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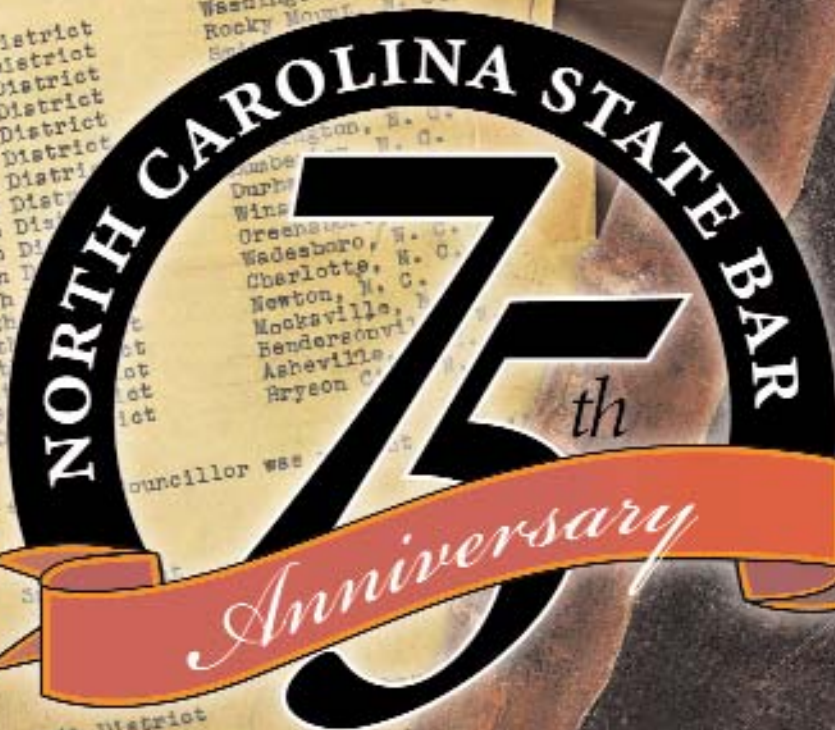
CERTIFICATE OF ORGANIZATION
OF
THE NORTH CAROLINA STATE BAR

At a meeting of the Council of The North Carolina
State Bar held in the City of Raleigh and in the Court Room
of the Supreme Court on the 6th day of October, 1933, the
following Councillors were present and qualified:

Junius D. Grimes
K. D. Estle
Ed. S. Abell
Albion Dunn
F. E. Wallace
Jos. B. Chesire, Jr.
Louis J. Poisson
Dickson McLean
R. P. Reade
G. H. Hastings
Chas. A. Hines
E. M. Covington
C. D. Taliaferro
Walter C. Feinstein
A. Turner Grant
J. E. Shipman
Julius Martin II
S. W. Black

1st District
2nd District
4th District
5th District
6th District
7th District
8th District
9th District
10th District
11th District
12th District
13th District
14th District
15th District
16th District
17th District
18th District
19th District
20th District

Washington, N. C.
Rocky Mount, N. C.
Spartanburg, S. C.
Durham, N. C.
Winston-Salem, N. C.
Greensboro, N. C.
Wadesboro, N. C.
Charlotte, N. C.
Newton, N. C.
Mocksville, N. C.
Bendersonville, N. C.
Asheville, N. C.
Bryson City, N. C.



The following

to qualify:

Geo. C. Greene

The following

qualified:

Hayden Clement

15th District

The following officers were elected by

I. M. Bailey, President
Julius C. Smith, Vice-President
Harry M. London, Sec.-Treas.

Raleigh
Greensboro
Raleigh

The Long Road to Founding the North Carolina State Bar

BY JOHN B. MCMILLAN

The first efforts to organize the lawyers of North Carolina occurred in the 1880s, but that effort failed to take root. Then on the evening of February 10, 1899, a group of more than 65 lawyers from across the state met in the Supreme Court chambers in Raleigh and gave birth to what is now the North Carolina Bar Association.¹

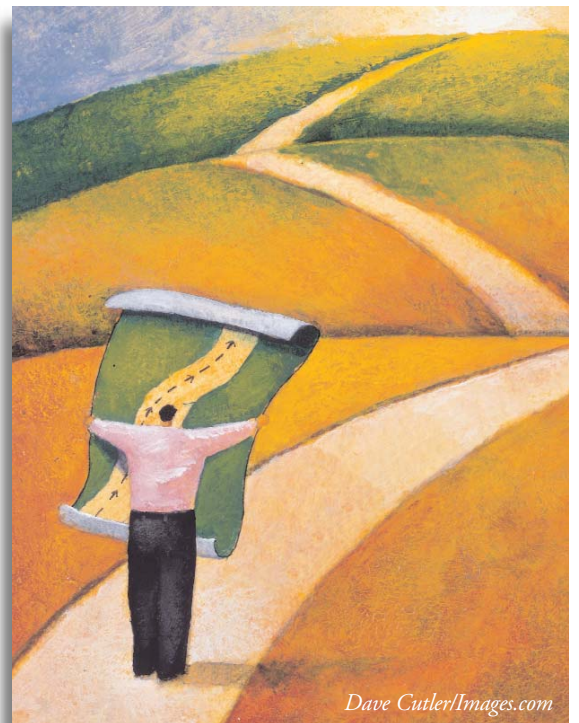
The early 1900s marked the beginning of landmark changes in the legal profession across the country. Initiatives included the establishment of standards of legal ethics (in 1908 the American Bar Association adopted its "Canons of Legal Ethics"), formulation of requirements for admission to the bar, and tackling the issue of the discipline and disbarment of lawyers. In those days the courts of the various states controlled the admission of lawyers and their discipline and disbarment. But there were calls for the lawyers of the states to become more involved in the regulation of the profession.

"By 1918, both the American Bar Association and the American Judicature Society had formulated and published a model statute for bar unification."²

In 1921, North Carolina Bar Association President Thomas W. Davis called on the lawyers of the state to create a mandatory bar. "Davis envisioned a state bar organization—to which all practicing attorneys would belong—as a means to regulate legal education; to control the licensing and disbarment of attorneys; and to elevate the reputation of the profession in the public mind."³

The 1920s saw the creation of unified bars by the legislatures in North Dakota (1921), Alabama (1923), Idaho (1923), and California (1927). The courts created mandatory unified bars in Nevada (1928) and Oklahoma (1929). Bar leaders in North Carolina were pressing for the establishment of standards for admission to the bar, but nei-

ther the Supreme Court nor the legislature responded. The Bar Association's Committee on Legal Education and Admission to the Bar suggested that each applicant to the bar at least have a high school education or its equivalent. "The Court failed to respond to this suggestion, just as it had failed to respond to Dean Gulley's proposals in 1910. In 1925, the annual meeting heard again the familiar complaint that neither the legislature nor the Supreme Court had acted and that North Carolina still had no educational prerequisite for admission to the bar. Only in 1926 did the Supreme Court confirm the necessity of evidence of good character in order to obtain a license to practice law."⁴



On July 1, 1926, at the 28th Annual Meeting of the North Carolina Bar Association in Wrightsville Beach, Hon. Thomas W. Davis of Wilmington introduced a resolution calling for the formation of a committee on incorporating the bar. Mr. Davis was one of three delegates from the North Carolina Bar Association to the ABA and had attended a meeting of the ABA in Washington at which this issue was discussed. Mr. Davis pointed out that a similar committee was appointed in 1920, but it never met. The motion carried and the president appointed the committee: I.M. Bailey, chairman, Raleigh; H.M. Ratcliff, Winston-Salem; H.G. Conner Jr., Wilson; T.J. Gold, High Point; and G.V. Cowper, Kinston.⁵

The Committee on Incorporating the Bar reported to the North Carolina Bar Association at the annual meeting held in Pinehurst in May 1927 that: "In the opinion of your committee, there is no subject now facing the bar of the different states or the entire bar of the country more important than this, for it seems to embody the practical solution of the problem of raising the dignity and power of the profession to the standard to which so many aim."⁶ "The question of bar organization, referred to this committee for consideration, looks to the unification of the bar of this state into a body, which shall include all who practice law, to act as an agency of the state for the purpose of regulating admission, discipline, and disbarment."⁷ The committee reported that an incorporated bar would enjoy "...broader and more powerful influence, a greater inherent democracy, the raising of ethical standards, and improved status and dignity of the bar as a recognized state agency (and) increased continuity in organization and purpose—a power which cannot be attained by selective associations."⁸ Although there were opponents of the concept of incorporating the bar, a resolution was passed to allow the committee to continue its work and report to the next annual meeting with a draft bill, provided the association did not commit itself in any way to the idea.⁹ Judge J. Crawford Biggs of Raleigh commented that he had been at the conference in Washington and "...heard it discussed at great length for many hours by leaders of the American Bar, and they overwhelmingly reported against the proposition." Mr. Bailey responded: "The record does not so disclose it."¹⁰

I.M. Bailey continued to serve as chair-

man of the Committee on Incorporating the Bar after the 1927 Annual Meeting; H.G. Conner Jr. and G.V. Cowper continued as members. W.M. Hendren (Winston-Salem) and L.R. Varsler (Lumberton) replaced H.M. Ratcliff and T.J. Gold. There was no action taken on this subject at the annual meetings of the North Carolina Bar Association in 1928, 1929, or 1930. Then, in 1931, at the annual meeting in Chapel Hill, the association passed a resolution authorizing the Committee on Incorporating the Bar to draw and submit for consideration an act to be submitted to the General Assembly that embodied the principles the committee advocated. The committee appointed by the president was I.M. Bailey, chairman, L.R. Varsler, and Kemp D. Battle (Rocky Mount). That committee reported to the annual meeting in Asheville in 1932.

As of the time of the annual meeting of the Bar Association in Asheville in 1932, two additional states had adopted the incorporation of the bar—South Dakota (1931) and Mississippi (1932). The bars in 20 other states had approved resolutions to seek legislative approval in those states.

A great deal of the material used in preparing the proposed legislation came from the American Bar Association, and the bill as presented was modeled "somewhat after the act proposed and approved by the Virginia Bar Association."¹¹ (Despite the fact that the Virginia Bar Association approved proposed incorporation legislation before North Carolina, the Virginia legislature did not pass the bill until 1938.) The draft North Carolina bill provided that the North Carolina State Bar would be an agency of the state and would be governed by a council made up of one councilor from each judicial district of the state (20 at that time); rules, regulations, and bylaws would be approved by the Supreme Court; and questions of admission would be addressed by a Board of Law Examiners. One issue that provoked heated discussion was whether the deans of the law schools would be members of the Board of Law Examiners. It was decided that they should not and that the board would be composed of one member of the Supreme Court and six members of the bar elected by the council.¹²

Another issue for consideration was whether the members of the faculty of the law schools should be honorary members of the State Bar. It was decided that they should

not.¹³ The honorary membership issue also involved which judges should be included as honorary members. It was decided that honorary membership would be extended to (a) the chief justice and associate justices of the Supreme Court; (b) the judges of the superior courts of North Carolina; (c) all former judges of the above named courts resident in North Carolina but not engaged in the practice of law; (d) judges of the district courts of the United States and of the circuit court of appeals resident in North Carolina.¹⁴

There was a dispute as to whether examinations would be required of all applicants. J.W. Pless Jr. of Marion wanted all graduates of accredited law schools within North Carolina that were members of or approved by the American Association of Law Schools to be admitted without examination. A.B. Andrews of Raleigh argued against that proposition. He pointed out that ten years earlier the ABA had adopted a standard that graduates of law schools should be required to pass an examination just like everyone else. Lawrence Wakefield of Lenoir also argued vigorously against that proposed amendment and it failed.¹⁵

J. Elmer Long of Durham moved that the bill be referred to a committee of five to have the power and authority to discuss it with the next General Assembly but without a recommendation of the Bar Association. J.W. Pless Jr. of Asheville pointed out that, "We don't know what success we will have with the legislature. We never have had much."¹⁶ However, he then made a substitute motion "that this Bar Association approves this bill as amended."¹⁷ Kemp Battle attempted to table the bill but was ruled out of order. He argued that the bar should be virtually unanimously in favor of the bill before it was presented to the legislature and predicted that it would not fare well.¹⁸ Mr. Parker predicted that if the bill were to become law, "it is good-bye to your Bar Association."¹⁹ The substitute motion to endorse the bill and present it to the General Assembly passed 46-30.²⁰ The following day Julius Smith moved that the incoming president appoint a special steering committee of five to cause the bill to incorporate the bar to be introduced in the legislature.²¹ That motion was seconded and carried.

