, NC

Reid Garrett Hinson
Charlotte, NC

Knox Vaughan Jenkins Jr.
Four Oaks, NC

W. T. Joyner Jr.
Raleigh, NC

Matthew David Kilgus
Charlotte, NC

Antonia Lawrence
Rocky Mount, NC

Fred Elvin Lewis III
Mount Airy, NC

Gary Lewis Loflin
Charlotte, NC

Jennifer Horn Maher
Wendell, NC

William Henry McCullough
Raleigh, NC

George John Miller
Charlotte, NC

Robert Anthony Mineo
Raleigh, NC

E. James Moore North
North Wilkesboro, NC

Harrell Powell Jr.
Winston-Salem, NC

Rick D. Rhodes
Jacksonville, NC

Marquis D. Street
Greensboro, NC

James R. Trotter
Raleigh, NC

Thomas David Zweigart
Raleigh, NC

North Carolina Central School of Law

NCCU Law launched the Intellectual Property Law Institute (IPLI) just over one year ago. More than 100 IP attorneys gathered when NCCU Law hosted the United States Patent and Trademark Office (USPTO) Fall Roadshow for the inaugural event on November 6, 2015. Various topics were discussed, including the USPTO's new campaign—The Enhanced Patent Quality Initiative.

On September 8, 2016, Mr. Gautam Prakash led a Careers Panel for NCCU law students. Prakash is assistant coordinator for the USPTO's Patent *Pro Bono* Program. He has 15 years of experience with the USPTO as a primary examiner and patent agent. The following day, the Triangle Intellectual Property Law Association held a luncheon at the law school, themed "Performing *Pro Bono* Practice for Patent and IP Clients."

On September 15, 2016, William G. Pagán—award-winning patent attorney, former IBM master inventor, and *pro bono* volunteer—met with members of IPLI and discussed patent practice and the Patent Bar. Pagán graduated from NCCU Law as valedictorian of the evening program. As an IBM master inventor, his inventions have been acquired by some of the world's most reputable technology companies, including IBM, Google, Lenovo, Toshiba, Twitter, Alibaba, and Activision.

The USPTO returned October 24, 2016, to discuss career opportunities within the agency. Guest speaker Gerard Taylor encouraged students to investigate career opportunities with the USPTO, which ranked first out of 300 federal agencies in Partnership for Public Service's 2013 survey of "Best Places to Work in the Federal Government."

Storied faculty member and inaugural IPLI Director Charles Smith retired in October 2016. On December 1, 2016, he was succeeded by Professor Brenda Reddix-Smalls, a seasoned litigator with IP expertise. NCCU Law also welcomes patent attorney

Maymanet Afshar, who has been hired to supervise the USPTO patent clinic, a *pro bono* clinic within IPLI.

University of North Carolina School of Law

Students learn invaluable skills working with Professor Don Hornstein on* pro bono *storm resilience project—If a storm devastates North Carolina's Outer Banks and Barrier Islands between now and June 30, some property owners will be able to fortify their houses for free, with help from a UNC School of Law *pro bono* project. The industry-leading storm-mitigation construction initiative has caught the attention of those in the nation's most prominent home—the White House. Carolina Law Professor Don Hornstein, faculty adviser to the *pro bono* project and North Carolina Insurance Underwriting Association board member, gave three White House briefings about the plan late last year.

Students excel in fall competitions—Members of Carolina Law's Holderness 3L National Negotiation Team, Josephine Kim and Nick Hanna placed first in the American Bar Association Southeast Negotiation Competition last fall. The Holderness International Moot Court Team featuring four 2L students traveled to London to compete in moot court sessions and learn about the British legal system. The 2L Broun National Trial Team ranked among the top four competing teams at the Carolinas Invitational Mock Trial Tournament.

Native American Law Students Association (NALSA) helps storm victims—After Hurricane Matthew, NALSA President Chelsea Barnes (2L) organized a supply drive and delivered nonperishable food, cleaning supplies, household items, and toys collected to help storm victims in the Lumbee tribe. NALSA has also helped the Native American community by providing *pro bono* services related to living wills and will do so this semester with Legal Aid of North Carolina in Pembroke.