Legislation to incorporate the North Carolina Bar into a state agency was introduced in January 1933. On the night of January 31, 1933, the bill was heard by a



I. M. Bailey

joint committee of the House and Senate. "A spirited exchange of views indicated that the measure would be hotly contested when a vote on it is taken."²² According to the news article, those advocating for the legislation were: "I.M. Bailey, judge; L.R. Varser, former justice of the Supreme Court; Kemp D. Battle, president of the North Carolina Bar Association; Justin Miller, dean of the Duke University Law School; and M.T. Hecke, dean of the University Law School. "Particularly opposed were members of the Mecklenburg delegation and Senator A.B. Corey of Pitt."²³

"Discussion between Senator Thomas L. Kirkpatrick of Mecklenburg and Mr. Bailey waxed so personal at one point that Senator John W. Hinsdale, chairman of Senate Judiciary I who presided over the joint meeting, was forced to call the gentlemen out of order."

"Who daddied this thing?" demanded the Senator.

"The North Carolina Bar Association at its meeting last year in Asheville," replied Mr. Bailey.

"I'll tell you that it passed by a very small majority and over protest," asserted Senator Kirkpatrick.

"That is not true," said Mr. Bailey.

"You aren't calling me what I ain't, are you?" queried the senator, his face turning crimson.

"I may call you what you are," Mr. Bailey shot back.²⁴

When being told that he would be required to pay an annual \$4 fee, Representative Basil M. Boyd of Mecklenburg stated, "Anything you want me to join that costs over \$1, I don't want it unless I can eat it or wear it."²⁵

"The central thought behind the bill is to give the bar power over itself," asserted Mr. Bailey. "It would give lawyers the right to say who is qualified to practice, and would take the selection out of the hands of the Supreme Court."

Another of its features, he said, provided the taking "away from juries the right to say if a man has violated legal ethics and gives it to his fellow lawyers."²⁶

On March 2, 1933, the sponsors of the bill in the House—Representatives R.O. Everett of Durham, Luther Hamilton of Carteret, and O.B. Moss of Nash—successfully argued for the passage of the bill.

"Representatives H.L. Taylor of Mecklenburg, Clayton Grant of New Hanover, and W.A. Sullivan—all lawyers—opposed it vigorously."²⁷ "Mr. Grant caused a ripple when he charged that the bill was concocted at the Asheville convention last summer and that the convention was attended only by railroad lawyers who rode there on passes while the poor lawyers were unable to stir from home."²⁸

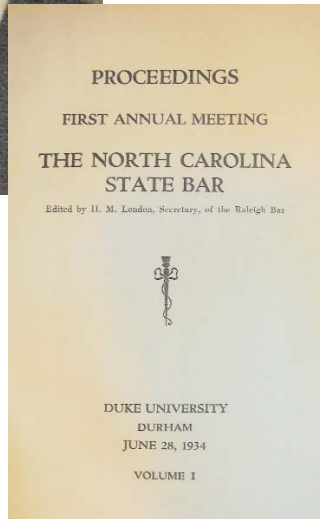
On March 20, 1933, the Senate took up the measure. Speaking for the bill were Senators Bland of Wayne, Land of Iredell, and John Hinsdell. Speaking in opposition to the bill were Senators Thomas Kirkpatrick of Mecklenburg and W. Roy Francis of Haywood. The measure passed 24-18. Senator Francis objected to a third reading and the bill was held over until the next day for final passage. By this time in the process the amount of the proposed dues had been amended to \$3 per year. During the debate, Senator Edward M. Hairfield of Burke argued against the mandatory dues even in that reduced amount. Senator Luther

Hartsell Jr. of Cabarrus said: "Any lawyer that can't pay 25 cents a month to be a member of his profession is a menace to the people he might serve."²⁹

"Under this act, there is presented to the bar of North Carolina an opportunity to eliminate many of the criticisms which, in the past, have been directed at the profession. The responsibility is squarely placed upon the profession to so conduct itself as to merit the confidence of the public and to justify its position of leadership in the life of the state. Your committee feels that this association should continue its efforts in support of this movement in order that the greatest possible benefits may be derived from this act of the legislature."³⁰

On April 3, 1933, Chapter 210, Public Laws of 1933, incorporating the North Carolina State Bar was ratified. During the month of July 1933, pursuant to the statute, meetings were called of all the lawyers in the various judicial districts of the state for the purpose of electing the councilor for each district. The resident judge of each district was given the responsibility of calling the meetings, and if he failed to do so, the meeting could be called by three lawyers. The duly elected State Bar Council met for the first time in Raleigh on October 6, 1933. I.M. Bailey was elected as the first president. The Council adopted the Certificate of Organization. This was approved by Chief Justice W.P. Stacy on October 17, 1933.³¹

It can truly be said that I.M. Bailey was the father of the North Carolina State Bar. He chaired the Committee to Incorporate the Bar throughout that committee's existence, he drafted the proposed legislation, and he shepherded the bill through the Bar Association's annual meetings and both houses of the General Assembly. He then served as the first president. Mr. Bailey began practicing law in 1916. During the 1925 session of the General Assembly, he served in the NC House representing Onslow County. He later served as general counsel to the North Carolina Corporation Commission, corporation commissioner, and securities commissioner. In 1930 he was elected president of the National Association of Securities Commissioners. From 1931 through his untimely death in 1951, Mr. Bailey practiced law in Raleigh as the founder of Bailey & Dixon.³² (On a personal note, I was privileged to practice law along side I.M. Bailey's



son Ruffin for 25 years who, like his father, was an extraordinary lawyer and gentleman.)

The first annual meeting of the North Carolina State Bar was held on June 28, 1934, in conjunction with the annual meeting of the North Carolina Bar Association in Durham.

President Bailey addressed the meeting:

In 1926, there began in this state, through the voluntary association of the lawyers of this state, a movement to bring this hour to pass. Continuously from that date until April 3, 1933, there was doubt as to what would be the outcome of the effort to bring to the profession the right of self-government. On April 3, 1933, however, the grant of power was extended to us, and today, for the first time, we are met to determine for ourselves, individually and collectively, what disposition we shall make of that grant of power.³³

As they say, the rest is history. The North Carolina State Bar celebrated its 75th anniversary in April 2008. As predicted by some, following incorporation, membership in the North Carolina Bar Association initially declined. This was arguably as a direct result of the creation of the State Bar. The 1930 membership of 1,151 had by 1935 declined to 943 and by 1940 to 713 members. But through the years, the lawyers of this state have seen the wisdom of supporting both organizations. As of September 2007, the North Carolina Bar Association had a membership of 14,500—almost three out of four of the lawyers in this state. The leadership of both organizations continues to work hand-in-hand for the benefit of the citizens and the lawyers of North Carolina. I am proud to be an active member of both. ■

John B. McMillan is the president-elect of the North Carolina State Bar.

Endnotes

1. *Seeking Liberty and Justice - A History of the North Carolina Bar Association 1899-1999* by J. Edwin Hendricks (1999) p. 34
2. www.msbar.org/history.php
3. *Seeking Liberty and Justice*, supra p. 67
4. *Seeking Liberty and Justice*, p. 79.
5. *Reports North Carolina Bar Association* vol. 28, p. 50 and p. 220
6. *Id.* vol. 29, p. 132
7. *Id.* vol. 29, p. 133
8. *Id.* vol. 29, p. 136
9. *Id.* vol. 29, p. 141
10. *Id.* vol. 29, p. 139

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11. *Id.* vol. 34, p. 231
12. *Id.* vol. 34, p. 95-96
13. *Id.* vol. 34, p. 117-120
14. *Id.* vol. 34, p. 108
15. *Id.* vol. 34, p. 199
16. *Id.* vol. 34, p. 191
17. *Id.* vol. 34, p. 193
18. *Id.* vol. 34, p. 193
19. *Id.* vol. 34 p. 194
20. *Id.* vol. 34, p. 196
21. *Id.* vol. 34, p. 198
22. *Raleigh News & Observer*, Feb. 1, 1933

23. *Id.*, Feb. 1, 1933
24. *Id.*, Feb. 1, 1933
25. *Id.*, Feb. 1, 1933
26. *Id.*, March 3, 1933
27. *Id.*, March 3, 1933
28. *Id.*, March 3, 1933
29. *Id.*, March 22, 1933
30. *Reports North Carolina Bar Association*, vol. 35, p. 74
31. 205 North Carolina Reports 876
32. www.BaileyDixon.com
33. Proceedings First Annual Meeting The North Carolina State Bar, p. 5-6

The State Bar 1983-2008: A Quarter Century of Expansion and Growth

BY MICHAEL DAYTON

The State Bar turns 75 this year, giving North Carolina's legal professionals a chance to celebrate the Bar's accomplishments and reflect on its future. The Bar has twice before compiled histories, once in 1950 and again in 1983.



This third installment covers highlights of the 25-year stretch from 1983 to 2008.

During the last quarter century, the state's legal community has more than doubled, and that growth shows no signs of slowing down. As many as 700 new attorneys join the Bar each year, and nearly 23,000 attorneys now hold North Carolina law licenses. That's a far cry from the Bar's humble beginnings, when annual dues were a mere \$3 and 29 attorneys successfully took the first exam administered by the newly formed agency.

The last 25 years have brought dramatic shifts in the Bar's very makeup—North Carolina's legal population is more diverse

today than it has ever been. It is a sign of the changing times that the Bar's own governing body has elected one female president and two African American presidents in the past decade.

State Bar leaders from the 1980s can be proud that some of the programs they envisioned, including specialization, mandatory CLE, and the Client Security Fund, are now cornerstones of the Bar's efforts to protect the public and ensure the competency of its members. There are several other new initiatives—for example, Fee Dispute Resolution,

the Attorney-Client Assistance Program, and the Lawyer Assistance Program—of which those former leaders would undoubtedly approve. Those programs have brought expansion in the Bar's staff, and this 75th anniversary year finds the Bar searching for new headquarters with more space.

The last quarter century has brought some of the greatest tests in the Bar's 75-year history. Divisive topics such as lawyer advertising have sparked vigorous debate. Several high-profile disciplinary cases have thrust the State Bar into the national media spotlight. The

untimely resignation of a former leader became one of the Bar's darkest moments. The advent of the Internet has raised ethical questions that were inconceivable just two decades ago. Those challenges have been met, thanks to the steady leadership of the Bar's elected officers and the dedication of its staff, and the agency is on firm footing as it heads into the next 25 years.