Earn CLE credit at festival and more—Upcoming CLE programs include the Festival of Legal Learning, Chapel Hill, February 10-11; The ABCs of Banking Law, Charlotte, March 22; the Banking Institute, Charlotte, March 23-24; J. Nelson Young Tax Institute, Chapel Hill, April 27-28. Visit law.unc.edu/cle.

Wake Forest University School of Law

Wake Forest Law Review has published a one-of-a-kind book reproducing Volume 51 of the 2015 *Wake Forest Law Review* Symposium on Langdell and legal education reform, *Revisiting Langdell: Legal Education Reform and the Lawyer's Craft*. "Due to its importance for legal education reform and for ease of scholarly citation to the included articles, this volume is reproduced in original form," according to Professor Harold Lloyd, who helped organize the symposium along with Professor Christine Nero Coughlin (JD '90), who is also director of the law school's Legal Analysis, Research, & Writing (LAWR) program. Professor Lloyd also shepherded the publication of the book, which can be purchased on Amazon. "I hope it inspires a trend both at Wake Forest and other law schools and institutions," Lloyd says. "The symposium shows Wake Forest's deep concern for the future of legal education and its desire to lead in this area."

Professor Tanya Marsh co-authored *Real Property for the Real World: Building Skills Through Case Study*, a first-of-its-kind book which features eight in-depth case studies based on real cases, real people, real documents, and real problems. The casebook was co-written with University of Texas School of Law Professors Heather Way and Lucille Wood. "Using the case studies in the book, students are challenged to apply property doctrines prospectively and to think about identifying and addressing client problems in a way that they are not typically challenged to do so during the first year of law school," Professor Marsh says. In addition to her scholarship in real estate, Professor Marsh teaches funeral and cemetery law. She recently contributed to the national discussion on fetal burial laws, authoring an analysis of Texas's new fetal burial rules and T*he Huffington Post* blog article, "Pence's Legacy: Indiana Law Requires Burial or Cremation of Blighted Ovum." ■

John B. McMillan Distinguished Service Award

Cecil Whitley

Cecil L. Whitley received the John B. McMillan Distinguished Service Award on November 16, 2016, at the annual meeting of the Rowan County Bar. Former Bar President Ronald L. Gibson presented the award.

Whitley has 38 years of experience in criminal, traffic, and domestic law. He has written a number of manuscripts on motor vehicle law and professionalism, and has presented at several continuing legal education seminars. Whitley is a member of North Carolina Advocates for Justice and the North Carolina Bar Association. With the Rowan County Bar he has volunteered with "Ask a Lawyer Day" as well as Habitat for Humanity. Cecil also provides *pro bono* legal services to veterans in the community.

Whitley came to the practice of law with a unique perspective, having served in the United States Army as a 1st lieutenant and in active combat on the front lines during the Vietnam War. Whitley has drawn upon the lessons he learned during his military service to provide encouragement, support, and counsel to his clients, especially young men and women who find themselves in criminal trouble.

Whitley is dedicated to his community. He has partnered with Chief District Court Judge Charlie Brown to educate underage drivers during prom season on the consequences of driving while impaired. Whitley also provided advocacy and financial support for the much relied upon courthouse childcare facility.

Whitley is and has been a mentor to countless young lawyers. He shares packets of information with forms, statues, etc. to help young attorneys. He also makes an effort to be at the swearing in ceremonies of new attorneys, and invites them to lunch to talk about practicing law in a small town as well as explaining what judges, DAs, and other attorneys expect in terms of professionalism.

Whitley has defined his era by service to

his county, his community at large, and his colleagues. He is a deserving recipient of the John B. McMillan Distinguished Service Award.

Christine Cameron Roeder

Christie Speir Cameron Roeder was presented the John B. McMillan Distinguished Service Award at the WCBA luncheon/Tenth Judicial District Bar Meeting on Tuesday December 6, 2016. State Bar President Mark W. Merritt presented the award.

After receiving her law degree from the University of North Carolina at Chapel Hill, Roeder served as a research assistant for Judge John Webb at the North Carolina Court of Appeals. She then served as the assistant appellate division reporter from 1981-1984. In 1984 she joined the firm of Wyrick, Robbins, Yates, and Ponton were she practice in the real estate section until 1991.

Roeder is well known and respected in the legal community for her service as clerk of the North Carolina Supreme Court from April 1991 until June 2016. She is the only woman to have served in this capacity, and she is one of the longest serving clerks in the court's 200 year history.