Legal Trends & Developments

Rules Revisions: Raising The Bar On Professional Conduct

The State Bar's Rules of Professional Conduct are in place to assure the highest standards of professional competence and ethical conduct among members of the legal profession. In 1973, the State Bar began basing its rules on the American Bar Association's Model Code of Professional Responsibility. However, shortcomings with those rules slowly emerged. For instance, there was often confusion about what weight to give the rules' aspirational and explanatory provisions. Certain issues, such as conflicts of interest with former clients, were not addressed.

In 1977, the American Bar Association appointed a special commission to review the model code. The commission settled on a restatement format of black letter rules followed by comments. Those Model Rules of Professional Conduct were adopted by the ABA on August 2, 1983.

In North Carolina, the Special Committee to Revise the Code of Professional Responsibility, chaired by Weston P. Hatfield of Winston-Salem, labored for a year, holding meetings and public hearings before submitting recommendations in January 1985 to the State Bar Council. The committee's recommendations integrated the ABA Model Rules with provisions from the existing Code, while also adding completely new material. Although much was retained from the Code, differences included a more restrictive rule on solicitation and new treatments of conflicts of interest and imputed disqualification. Rules on confidentiality remained largely the same. The Bar had recently adopted provisions on

State Bar Presidents, 1983-2008

Clifton W. Everett
Bethel, 1983-1984

Wright T. Dixon Jr.
Raleigh, 1984-1985

Roy W. Davis Jr.
Asheville, 1985-1986

William K. Davis
Winston-Salem, 1986-1987

James Y. Preston
Charlotte, 1987-1988

Robert G. Baynes
Greensboro, 1988-1989

Emil F. Kratt
Charlotte, 1989-1990

Tommy W. Jarrett
Goldsboro, 1990-1991

John H. Vernon III
Burlington, 1991-1992

Robert A. Wicker
Greensboro, 1992-1993

Robert J. Robinson
Asheville, 1993-1994

Charles M. Davis
Louisburg, 1994-1995

Fred H. Moody Jr.
Bryson City, 1995-1996

W. Erwin Spainhour
Concord, 1996-1997

William O. King
Durham, 1997-1998

Robert C. Sink
Charlotte, 1998-1999

Cressie H. Thigpen Jr.
Raleigh, 1999-2000

M. Ann Reed
Raleigh, 2000-2001

E. Fitzgerald Parnell III
Charlotte, 2001-2002

James K. Dorsett III
Raleigh, 2002-2003

Dudley Humphrey
Winston-Salem, 2003-2004

Robert F. Siler
Franklin, 2004-2005

Calvin E. Murphy
Charlotte, 2005-2006

Steven D. Michael
Kitty Hawk, 2006-2007

Irvin W. Hankins III
Charlotte, 2007-2008

trust accounts. Those survived intact but were supplemented by new commentary. The committee made several revisions based on comments it had received. On July 26, 1985, the State Bar Council approved the committee's final report. The Supreme Court approved the rules package later that year.

1997 Revised Rules of Professional Conduct

The Bar's ethics rules underwent another sweeping modernization in 1997. Following

two years of study by the Committee to Review the Rules of Professional Conduct, the State Bar Council in April 1997 approved by overwhelming majority the Revised Rules of Professional Conduct. The state Supreme Court gave them final approval in August 1997.

To make research and teaching easier, the rules were renumbered and reordered in a manner similar to the ABA Model Rules of Professional Conduct. Gone were the ten canons of ethics that existed under the old

"The single most significant thing in the life of the organized bar during the last 30 years has been lawyer advertising," said Bar Executive Director Tom Lunsford.

rules. In their place was an organizational scheme that bundled the provisions into eight categories: Client-Lawyer Relationship; Counselor; Advocate; Law Firms and Associations; Transactions with Persons Other Than Clients; Public Service; Information about Legal Services; and Maintaining the Integrity of the Profession. Despite the renumbering, many sections remained the same as under the old rules.

But significant changes were made, including: new rules on representing a client under a disability and on selling a law practice; clearer rules on the ethical roles of a supervising attorney to a subordinate lawyer; new provisions for lawyers serving as an intermediary between clients with competing interests; and an amendment that gave lawyers the discretion to inform the court of a client's perjury. Lawyers also saw a rule that banned sexual relations with clients in most instances. That rule, which sparked considerable debate, put North Carolina at the forefront in prohibiting that conduct. The impetus for that rule grew out of disciplinary cases that involved allegations of intimate relations between lawyers and clients.

While many of the model ABA rules were adopted, model Rule 6.1 was not among them. That rule was intended to encourage lawyers to render pro bono or cut-rate legal services, but Bar leaders decided not to include it because of its voluntary nature. However, the spirit of Rule 6.1 was inserted in the rules preamble, which stated: "It is acknowledged that it is the basic responsibility of each lawyer engaged in the practice of law to provide community service, community leadership, and public interest legal services without fee, or at a substantially reduced fee, in such areas as poverty law, civil rights, public rights law, charitable organization representation, and the administration of justice." Also missing from the revisions was a proposed 30-day ban on targeted mailings by lawyers. That rule had been sent over separately to the Supreme Court and was eventually withdrawn after the Court failed to act on it.

2003 Rules Changes

The year 2003 saw yet another rewrite

of the Rules of Professional Conduct, which was approved by the state Supreme Court in February 2003. The revisions grew out of the American Bar Association's Ethics 2000 Commission, which made minor updates to the model Rules of Professional Conduct.

"The Ethics 2000 Commission has described this as a minimalist revision," said Charlotte attorney E. Fitzgerald Parnell III, a past-president of the State Bar and chair of the State Bar committee that recommended the changes. "The ABA reviewed carefully each of the rules, and they found only a few of them in need of tweaking."

Most ethics rules were left undisturbed, but there were some notable shifts. For instance, written fee agreements in contingency cases were required under revised Rule 1.5. The absence of those written agreements was at the heart of many fee disputes, according to the Bar's executive summary. Under another significant rule change, law firms were permitted to screen a partner with a conflict and hold onto a case that previously had to be referred elsewhere. Lawyers had always owed ethical duties to prospective clients, but those were more clearly set out under Rule 1.18, including the duty to protect confidential information shared during the initial meeting. Other rules addressed client consent. Revisions stated that informed consent was required for most waivers of conflicts and had to be confirmed in writing.

Advertising: A Perennial Debate

Perhaps no issue in the past quarter century has been as polarizing for the State Bar as lawyer advertising. The US Supreme Court opened the door to lawyer ads in the 1977 decision of *Bates v. Arizona State Bar*, 433 U.S. 350 (1977). The Bar has been wrestling with the consequences ever since. Many types of advertising that were once strictly forbidden—targeted direct mailings, for example—are now permitted. The last 25 years have seen tension develop between Bar regulators charged with defining the lim-

its of commercial speech and lawyers who have grown increasingly creative and resourceful as new advertising avenues and technologies have emerged.

"The single most significant thing in the life of the organized bar during the last 30 years has been lawyer advertising," said Bar Executive Director Tom Lunsford. "You cannot find an agenda for any meeting of the State Bar Council since 1977 where there has not been at least one significant issue relating to lawyer advertising. These issues have appeared in disciplinary cases, in ethics opinions and in civil litigation to which the State Bar has been a party. Lawyer advertising has consumed an enormous amount of administrative and regulatory energy during the past 30 years."

Targeted Mailings

No advertising method has proved more useful for enterprising personal injury and traffic court lawyers than targeted mailings—and no method has stirred up more controversy. Targeted mailings became a staple of lawyer advertising following the US Supreme Court ruling in *Shapero v. Kentucky Bar Association*, 486 U.S. 466 (1988). That opinion struck down a state regulation that banned attorneys from sending targeted communications directly to a person known to have a specific legal need. Said Bobby James, the Bar's Executive Director at the time, "What this means is that you can go down every morning and look at the police blotter and find out who was arrested the night before. You can write them letters and say you're in this type of business and offer your services."

After *Shapero* was handed down, the State Bar amended its ethics rules to permit targeted direct mailings. "It became clear when we read *Shapero* that our rule was constitutionally infirm and that it would be necessary to revise the rule to conform with the Supreme Court's opinion," said Lunsford, who at the time served as counsel to the Ethics Committee.

Some lawyers welcomed the change, saying it would benefit the public. Others were skeptical. Charlotte attorney Louis A.

Bledsoe expressed concern about the negative impact of targeted mailings. "This kind of advertising is going to increase and it tends to deprofessionalize the profes-

sion," he said at the time.

Hamlet Fire

For those who held negative views of

lawyer advertising, a fire that swept through a Hamlet chicken processing plant in September 1991 reinforced their perceptions. The fire left 25 dead and another 50

No Business Like Bar Business - The Columns of Tom Lunsford

Bar members have enjoyed the wry wit and wisdom of Executive Director Tom Lunsford ever since he began penning a regular column—aptly named "State Bar Outlook"—in Vol. 1 No. 1 of the *State Bar Journal*. Drawing inspiration from a deep well of celebrity talent as varied as Ethel Merman and Barney Fife, Lunsford found a way to entertain even as he expounded on another mundane rules change. No look back at the last 25 years of State Bar history would be complete without digging through the potato field of Lunsford's prose.

Life as a Bar Executive

As the executive director of the North Carolina State Bar, I am a minor celebrity. An obscure but vaguely apparent star in the legal firmament, I am a fixture on the C-list, an invitational afterthought for all sorts of functions that might require a touch of bureaucratic luster. You've probably seen me at cocktail parties discussing the latest ethics opinions. In my experience, nothing enlivens a social gathering like a few salty anecdotes relating to trust account maintenance or the "no sex with clients" rule. Suffice it to say, my dance card is normally pretty full.

Being executive director of the State Bar is not all it's cracked up to be. Sure, there are some nice perks. I have complimentary subscriptions to every bar magazine in the country for instance. If purchased individually on the newsstand they would cost hundreds, maybe thousands, of dollars a year, but I get them for free. Heck, the presidents' messages alone are worth a fortune.

Lawyers—and Everybody Else

As faithful readers of this column will know, my regulatory philosophy has been heavily influenced by *The Andy Griffith Show*. That being the case, no one should be

shocked to learn that my worldview tends toward the unambiguous. Something is either this or that. Central to my understanding of the legal world has long been the notion that there are only two kinds of people: people with North Carolina law licenses and people without them.

On Eliminating Fire Hazards at State Bar Headquarters

I immediately banned smoking. I asked the officers for permission to hire an architect to design a comprehensive solution to our problem. I solicited the dental records of each employee. And I relocated my office to the first floor.

Client Security Fund v. *Animal House*

In the now classic film *Animal House*, one of Delta Fraternity's pledges somewhat reluctantly made a Lincoln automobile available to the brothers for a "road trip." Predictably, the car was returned in less than pristine condition. Perceiving the pledge's chagrin, one of the fraternity brothers remarked, in language far more colorful than these pages can bear, that the pledge had, in effect, made a mistake. "You f#@!ed up. You trusted us." Until the Client Security Fund was created by the Supreme Court at the behest of the State Bar in 1984, advice of that sort was essentially all the lawyers of North Carolina had to offer to the unfortunate victims of lawyer thievery.

The Ungovernable Internet

It is one thing to enjoin the unauthorized practice of an unlicensed individual in Asheboro. It is quite another to restrain faceless and ephemeral electronic impulses originating from Seattle or Kuala Lumpur. The internet is ubiquitous. It is unlimited by time and exists without regard to geopolitical boundaries. It is largely ungoverned and, some would contend, ungovernable.

Self-Regulation: A Lesson from Otis

The first recorded instance of outsourcing appears to have involved the fictional character of Otis Campbell on the old *Andy Griffith Show*. Devotees of that program will recall that Mr. Campbell had, during the 1963 season, a substantial interest in a local distillery known as the "Rafe Hollister still." When that business lost its lease on the "old Rimshaw house," Campbell, who was a heavy consumer as well as manufacturer of alcoholic beverages, decided to get out of the business and to look to the marketplace to satisfy his personal requirements. He thus became, to coin a term, an "outsourcerer." ... By definition, self-regulation can't be outsourced. Once the responsibility is relinquished, usurped, or transferred, the profession is compromised and diminished. To justify the privilege of self-regulation and the confidence of the public, the regulatory scheme must be comprehensive, coherent, and disinterested. It must also be evolving.

No Business Like Bar Business

To satisfy my readers' unquenchable thirst for whimsy there is always some incentive, if not pressure, to begin my article each quarter with a reference to Ethel Merman. In the interests of journalistic integrity, I usually resist the temptation. This time around, however, there is no avoiding the matter. The issue is clear. Either I stroll down tin-pan alley and risk a bit of musical disingenuousness, or I confess straightaway that the State Bar is, financially at least, a rather unremarkable enterprise—a business like any other. Having a passion for the theatre and being something of a troupier, I feel compelled to choose the first alternative and to declaim from these pages, as from the immortal boards themselves, that there's no business like bar business.

[T]he Bar's governing body voted in July 1996 to impose a 30-day waiting period for direct mailings after any event which might give rise to the need for a lawyer....The comments of Bar leaders at the time made it clear that they saw a court battle just over the horizon.

injured. It also exposed the raw nerves surrounding the debate over lawyer advertising. Richmond county lawyers were openly critical of display ads placed in a local newspaper by out-of-town attorneys shortly after the fire. In most of the ads, attorneys touted their experience with personal injury, wrongful death, or workers' compensation cases.

The ads drew criticism from some Bar leaders, including then State Bar President Tommy W. Jarrett. Jarrett said he favored more restrictive rules, a sentiment that would be voiced by other Bar leaders as they sought to curb lawyer advertising that they felt gave the profession a bad name. But Jarrett acknowledged that there was little the Bar could do in the wake of the Supreme Court rulings.

Two-Year Study Culminates with No Major Changes

Rather than wait for further action from the courts, in 1992 Bar President Robert A. Wicker appointed a special committee to review advertising rules and draft any recommended changes. In appointing the committee, Wicker said there was a "growing sense that lawyer advertising had gone too far."

The committee, chaired by P.C. Barwick Jr., conducted extensive research by compiling a history of lawyer advertising and cataloguing rules from other states. That survey found that many states were much more restrictive than North Carolina. For instance, at least one state imposed a 30-day waiting period before accident victims could be contacted while others prohibited the use of actors or celebrities in legal advertising.

However, after two years of study and public hearings, the State Bar voted in July 1994 to leave its advertising rules largely undisturbed. For one, the Advertising Committee could not agree on what new regulations to adopt. Also, Bar Councilors may have been reluctant to approve any untested regulations that might entangle the State Bar in drawn-out litigation. There was

yet another persuasive reason for leaving the rules alone—two public hearings failed to generate any real interest from the general public.

Even though no new limits were imposed, it was clear that lawyer advertising would remain under the Bar's microscope for years to come. The committee drew up a list of specific advertising techniques that it concluded were prone to abuse. The Ethics Committee was encouraged to pay special attention to inquiries in those areas. Among the trouble spots: testimonials and endorsements; advertisements that did not disclose a lawyer's geographic location; dramatizations; and advertising that focused on favorable verdicts.

While the Bar's concern about litigation had been one reason for not imposing new regulations, a 1995 US Supreme Court opinion, *Florida Bar v. Went For It, Inc.*, 515 U.S. 618 (1995), gave new hope to lawyers who wanted to pull back the reins on advertising. In *Went For It*, the Supreme Court upheld a Florida Bar rule that imposed a 30-day waiting period before attorneys could contact potential clients in personal injury or wrongful death cases.

Thus began another round of vigorous debate at the State Bar, with some leaders contending a 30-day rule was needed to help stem the erosion of public confidence in the legal profession. Robert F. Baker, who served on an advertising subcommittee, said there was a groundswell among members of the Bar to tighten the rules. "All the letters I've gotten are from lawyers, and they want a 30-day rule in effect," he said.

The Advertising Committee in July 1995 proposed a revision of RPC Rule 2.4(c) in line with the Florida rule. That would have created a cooling-off period before accident victims could be contacted. In October 1995, the committee evenly split on publishing the proposal for public comment. However, a proposal by Bar President-Elect Fred Moody emerged from the Executive Committee with a much broader sweep. The proposal amounted to a ban, with a few

exceptions, on any direct mailings to persons known to need legal representation, including those cited for traffic violations.

North Carolina lawyers that relied on targeted mailings to generate personal injury and traffic court cases argued the rule was an impermissible restriction on commercial speech. They vowed to sue if the rule won approval.

To strengthen the rule's chance in any court fight, Bar leaders earmarked \$20,000 for a survey of public opinion. The survey had been recommended by Bar Assistant Director Alice Neece Mine as a way to gather evidence that the rule advanced a substantial state interest—the magic words for regulating constitutionally protected commercial speech. The survey found that a high percentage of participants agreed an unsolicited letter was an invasion of privacy in several situations, including after an automobile accident or traffic ticket.

Armed with that ammunition, the Bar's governing body voted in July 1996 to impose a 30-day waiting period for direct mailings after any event which might give rise to the need for a lawyer. Critics said the rule was too broad because it covered such events as births, deaths, personal injuries, divorce, bankruptcies, traffic tickets and criminal arrests. The comments of Bar leaders at the time made it clear that they saw a court battle just over the horizon. Said Howard E. Manning of Raleigh, "I'm 100% for it. We will be counted as a leadership organization. Let's go down swinging." Past-President Charles M. Davis seconded that view: "Let's take the bull by the horns and adopt this rule and let the public know we're doing something to clean up the profession," he said.

Two coalitions of North Carolina lawyers that mostly handled misdemeanor or traffic cases promised a lawsuit, arguing the rule adopted by the Bar was too broad to survive constitutional scrutiny. "No doubt about it," said Greensboro attorney Wendell Sawyer, "we're going to federal court the minute the Supreme Court approves it, and I really

believe we will prevail.... There is no foundation for limiting advertising in traffic and criminal cases."

The State Bar Council formally approved the rule—the toughest such regulation in the nation—at its October 1996 quarterly meeting and sent it to the state Supreme Court for final approval. Any hope that the Court would quickly act faded as several court conferences passed without action.

In 1997, Bar officials took the unusual step of filing an amicus brief in support of a Maryland statute in litigation at the US Fourth Circuit Court of Appeals. Passed in 1996, the Maryland law imposed a 30-day ban on targeted mailings to persons charged with crimes or certain traffic offenses. A federal judge in Maryland struck the provision in October 1996, just three weeks after it took effect. With that case pending, Supreme Court Chief Justice Burley B. Mitchell Jr. said it was possible there would be no movement on the North Carolina rule until the Maryland case was decided. "I have to convince myself that the proposed rule change doesn't violate any of our statutes," Chief Justice Mitchell said. "I haven't made that determination yet, and I don't really want to do anything precipitous."

At around the same time, solicitation bans for criminal and traffic cases were running aground in California and Tennessee, and lawyers who opposed the North Carolina rule were cautiously optimistic. Those lawyers got the news they'd been waiting for in July 1997 when the US Fourth Circuit rejected Maryland's law. The unanimous opinion in *Ficker v. Curran*, 119 F.2d 1150 (4th Cir. 1997), held that the restrictions were an unconstitutional limit on free speech and an infringement on potential clients' right to counsel.

The North Carolina rule remained in limbo at the state Supreme Court for another year. In October 1998, the State Bar Council voted to withdraw the controversial provision from consideration. "We got the feeling that the Supreme Court didn't like it, and the Advertising Committee itself was very divided on it," said Committee Chair Howard Satsky.

Court Fight over Dramatizations

The 1994 report from the Bar Advertising Committee listed dramatizations as a potential trouble spot for lawyer advertising. In 2000, a legal fight devel-



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oped over TV commercials that featured a fictionalized settlement conference. That was the year that the State Bar Council approved 2000 Formal Ethics Opinion 6, which ruled that a syndicated ad featuring actor Robert Vaughan was misleading. The ad was pulled after the Bar raised concerns, but the law firms that were airing the commercial argued it was not unethical. They eventually filed suit but were unsuccessful. US Middle District Judge William L. Osteen upheld the Bar's position in the

2001 case of *Farrin v. Thigpen and the North Carolina State Bar*, 173 F.Supp.2d 427 (M.D.N.C. 2001).

Ongoing Issue

Targeted mailings, the 30-day rule, and fictional dramatizations may have taken center stage in the Bar's attempts to regulate lawyer advertising during the past 25 years, but there were literally dozens of other ethical rulings that played minor roles in that ongoing drama. The State Bar

has been asked to rule on nearly every subject under the advertising sun—from the writing on the outside of a direct mail envelope (2006 FEO 6), to the size of a jury verdict (2000 FEO 1), or the listing of the "Super Lawyers" designation (2007 FEO 14). Even the use of animals in a law

firm ad campaign has been the subject of an ethics inquiry. Increasingly, the Bar's Ethics Committee has found itself struggling with advertising issues created by the electronic frontier of the Internet. Twenty-five years ago, State Bar officials could not have imagined that they'd be asked to

decide whether a URL was misleading (2005 FEO 14) or whether a law firm could deliver all of its services exclusively over the Internet. But that is the reality of today's online world. It is an easy prediction to say that the next 25 years will see many more challenges in this area.

Lunsford Reflects on the Bar's Key Leaders

Tom Lunsford credits much of the Bar's success in the past 25 years to several key staff members: Carolin Bakewell, Root Edmonson, and Alice Neece Mine. Following are their bios and what Lunsford said about their unique talents.

Carolin D. Bakewell

Education: UNC-Chapel Hill, undergraduate; UNC-Chapel Hill School of Law. After law school, Bakewell served as a research assistant for court of appeals judge Hugh Wells. From 1984 to 1987, she was an associate at the Raleigh firm of Bailey, Dixon, Wooten, McDonald, Fountain & Walker. She was an associate at Mays & Valentine from 1987 to 1988 before joining the State Bar to become deputy counsel, a position vacated by Lunsford when he became director of the new CLE program. Bakewell was promoted to general counsel in 1991. She left the State Bar in 2006 to become counsel for the NC Board of Dental Examiners.

Lunsford's comments: "Carolin is a terrific lawyer, with a legendary work ethic and a rightly earned reputation for hyper-productivity. I think it could be fairly said that Carolin throughout her career at the State Bar did the work of at least two people, on top of which she exercised her administrative responsibilities to great effect. She was a no-nonsense prosecutor who jealously protected the reputation of the Bar and the public. Those of us who worked with Carolin were greatly inspired by her uncompromising insistence on the highest professional standards for her legal department and the agency as a whole. We also loved having her around."

A. Root Edmonson

Education: UNC-Chapel Hill, under-



Edmonson

graduate; North Carolina Central University School of Law. Following law school, Edmonson was in private practice in Raleigh as a partner in the firm of Jernigan & Edmonson. He joined the State Bar in 1979 as a trial attorney on the disciplinary staff and is currently deputy counsel. He has represented the State Bar's Client Security Fund and in 2006-2008 served as president of the National Client Protection Organization. He has served on the Board of Directors of the Wake County Bar Association and the 10th Judicial District Bar.