As clerk, Roeder was a leader both nationally and locally. She has overseen trailblazing advancements at the Supreme Court—including the Supreme Court becoming the nation's first state appellate court to accept all documents by electronic filing, now more than 15 years ago.

She also has served in numerous national leadership roles, including president of the National Conference of Appellate Court Clerks. She is also the recipient of the organization's highest honor, the J. A. Sentell Award.

Roeder has served as the president of the Wake County Bar Association and the 10th Judicial Bar. She has also served on the board of the North Carolina Child Advocacy Institute, the National Advisory Board for the Court Services Division of the National Center of State Courts, and the North Carolina Board of Corrections

Roeder is a highly deserving recipient of the John B. McMillan Distinguished Service Award.

Leo Daughtry

Namon Leo Daughtry received the John B. McMillan Distinguished Service award on December 9, 2016, at the Johnston County Bar's holiday dinner and dance. John M. Silverstein, president-elect of the North Carolina State Bar, presented the award. Root Edmonson, deputy counsel with the State Bar and counsel to the Client Security Fund, was also present for the award presentation.

Daughtry graduated from Wake Forest University with a bachelor of arts degree in 1962 and his law degree in 1965. He founded the law firm of Daughtry, Woodard, Lawrence & Starling as a solo practitioner in 1969.

Daughtry became active in politics in 1976 and was elected to the NC Senate in 1989. His political career has expanded to both the NC Senate and the NC House of Representatives, including house majority leader and house minority leader.

Daughtry has served as a member and chair of the Judiciary Committee for many years. He has also served on the Courts Commission and as co-chair of the Future of the Courts Committee as well as the Judicial Efficiency and Effective Administration of Justice Committee and the Justice and Public Safety Oversight Committee.

He has served as a mentor to many young lawyers and is a pillar of the local community. He is active in and around Johnston County, including the Johnston County Schools, Johnston County Chamber of Commerce, the Boy Scouts of America, and St. Paul's Episcopal Church.

Leo Daughtry is a highly deserving recipient of the John B. McMillan Distinguished Service Award.

Chief Justice Sarah Parker

Chief Justice Sarah Parker received the John B. McMillan Distinguished Service Award on November 9, 2016, at the monthly meeting of the Susie Sharp Inn of Court. After being introduced by North Carolina State Bar President Mark Merritt, John B. McMillan presented Justice Parker with the award. Several past bar presidents were also in attendance.

Justice Parker graduated from UNC School of Law in 1969. She then served in the United States Peace Corps for two years. After working in private practice in Charlotte, Justice Parker served as a judge on the North Carolina Court of Appeals from 1984 to 1992. She began service as a justice on the North Carolina Supreme Court in 1993. She was appointed chief justice in 2006 and served in that capacity until 2014.

Justice Parker has served on the Governor's Crime Commission, the NC Courts Commission, the NC Equal Access to Justice Commission, the Commission on Professionalism, the State Advisory Council on Juvenile Justice and Delinquency Prevention, and the Institute of Judicial Administration and National Association of Women Judges.

Justice Parker has received numerous awards, including: the Gwyneth B. Davis Public Service Award, NC Women Attorneys Association; Distinguished Woman of North Carolina Award, 1997; General Federation of Women's Clubs Woman of Achievement Award, 1997; honorary Doctor of Humane Letters Queens College, 1998; Judge of the Year, NC Women Attorneys Association, 2002; Fellow, American Bar Foundation; Distinguished Alumni Award University of North Carolina Law School, 2003; NC Association of Black County Officials Humanitarian Award, 2003.

Justice Parker has made significant contributions to the legal profession and community and is a deserving recipient of the John B. McMillan Distinguished Service Award.

Seeking Award Nominations

The John B. McMillan Distinguished Service Award honors current and retired members of the North Carolina State Bar who have demonstrated exemplary service to the legal profession. Awards are presented in recipients' districts, with the State Bar councilor from the recipient's district introducing the recipient and presenting the certificate. Recipients are recognized in the *Journal* and honored at the State Bar's annual meeting in Raleigh.

Members of the bar are encouraged to nominate colleagues who have demonstrated outstanding service to the profession. The nomination form is available on the State Bar's website, ncbar.gov. Please direct questions to Suzanne Lever, SLever@ncbar.gov ■

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