Lunsford's comments: "Root is the longest serving member of the State Bar staff. His great strengths are his superb judgment and his generous spirit. I think he is everything a prosecutor ought to be because of his innate sense of fairness. Root is a great human being and has a special talent for defusing volatile situations, especially in courtrooms. As the State Bar's representative, he has on many occasions by the sheer force of his magnanimous personality gotten lawyers and judges to put aside anger and frustration in order that justice might be calmly and professionally administered. I can't think of anyone who's done more than Root to enhance the image of the State Bar."

Alice Neece Mine

Education: North Carolina State University, undergraduate; UNC-Chapel Hill School of Law. Mine practiced law in

Durham from 1985 until 1993, concentrating in the areas of employment law and transactions, before joining the staff of the State Bar in 1993 as assistant executive director. She serves as staff counsel to the Ethics Committee, director of the Board of Legal Specialization, director of the Board of Continuing Legal Education, and director of the Board of Paralegal Certification. From 1995 until 1997, she served as staff counsel to the ad hoc Committee to Review the Rules of Professional Conduct. She also served as staff counsel to the State Bar committee appointed in 2001 to study and report on the recommendations on the Model Rules of Professional Conduct of the ABA Ethics 2000 Commission. She is an adjunct professor at Duke University School of Law where she teaches professional responsibility.

Lunsford's comments: "Alice has more programmatic responsibility than anyone at the State Bar has ever had. She is absolutely indispensable to me and to the agency—a woman of almost infinite capacity and talent. In addition to being an excellent administrator, Alice is a fine lawyer. She is unquestionably the state's leading authority on the law of professional responsibility and is a very credible spokesperson for the State Bar on any number of substantive issues. If we had to pay her what she is worth, there is no way we could afford her. Hiring her was the best thing I ever did for the lawyers of North Carolina."



Mine

Real Property, Ethics, and the Unauthorized Practice of Law

The past 25 years have been especially tumultuous for lawyers plying their trade as real property practitioners. Attorneys handling residential closings have faced falling prices for their services and increased competition from nonlawyers, including some who allegedly strayed into the unauthorized practice of law. In the 1990s, some real property lawyers even found themselves holding the bag when a lender went bankrupt and left behind a trail of dishonored checks. That crisis resulted in a new law and revised Bar rules to shore up trust accounting procedures. For a brief moment, the real property bar could point to ethics opinions that required the presence of an attorney in nearly every facet of a residential closing. However, those ethics rulings were ultimately discarded by the Bar after drawing intense scrutiny from a federal agency.

Abbey Financial Crisis

The first storm washed over real property attorneys in 1994. The saga began in March of that year when several North Carolina closing attorneys deposited checks from Abbey Financial Corporation, a Massachusetts mortgage lender, into their trust accounts. Those attorneys were given provisional credit by the depository banks. As was standard practice among many closing lawyers at the time, checks were immediately written on the trust accounts to pay off prior lenders and the sellers.

The bad news hit a few days later. Checks from Abbey Financial were dishonored shortly before the company initiated bankruptcy proceedings on April 1, 2004. Trust account banks took back the credit they had extended, leaving closing attorneys who had disbursed mortgage checks based upon provisional credit facing about \$1 million in losses. In some cases, the shortfall dragged innocent third parties into the fray because some Abbey Financial checks were paid with other money that happened to be in the lawyers' trust accounts.

Those events forced the State Bar to take another look at ethics opinion CPR 358. Issued in 1984, that opinion allowed



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lawyers to immediately disburse closing funds based on provisional credit. There were calls from some quarters to put an end to that practice. In an April 25, 1994, letter to the Bar, a group of New Hanover real property lawyers said they had become "the whipping post for the real estate industry" and urged the State Bar to require wire transfers or certified funds in all closings. But that proposed solution was not universally favored. Some lawyers argued the Abbey Financial fiasco needed a legislative fix to balance the competing interests among lawyers, homebuyers, banks, and other financial institutions.

The problem was eventually tackled by both the Bar and the General Assembly. The State Bar Council moved first, approving an ethics ruling, RPC 191 (Second Revision), in October 1995. That ruling permitted closing attorneys to disburse against provisional credit in their trust accounts, provided that the deposited funds came from a list of highly reliable instruments such as wire funds, certified and teller's checks, or government checks. In 1996, the General Assembly passed the

Good Funds Settlement Act, SB 470, which first came up for consideration in 1995 but stalled because of objections from mortgage bankers. The new law, codified as Chapter 45A, also specified the types of checks and other instruments against which real property lawyers could provisionally disburse closing proceeds.

Representing Both Parties

Even as the provisional credit dilemma was being resolved, the Bar experienced another controversy in January 1996 after its governing body adopted two controversial ethics rules that barred lawyers from representing the buyer and the seller at the closing table—a standard practice for 19 years under an older ethics opinion, CPR 100. RPC 210 prohibited the buyer's attorney from representing the seller at a residential closing. A second opinion, RPC 211, banned a developer's attorney from representing the buyer at closing. Those opinions were drawn up in reaction to a September 1995 appeals court case, *Cornelius v. Helms*, 120 N.C. App. 172, 461 S.E.2d 338 (1995), *disc. rev. denied*, 342 N.C. 653 (1996). The *Cornelius* court, rely-

ing on expert and lay testimony, found an attorney-client relationship existed between a lawyer and the seller even though the two never had any direct contact. The ruling allowed a seller to sue when problems arose after a closing.

The assumption underlying the 1996 ethics rulings—that buyers and sellers had inherently adverse interests—was criticized by lawyers who argued that disclosure of potential problems adequately protected buyers and that actual conflicts seldom occurred. Reacting to that criticism, the State Bar Council voted to withdraw both opinions just three months after signing off on them, sending them to a task force for further study.

Nonlawyers in Closings Raise UPL Concerns

The activities of nonlawyers in residential real estate transactions have for years raised concerns about the unauthorized practice of law. In response, the Bar has attempted to sort out the ethical duties of real property practitioners and the statutory limits imposed on laypersons. An ethics opinion proposed in 1995, RPC 216, addressed the level of supervision required of attorneys when using independent title searchers. One version of the proposed ruling would have placed a detailed laundry list of duties on attorneys. However, in January 1996 the Bar's Ethics Committee voted to go back to the original proposal, which simply required lawyers to take reasonable steps to instruct and supervise freelance paralegals. That ethics ruling was symptomatic of an ongoing debate over the expanding role of nonlawyers in residential closing transactions.

The supervisory roles of lawyers in residential closings also played out on the disciplinary front. At least two lawyers were sanctioned for failing to review the work of freelance title abstracters and allowing staff members to stamp their signature on closing documents. Around the same time, other bar groups were fielding complaints from closing attorneys who said they were being forced out of the market by a growing number of paralegals, brokers, national title companies, and lenders. In 1998, the North Carolina Bar Association hired a real property consumer protection attorney to investigate allegations of non-attorney closings.

In an attempt to define the roles of lawyers and nonlawyers in real estate transac-

tions, the council approved an ethics ruling that clarified the need for an attorney at the closing conference. In July 2000, the council approved 99 Formal Ethics Opinion 13 (later overruled), which stated that an in-house paralegal could not close a residential real estate purchase without the presence of the attorney. The closing conference was "the primary opportunity for the lawyer to meet with the parties," the opinion stated, and it might be "the only opportunity that the lawyer has to intercede when the interests of the client are threatened."

The State Bar attempted to put to rest any lingering questions about the attorney's mandatory presence at the closing table with two ethics rulings adopted in October 2001. Those opinions said various activities surrounding the closing transaction constituted the practice of law, necessitating the participation of an attorney. According to 2001 Formal Ethics Opinion 4, the competent legal representation of a borrower required the presence of the lawyer at the closing of a residential real estate refinancing. A nonlawyer could oversee the execution of documents outside the presence of the lawyer, according to the opinion, if the lawyer adequately supervised the nonlawyer and was present at the closing conference to complete the transaction. The second ethics ruling, 2001 Formal Ethics Opinion 8, removed any ambiguity about the lawyer's reserved seat at closing time. It stated: "The lawyer must be physically present at the closing conference and may not be present through a surrogate such as a paralegal."

Those rulings attracted the attention of the Federal Trade Commission and the Department of Justice's Antitrust Division. In a December 2001 letter to the Ethics Committee, those agencies urged the State Bar to reconsider both rulings, saying a ban on nonlawyer closings would hurt the public by raising prices and eliminating competition for services. The letter stated that homebuyers and sellers should be allowed to conduct their closings unrepresented by counsel if they so chose.

That prompted the State Bar in January 2002 to set up an *ad hoc* committee, chaired by former President Dudley Humphrey, to address the FTC concerns and hire specialized antitrust counsel, if needed. By June of that year, it became apparent that the Bar should back down from those ethics rulings, in part because Bar officials concluded North Carolina statutes did not ban layper-

sons from conducting closings.

By the fall of 2002, Bar officials had hammered out a position on the UPL question and issued Authorized Practice Advisory Opinion 2002-1, that allowed laypersons to close home sales provided they did nothing more than show parties where to sign, and collect or disburse money. Attorney participation was still required in the preliminary steps of a home sale, including title abstracting and drafting of any documents. A second proposed ruling, 2002 Formal Ethics Opinion 9, stated that a properly supervised nonlawyer assistant in the law office could oversee the execution of documents and disburse closing proceeds—even when the lawyer was not physically present. Those opinions were approved for publication in October 2002 and drew begrudging approval from many lawyers in the real property bar. They won final approval at the January 2003 council meeting. The new opinions overruled the 2001 opinions as well as 99 FEO 13.

The State Bar's Authorized Practice Committee summed up the result of those rulings: "The State Bar has recognized that non-attorneys can provide certain limited administrative services for residential real estate closings. As paralegals, notaries, and settlement service companies seek to do business in this area, however, many seem to exceed the limitations on their services by drafting legal documents and providing legal advice. These issues have received, and will continue to receive, scrutiny by the committee."

Education & Certification

Mandatory Continuing Legal Education Comes To North Carolina

Continuing legal education (CLE) came to North Carolina in 1988 after a subcommittee chaired by Robert A. Wicker of Greensboro concluded the program would enhance the competence of the Bar and serve the public's interest. Wicker's subcommittee looked at CLE in 28 other states before crafting a program specific to the needs of North

Specialization has earned its place as a cornerstone of the State Bar's efforts to match the public's need for specific legal services with lawyers skilled in eight practice areas. Yet specialization's short history in North Carolina has been marked by passionate disagreement over the program's growth and direction.

Carolina. On July 14, 1987, the State Bar Council approved mandatory CLE and the state Supreme Court made it a reality in an October 7, 1987, order.

The newly created Board of Continuing Legal Education consisted of a three-member staff. Tom Lunsford, who had been serving as a staff attorney for seven years, was named the board's executive director. Under the CLE rules, each active member of the State Bar was required to take a minimum of 12 hours of CLE each year, of which two had to be devoted to ethics. Each attorney also had to attend a three-hour course in professional responsibility at least once every three years.

The North Carolina Bar Association had been offering CLE programs for more than 40 years, and continues to be one of the state's largest providers. On March 4, 1988, one-third of the state's practicing bar—or more than 2,800 attorneys—showed up at 26 different sites linked by satellite to attend an NCBA CLE on professionalism and legal ethics.

The move to mandatory requirements prompted a wave of new CLE providers, and by year's end North Carolina attorneys had racked up 190,000 CLE hours—or about 18 hours per attorney. However, compliance was far from perfect in those early days. When the dust finally settled after the first full year of CLE, about one in every ten attorneys had fallen short in meeting their requirements by either not taking enough hours or neglecting to verify and return their annual report forms.

The 12-hour requirement has remained a constant for the CLE program, but other aspects have evolved. In the very first year of the program, attorneys aged 70 or older were allowed to apply for "senior status" and be exempt from taking CLE if certain conditions were met. Over the next two decades, other provisions have evolved as well. At one time, new lawyers were required to take "practical skills" courses but that requirement was dropped, allowing them to take a broader range of offer-

ings. The three-hour CLE block was phased out in 2001 and replaced by a requirement that lawyers take an hour of CLE on substance abuse or mental health awareness every three years, in addition to two annual hours of ethics.

Technology has rapidly changed the way that CLE is delivered. In the late 1990s, some CLE providers began offering interactive telephone seminars, allowing lawyers to earn lunchtime CLE from their home or office. Another major nod to changing technologies occurred in 2001, when the Bar approved a rule change that permitted lawyers to earn up to four hours of CLE credit on the Internet or by CD-ROM. The change was the Bar's acknowledgment of the educational revolution that had occurred on the Internet, where dozens of online CLE seminars were being offered.

"Everybody recognizes that the Internet is changing the way we do things," said Alice Neece Mine, the Bar's Assistant Executive Director. "The CLE Board wanted to broaden the options lawyers have for getting CLE, particularly for lawyers in rural communities who are inconvenienced and have to travel farther to courses." The future is likely to see similar developments in the types of credits that are required and the methods by which courses are delivered.

Specialization: A History of Evolution and Adaptation

Nearly 700 North Carolina lawyers have earned the right to call themselves board-certified specialists under the State Bar's specialization program, which was established in 1987. Specialization has earned its place as a cornerstone of the State Bar's efforts to match the public's need for specific legal services with lawyers skilled in eight practice areas. Yet specialization's short history in North Carolina has been marked by passionate dis-

agreement over the program's growth and direction.

The specialization program has its roots in the early 1980s, when State Bar President E.K. Powe established an *ad hoc* group, the Case Committee, to study various ways "to improve the proficiency of attorneys and the delivery of legal services to the public." Following 18 months of study, the committee recommended the establishment of a specialization program. The committee drafted a proposal that essentially tracked the American Bar Association's Model Plan for Specialization.

Under the plan, lawyers seeking certification had to be licensed for at least five years, devote a substantial portion of their practice to the specialty area, and attend related CLEs. They also had to receive favorable evaluations from their peers and pass a written exam. The State Bar adopted the specialization proposal in October 1982 and the Supreme Court certified the plan two months later, paving the way for the Board of Legal Specialization. Grady B. Stott was named as its first chairman.

The board presented five potential specialty areas to the Bar before settling on three categories: real estate, bankruptcy, and estate planning and probate. Real estate was split into subcategories of residential and commercial in October 1985. After the committee worked through several drafts of proposed standards, the plan won approval from the State Bar Council. Separate committees in each specialty area then began the laborious task of drawing up exam questions.

The initial exams in November 1987 drew 112 applicants—49 for estate planning and probate, 38 for bankruptcy, and 25 for real property. From those initial exams a freshman class of 92 lawyers emerged who could boast certification by the State Bar.

By the spring of 1989, 106 attorneys had achieved specialization status. But there were signs that the program was not getting the traction the specialty board had anticipated, and there were complaints from small-town

L. Thomas Lunsford II—State Bar Executive Director

Tom Lunsford has been with the State Bar for the past 27 years, including the last 16 as executive director. Much of the Bar's tremendous growth has occurred on his watch and there has been constant evolution in programs, procedures, and personnel. Under his leadership, the Bar has been transformed into an efficient administrative agency whose 73 staff members oversee a lawyer population of 22,500.



A native of Burlington, Lunsford graduated from UNC Law School in 1978 and returned to his hometown to engage in a general practice with Allen, Allen, Walker and Washburn, which eventually became Allen, Walker & Lunsford. Lunsford had clerked at the State Bar in 1977 and was hired in February 1981 as a disciplinary staff attorney and counsel to the Ethics Committee. Between 1985 and 1992 he taught professional responsibility as an adjunct professor at North Carolina Central University School of Law. In 1987, he became the executive director for the newly created Board of Continuing Legal Education and eventually became the Bar's assistant executive director. He was named executive director in 1992 when Bobby James resigned.

Lunsford recently reflected on some of the milestones and accomplishments of his State Bar career. Following are his comments.

The Birth of CLE in North Carolina

"I was chosen to implement the mandatory CLE program in 1987. Although we were able to steal most of our ideas from the State Bar of Georgia, it still required a lot of imagination and political will to install the concept in North Carolina. The program met some resistance at first, but the concept made sense intuitively and I think we

administered the requirements reasonably. It wasn't long before our members became habituated to the obligation to continue their legal educations and accepted the idea that mandatory CLE could actually help maintain the competence of the Bar. You never really hear lawyers today complaining much about having to take CLE courses. Maybe the most significant aspect of the program has been the ethics requirement. Since education concerning professional responsibility was mandated, the consciousness of the entire Bar has been raised in regard to ethics and professionalism. North Carolina lawyers now are much more likely to discern ethical dilemmas than they used to be. I attribute this in large part to the wisdom of those who conceived the State Bar's CLE program."

Organizing the State Bar's Rules

"During my tenure as director, we've done a lot to rationalize the State Bar's rules. Before I was involved, the rules were not centrally located. They were scattered in the minutes, they were in the Supreme Court reports, and they were in various drawers throughout the building. Nobody had ever organized them or tried to restate them in any sort of coherent fashion. One of the things we did pretty early on was to collect the rules and attempt to bring some order to them. We made sure they were included in the North Carolina Administrative Code. And we made them available in a single 'document'—the *Lawyer's Handbook*. These days I think everybody is pretty familiar with the *Handbook*, but at one time it seemed like a very novel idea. It no longer seems novel, but at 386 pages, it feels like a novel."

Revamping the State Bar's Publications

"There used to be the *State Bar*

Newsletter and the *State Bar Quarterly*; two publications, neither of which was particularly distinguished. Several years ago we decided to amalgamate them and rechristened them as the *State Bar Journal*. And we professionalized the entire editorial effort by hiring somebody trained to do the job whose primary responsibility was the *Journal*. Today I think it's fair to say that among such professional publications, our magazine is second to none."

Transparent Financial Procedures

"I think our finances are in much better shape now than ever before. We use the State Bar's money responsibly and we account for it appropriately. Prior to 1992, information about our finances was rather closely held. We were not terribly transparent. Since that time we have gone in a different direction. Everything is in plain sight and we are fully disclosing to the Council and to the membership. Anybody can, with relative ease, see where the money is coming from and where it's going."

State Bar *Journal* Columns

"I'm pretty proud of what I've written for the *State Bar Journal*. For someone who likes to pontificate as much as I do, it's nice to have a large captive audience. Of course, it's not clear that anyone is actually paying attention. I've been writing essays for the *Journal* for 10 years now, so there are probably about 40 pieces extant. If you took all 40—and could stand to read them back-to-back over a long weekend—I think you could learn a great deal about the State Bar and its recent history in a fairly short period of time. Although I am a 'company man,' I am proud to say that I have always told the truth and been true to myself. I have endeavored, even in regard to the powerfully mundane, to write in an interesting and thoughtful way. In so doing, I have also tried to be tolerably irreverent. Although I'm engaged in a very serious business, I try not to take myself too seriously."

Bar officials estimated that 500 paralegals would apply in the first six months. That estimate turned out to be low. Just five months after the program's launch, the Bar had 1,200 applications... When the grandfather period closed in June 2007, about 4,700 paralegals had applied for certification...

attorneys that stringent requirements discouraged them from seeking certification. The board pressed forward that same year with a fourth category: family law. Criminal law joined the lineup in the spring of 1990. Even with the new specialties, turnout for the exams fell short of expectations. By early 1992, only 213 lawyers were certified. The Specialization Board made a concerted effort to attract applicants, embarking on a public relations campaign and running testimonial ads from specialists. It also pursued a few perks—for example, lining up a separate listing for specialists in the business pages of telephone directories. In 1993, the board took additional steps to broaden the program's appeal, including a split of bankruptcy and criminal law into narrower subspecialties.

The board's various efforts appeared to pay off when 50 lawyers were certified in 1993—the biggest influx of new blood since the first exam. The program increased to 292 specialists, or about 2.4% of the 12,000 North Carolina lawyers. "This year was a real turning point," said State Bar Assistant Executive Director Alice Neece Mine.

By the fall of 1995, there were 323 certified specialists. But if the program had turned the corner on attorney participation, it was about to run head-on into new trials over the designation of additional specialty areas. In the spring of 1995, personal injury was proposed as the sixth specialty, but that plan was scuttled because of opposition from some Bar councilors. In 1997, immigration law was approved as a specialty but a proposal to add civil trial advocacy met the same fate as personal injury.

Next up was a two-year battle to have workers' compensation designated as a specialty. Board officials had hoped to introduce that specialty in 1998 but twice were forced back to the drafting table because of opposition from members of the workers' comp section of the North Carolina Bar Association. One concern was that specialists from larger cities would take comp cases

from small-town practitioners. The proposal also drew opposition from many commissioners and deputies at the Industrial Commission, who voiced similar concerns.

The specialty finally won council approval in January 2000, becoming the state's seventh recognized certification area, and the November 2000 exam drew 48 workers' comp hopefuls. By the end of the year, there were 489 specialists, a 16% increase over 1999.

In 2002, a new dispute developed over a proposed specialty in land condemnation. The council turned down the proposal by a close vote at its October 2002 meeting. Councilors were asked in April 2003 to reconsider their vote. This time, they rejected the proposal by a wider margin despite pleas from several speakers who argued land condemnation was a complex area worthy of specialty status. The debate at the council meeting called attention to a philosophical rift over specialization.

"I recognize there are a lot of members of the council who don't like specialization, period," said Raleigh lawyer and councilor John B. McMillan, the vice-chair of a committee that drafted the proposed land condemnation requirements. "They don't like the concept. I respect your right to have that opinion. But the issue is not whether there ought to be specialization, but whether this qualifies as one. Our board believes it does, and our committee believes that it does."

Following that setback, the board took a hard look at the review process for proposed specialties and revised its procedures for submitting new categories. The result: any proposed specialty pitched to the board must now be accompanied by the signatures of 100 lawyers who back its formation, and signatures from 20 lawyers interested in seeking certification. The first specialty to pass muster under those new rules was Social Security Disability Law, which was approved by the council in October 2005. The first class of 27 Social Security specialists earned certification in 2006.

As the board looks toward the future, it has begun to forge alliances with national accrediting groups. The first agreement was reached with an ABA-accredited agency in bankruptcy, the American Board of Certification. "Now North Carolina lawyers who take the ABC certification exam can also become certified by the state if they meet the rest of the North Carolina criteria and become dually certified," Mine said. She predicted the program would continue to evolve, just as it has done for the past two decades.

Paralegal Certification: A Bar Success Story

For more than seven decades, the State Bar was primarily concerned with the licensing, regulation, or certification of lawyers. The State Bar now offers certification to another group of legal professionals—paralegals.

In 2004, Bar officials began considering a proposal to formally certify paralegals. The rationale, in part, was to help law firms have more certainty in hiring key support staff. "Attorneys interviewing a certified paralegal would know immediately that the applicant had met the educational requirements for initial certification and fulfilled the education requirements for continued certification," said Charlotte attorney J. Michael Booe, who chaired a committee that helped draft the proposal.

The program won approval and went live in July 2005, making North Carolina a leader in the certification of paralegals. The setup was similar to specialization for lawyers, with requirements for minimum education, an initial exam, and continuing education. The exam was waived for applicants during a two-year grandfather period.

Bar officials estimated that 500 paralegals would apply in the first six months. That estimate turned out to be low. Just five

months after the program's launch, the Bar had 1,200 applications. Tara Wilder, a paralegal and assistant director of the program, said, "Every paralegal that I've talked to has been very excited about becoming certified, so I sort of knew this was going to be big."

When the grandfather period closed in June 2007, about 4,700 paralegals had applied for certification based on varying combinations of education and experience. The achievements of North Carolina's certification plan have caught the eye of paralegal groups across the nation, and many have turned to North Carolina as a model for programs in their states. Given the solid foundation that the program has built, the next 25 years are likely to bring continued success.

State Bar Programs

IOLTA Program: Raising Millions for the Public's Benefit

The State Bar initiated the IOLTA program—short for Interest on Lawyers' Trust Accounts—after four years of study and upon approval by the state Supreme Court on June 23, 1983. The IOLTA program works with lawyers and banks across the state to collect and aggregate income generated from lawyers' general, pooled trust accounts. That money is used fund grants benefitting the public.

Since distributing its first grants in 1984, IOLTA has been a vital source of funding for civil legal services programs for the poor, the elderly, and at-risk children. In the early 1990s, IOLTA was instrumental in establishing volunteer lawyer programs across the state that coordinated local pro bono efforts of private attorneys. Other programs funded in part by IOLTA over the years include: court interpreter services; public interest summer internships for law students; judicial education for North Carolina judges; and a law school loan forgiveness program for law students that enter into public interest jobs.

Until 2007, participation in IOLTA was voluntary for lawyers who maintained client trust accounts. That changed on October 11, 2007, when the state Supreme Court ordered the State Bar to implement mandatory participation, effective January 1, 2008. In the last year of voluntary participation,

State Bar Publications: Two Become One

Over the years, the State Bar's publications have been crucial for keeping lawyers up-to-date on everything from new rules and ethics opinions to legal trends and analysis, as well as the labors of the Bar staff and its governing body. One such publication is the *Lawyer's Handbook*, which serves as the Bar's official source for its rules, regulations, and ethics opinions. The first paper version was published in 1995, and it has been a regular publication for members ever since. Like other State Bar publications, it has changed with the times, and in 1999 the Bar released a CD-ROM version. The move was in part a cost-cutting measure. The 1998 *Handbook*, which ran 360 pages, cost \$69,000 to print and mail. The electronic version had revised rules, ethics opinions, and other databases, including State Bar forms, a directory of legal specialists, and committee memberships. When the Bar went online with a website in 1999, quarterly updates of the CD-ROM database were available. The website continues to be an invaluable source of legal information for lawyers and nonlawyers alike.

Another significant development for Bar publications was the consolidation in the fall of 1996 of the *State Bar Newsletter* and the *State Bar Quarterly*. Those were combined into a single package—the *State Bar Journal*. A two-year study by a special committee chaired by Roger Smith of Raleigh concluded separate publications



were no longer practical. The *Newsletter* had typically contained administrative items, including proposed rules changes, ethics opinions, committee and council reports, and disciplinary actions. The *Quarterly*, published since 1978, was a slicker magazine format featuring a color cover, lengthier articles, and greater use of photographs.

The new *Journal*, with updated and coherent graphics, was "intended to be at once the definitive source of information relating to the profession's self-governance and a mirror reflecting our physiognomy," wrote Executive Director Tom Lunsford in Vol. 1, No. 1. "A reader should be able to gather more about what it means to be a lawyer in North Carolina from the *Journal* than from any other publication."

Jennifer Eichenberger served as the first editor. Jennifer Duncan has headed up the Bar's publications since 1997.

IOLTA took in about \$4.5 million. The annual contributions to IOLTA are expected to increase dramatically under the mandatory system. In the three months following the Supreme Court order, about 700 new attorneys had signed up. IOLTA officials said increased participation would allow them to provide additional financial support to the justice community.

"We have now awarded more than \$55 million in grants and have brought in over \$61 million in income (\$61,661,382 at end

of 2007)," said Evelyn Pursley, executive director of NC IOLTA in June 2008.

Client Security Fund: Protecting Victims of Misconduct

The State Bar suffered negative publicity in the early 1980s when two officers were disbarred after embezzling substantial funds from their clients. It was

Officials with the Client Assistance Program fielded 14,455 calls in 1999. That same year, 1,709 grievances were filed against North Carolina attorneys, down from 1,837 grievances filed in 1998. In calendar year 2000, grievances plunged to 1,441, a 15% decrease from the previous year.

against that backdrop that a sense of urgency developed as to how the Bar should respond collectively. Two State Bar leaders, Clifton W. Everett Sr. and Wright T. Dixon Jr., were particularly interested in finding a way to detect and discourage embezzlement and to make victims whole when it occurred.

Everett, the State Bar President at the time, stated, "Though we as individuals are not responsible for the misdeeds of our colleagues, each of us owes a duty to the profession to be sensitive to the needs and demands of the public that it have a remedy for dishonest acts of a lawyer over and above that of discipline imposed by the State Bar."

The Client Security Fund was established by the North Carolina Supreme Court in an August 29, 1984, order. The plan and rules of procedure that were adopted were substantially the same as those developed and presented to the North Carolina General Assembly in 1975, 1977, and 1981 but failed to pass. The fund's stated purpose was "to reimburse, in whole or in part in appropriate cases ... clients who have suffered financial loss as the result of dishonest conduct of lawyers engaged in the private practice of law in North Carolina."

The fund was set up to be administered by a Board of Trustees, with a mix of lawyers and public members appointed by the State Bar Council. The first board members were: Clifton W. Everett Sr., Marshall T. Spears Jr., Charles L. Fulton, all attorneys; and Leander Morgan from New Bern and Janis Ramquist from Cary, representing the public sector. The board's current composition includes four lawyers and one lay member.

Under CSF rules, clients can receive up to \$100,000 for a reimbursable loss which results from the dishonest conduct of their lawyer. The fund is financed by assessments of North Carolina lawyers by order of the Supreme Court. Assessments are ordered when the CSF's Board determines additional money is needed to pay known claims and maintain a reserve of \$1 million in its account. The Client Security Fund has paid,

since April 2008, \$7,287,402 in reimbursable losses during its 24-year existence.

Trust Account Audit Program: Safeguarding Client Funds

Each year North Carolina's private practitioners collect, hold, or disburse millions of dollars in client money. The careful handling of those funds is one of the most significant fiduciary obligations that lawyers owe to their clients, and misuse of that money is considered among the most serious violations of the clients' trust. It is not only the client who is harmed by attorney theft. Ultimately, the image of the entire legal community suffers lasting damage because of the financial misconduct of a few.

To reduce the possibility of misappropriation or mishandling of client funds, the State Bar has established strict trust accounting standards, currently set out in Rule 1.15 of the Rules of Professional Conduct. The Bar also publishes a trust account handbook that explains the requirements for segregating, safekeeping, and recordkeeping of client funds.

In 1985, the Bar took a proactive approach to safeguarding client funds by implementing a program of random audits of lawyers' trust accounts. Bruno DeMolli was hired as staff auditor and his name is synonymous with the program to this day. Random audits allow the Bar to monitor compliance with the rules and procedures for trust account recordkeeping. Each quarter, Bar officials audit the trust accounts of 60 lawyers from two judicial district bars that are selected at random. The staff auditor reviews trust account records for the preceding 12-month period, then meets with the lawyer and offers an analysis of the firm's procedures.

Minor technical violations of the trust accounting rules are addressed by the auditor, while more serious violations may be

reported to the counsel, who can decide to institute a grievance investigation. While the program occasionally uncovers account improprieties such as commingling or incorrect balances, its greatest success has been in raising the level of understanding of, and compliance with, the Bar's trust account rules. The Bar's auditor is available to educate lawyers in the proper management of client funds and trust accounts, and conducts workshops in the judicial districts selected each quarter for random audit. He also conducts workshops for other legal groups upon request.

Attorney-Client Assistance Program: Defusing Complaints

In 1997, the State Bar's Grievance Committee had a staggering case-load of 1,883 grievances filed against lawyers. As many as four of every five complaints would ultimately prove to be meritless, but every case required evaluation by the Bar staff or a committee member. Many of those grievances were filed because clients had nowhere else to turn when they had a minor complaint against their attorney. Enter the Client Assistance Program, approved by the council in the spring of 1998. The program's aim was to field the dozens of questions or complaints the Bar received on a daily basis from the general public and to respond in a meaningful way.

"This will go a long way toward making the Bar more responsive to the inquiries we receive from the public," said Charlotte lawyer Robert C. Sink, the Bar's President-Elect when the program was approved. "We should be able to help the public address their real concerns, and not lead them to some false hope that they will somehow get the help they need by filing a grievance complaint."

Bar Counsel Carolin Bakewell predicted the overall volume of grievances would drop once the CAP program got up to speed in

early 1999. Her prediction was right on the money. Officials with the Client Assistance Program fielded 14,455 calls in 1999. That same year, 1,709 grievances were filed against North Carolina attorneys, down from 1,837 grievances filed in 1998. In calendar year 2000, grievances plunged to 1,441, a 15% decrease from the previous year. The last time the annual grievance total had fallen under 1,500 was in 1995, and records indicated there had not been a three-year decline in grievance filings during the past two decades.

"Before we came along, clients would get ticked off and end up filing a grievance because they didn't have anyone to talk to," said Bobby White, an attorney who headed the CAP program in its early years. "We spend most of our time listening. We don't provide legal advice, but we can guide them through their options. And we help the attorneys as well by keeping them from going through the grievance process."

State Bar Vice President Jim Dorsett, the outgoing chair of the Grievance Committee in 2001, said several programs, including CAP, played a role in cutting the number of grievances.

"A lot of the credit goes to the extent to which the Bar has addressed underlying causes for grievances, which would include substance abuse and emotional problems," Dorsett said. "If you read between the lines, in a lot of grievances involving neglect you'll see evidence of those problems. So PALS and Friends have been of some help." Dorsett also credited the Bar's fee dispute resolution program, which helped defuse client-lawyer money disputes, and the Bar's trust account audit program, which gave lawyers incentive to carefully maintain their clients' funds.

The CAP program is now known as the Attorney-Client Assistance Program and has a three-member staff that responds to calls from members of the general public who have complaints or concerns about their lawyers.

Fee Dispute Resolution: Defusing Lawyer-Client Money Disagreements

Several Bar programs launched in the past 25 years have expressly looked after the general public in their dealings with members

of the Bar, especially when complaints or financial disputes arise. In July 1992, State Bar officials began discussing a plan to have fee disputes between North Carolina lawyers and their clients heard by arbitration panels. At that time, successful fee arbitration programs were up and running in Wake and Mecklenburg counties.

Creating a similar program at the statewide level was seen as a way to relieve pressure at the Bar's Grievance Committee, which was experiencing an increase in the number of complaints—including about 1,200 grievances in 1991. Some of those were, at their core, nothing more than fee disputes. The rationale behind a proposed statewide program was to give disgruntled clients an avenue of relief other than the Grievance Committee, which often turned into a frustrating dead end. "From my experience on the Grievance Committee, the grievance process is not an effective way to deal with financial problems, and the kind of emotions the clients have," said Greensboro lawyer W. Erwin Fuller Jr., who headed a subcommittee that drafted the fee dispute arbitration proposal.

The plan was approved by the State Bar Council in 1993. It allowed clients to trigger the arbitration process. Fee disputes were heard in a quick and informal hearing, with mediation encouraged prior to the hearing date. Disputes involving less than \$1,000 were heard by a single arbitrator. Those involving larger amounts were heard by a three-member panel with one public member. The arbitrators' decision was not binding, meaning either party could file an action in the state's trial courts.

The program, now known as Fee Dispute Resolution, has met its goal of steering lawyer-client money issues to mediation. For the past several years, about 700 to 800 petitions have been filed annually, according to Luella C. Crane, the State Bar's Fee Dispute Coordinator. "The majority of the requests for fee dispute resolution are investigated or mediated by two State Bar mediators," Crane said. "Mediation at the State Bar is attempted only in those cases where the client owes the attorney legal fees or is perhaps due a partial refund. All other cases are sent to the chair of the Attorney-Client Assistance Committee for dismissal."

Three districts presently have their own

fee dispute resolution committees: the 10th Judicial District (Wake County), the 18th Judicial District (Greensboro/High Point), and the 26th Judicial District (Mecklenburg County). The 21st Judicial District (Forsyth County) is in the process of forming a fee dispute resolution committee. Mediations held at the district level are for the most part conducted face-to-face, while those at the State Bar are conducted over the telephone.

Lawyer Assistance Programs: Help in Troubled Times

In 1979, the State Bar established PALS—short for Positive Action for Lawyers—to assist attorneys in their attempts to overcome drug or alcohol addiction. By 1993, the program had helped dozens of lawyers and was supported by 60 volunteers, some of whom devoted as many as 300 hours per year to the cause. Operating confidentially, PALS members investigated reports of impaired lawyers and steered them toward help, either through treatment centers or support groups such as Alcoholics Anonymous. In some cases, they intervened to get lawyers into treatment. Realizing more administrative support was needed to ensure the program's continued success, the State Bar Council voted in October 1993 to add a full-time PALS director. Charlotte lawyer W. Donald Carroll Jr. was ultimately selected.

Also in 1993, the State Bar's Lawyer's Management Assistance Program (LMAP) was initiated on a one-year trial basis. The program was envisioned as providing office management assistance to lawyers who struggled with the business side of their practice. The belief was that lawyers would benefit from more efficient, ethical, and profitable office techniques while the public interest would be served by cutting down on grievances that stemmed from sloppy management practices. Nancy Byerly Jones, who had a background in law office administration and risk management, was hired as the program's director. During the four years of its existence, LMAP won accolades for meeting its objectives and was cited nationally as a model that other bars sought to emulate. However, in the fall of 1997 the State Bar

decided to pull the plug on the program after Jones resigned. The State Bar's leadership concluded that LMAP's cost—about \$180,000 a year—could not be justified given the relatively small number of attorneys that the program was able to help.

A special committee chaired by President-Elect Robert C. Sink was asked to find other ways that the State Bar might use the resources formerly dedicated to LMAP. In April 1998, Sink's committee recommended that the State Bar turn its attention to another type of impairment—mental disability—and establish a program to help lawyers suffering from depression and other acute mental illnesses.

The proposal presented to the State Bar Council stated: "As in the case of alcoholism and other drug addiction, the prevalence among lawyers of depression and other mental illness is difficult to quantify, but is widely acknowledged to be considerable. Mental illness and drug dependency are often intertwined. Both can manifest themselves in professional incompetency and damage to clients, albeit in different degrees and forms." The recommendation from Sink's committee called for the creation of a Lawyers Assistance Program, with PALS and the new mental health initiative, called Friends, as independent but complementary components.

Today LAP helps lawyers find a way to address a wide range of health and personal issues, including alcohol and drug abuse, stress, depression, and anxiety and compulsive disorders. LAP trains and supports peer counselor volunteers, and also provides assessments, referrals, interventions, and education.

The Lawyer Assistance Program was set up with a nine-member board comprised of three Bar Councilors, three experts in the fields of addiction and mental health, and three lawyer volunteers. The Lawyer Assistance Program is directed by three full-time professionals: Carroll, who serves as LAP Director; Edmund F. Ward III, the LAP Assistant Director; and Towanda C. Garner, Piedmont LAP Coordinator. In addition, both programs use a number of lawyer volunteers who have personal experience or training in addiction or mental health issues and are trained in confidentiality and how to provide peer assistance.

The James Controversy

BE. "Bobby" James served as the State Bar's Executive Director for 31 years and is widely regarded as a visionary leader. James oversaw the introduction of several innovative programs that transformed the Bar, including mandatory continuing legal education and the Client Security Fund. James was the driving force behind the Positive Action for Lawyers Committee (PALS), which has helped many lawyers overcome alcohol and substance abuse problems. He also organized a program to issue advisory ethics opinions over the phone, allowing lawyers to get binding advice on time-sensitive legal matters.

"Bobby was synonymous with the Bar for three decades," said Bar Executive Director Tom Lunsford. "He was a very, very bright man who was a great judge of talent. He consistently hired good people and allowed them the freedom to do good work. He was directly or indirectly responsible for a great many of the programmatic initiatives that have brought so much credit to the State Bar in recent years, including creation of the Disciplinary Hearing Commission as an independent administrative tribunal."

James graduated *cum laude* from Wake Forest University School of Law in 1959 and joined the State Bar as an employee in 1961, at a time when there were only 3,200 North Carolina lawyers. He oversaw a period of tremendous growth. When he resigned in 1992, the Bar had 12,000 members.

James received various honors, including the Governor's Volunteer Award in 1980 and the Special Services to the Profession Award from the North Carolina Academy of Trial Lawyers in 1989. In 1991, he became a Fellow of the American Bar Foundation, in recognition of a career dedicated to the welfare of the community and the traditions of the legal profession.

James' resignation from his post as executive director on September 9, 1992, ushered in one of the darkest moments in the State Bar's history. Shortly after he resigned for what he said were personal reasons, Bar officers announced that James' expense account records were being examined.

A special seven-member committee selected by incoming Vice-President Charles M. Davis and chaired by Raleigh attorney

Howard E. Manning conducted an investigation. At a December 1992 meeting of Manning's committee several past Bar presidents spoke on James' behalf and expressed complete confidence in his honesty and integrity. Those presidents included Woodrow Teague, Grady Stott, John Campbell, and Wright Dixon. However, in January 1993, the Manning committee released a report that concluded James had misused approximately \$30,000 in Bar funds. James repaid all the money and surrendered his law license. In September of that year, he was indicted on criminal charges to which he eventually pled guilty and received a suspended sentence.

James' attorney, Joseph B. Cheshire V of Raleigh, talked about the impact the ordeal had on James. "This has been very painful for Bobby, his family, and the Bar," Cheshire said. "Bobby gave almost his whole life to the State Bar. The whole process he went through in the examination of his job has worn him down and changed him. I won't say it has ruined him, but it has had a significant adverse effect on his life."

The event had an equally negative impact on the Bar as an institution. The James story received widespread coverage in the public press. However, there was a silver lining. The Bar's Policies and Procedure Committee, headed by Louisburg lawyer Charles M. Davis, used the opportunity to revamp the Bar's personnel and fiscal policies. The Bar's policies had been scattered throughout two large notebooks that held the minutes from the quarterly State Bar Council meetings. Davis' committee drafted the first ever employee handbook which outlined office and expense account procedures.

Bobby James died in Raleigh on November 28, 2001, at the age of 71.

The State Bar's Disciplinary Process

The Bar's procedures for prosecuting lawyers accused of misconduct have been in place since the 1970s, when the General Assembly established the Disciplinary Hearing Commission. The DHC is an independent trial body, comprised of 12 lawyers and eight nonlawyers, which hears disciplinary cases of alleged ethics viola-

tions. The State Bar's counsel and deputy counsels serve as prosecutors in those cases, while a three-member DHC panel serves as judge and jury. The DHC can dismiss a case or impose a variety of sanctions, including the ultimate penalty of disbarment.

Statistics from the past 25 years show that North Carolina attorneys are serious about their obligation to police their own and punish misconduct. Since 1983, the Bar has stripped 325 lawyers of their licenses and suspended another 352. The state's legal population has increased over the past two decades and that has brought corresponding growth in the disciplinary staff's caseload—as well as in the staff itself, which presently includes 11 lawyers, eight of whom try DHC cases and two of whom handle only grievances. They are supported by a team of investigators, administrative personnel, and paralegals.

Misappropriation of client money and neglect are common themes running through many of the more serious disciplinary cases in the past quarter century. In the misappropriation cases, the amounts taken have often been relatively small but occasionally have run into the millions of dollars. In September 1995, a Hendersonville attorney surrendered his law license after disclosing he had embezzled more than \$1 million from clients. "This is by far the biggest embezzlement in State Bar history," said Carolin Bakewell, the State Bar Counsel at the time. But that amount was eclipsed in April 2004 when a Winston-Salem lawyer turned in his law license after admitting he took at least \$2.5 million from clients, lenders, and his own family's estate.

It was not always clients who were the victims of misappropriation. In 1998, four lawyers were disbarred for misusing money that belonged to their law firms. In two older disciplinary cases, lawyers who took money from their partners had received a suspensions rather than disbarments. However, in 1997 a new comment to revised ethics Rule 8.4 made it clear that embezzlement by a lawyer would be treated harshly, no matter who the victim was. The new comment stated: "A lawyer's dishonesty, fraud, deceit, or misrepresentation is not mitigated by virtue of the fact that the victim may be the lawyer's partners or law firm." Said Bakewell, "The comment indicates the drafters did not view stealing from a law firm as any less egregious than stealing from clients. Either kind of stealing renders him or her unfit to practice law. Who the victim is makes no difference."



Mike Nifong reviews complaints brought against him by the State Bar about his handling of the Duke lacrosse case. (Photo courtesy News & Observer)

The mid-1990s saw a new twist on discipline in misappropriation cases when lawyers began to face disbarment for embezzlement by their employees. In two 1995 cases, *North Carolina State Bar v. Ford*, 94 DHC 4, and *North Carolina State Bar v. Jordan*, 95 DHC 17, the Disciplinary Hearing Commission disbarred two attorneys after their employees dipped into the trust account. The lawyers were cleared of dishonest conduct but were nevertheless disbarred for failing to keep proper trust account records and failing to reconcile trust accounts on a quarterly basis. Until the *Ford* case, the Disciplinary Hearing Commission had never disbarred a lawyer for misappropriation without first showing dishonest conduct. That ruling made North Carolina one of only two jurisdictions to disbar attorneys for gross negligence in managing a law office's finances. Bar Deputy Counsel Fern Gunn, who prosecuted *Jordan*, stated, "The DHC is making another strong statement indicating lawyers must pay attention to trust accounts and properly supervise employees. There is no excuse for the lawyer when the employee is the one taking money."

A disciplinary case that centered on the bookkeeping habits of a Charlotte lawyer ended with a different result. The lawyer was disbarred in March 2000 after the DHC found that he had been grossly negligent in the management of his trust account and had benefited from that misconduct. He appealed

and the state Supreme Court ruled in his favor in a February 2003 opinion, concluding the DHC had overstepped its authority by disbarring him—in part because the Bar could not show that any client or creditor had been harmed financially. The Supreme Court also focused on the fact that the order was insufficient to support a conclusion that the taking was intentional. The case was remanded to the DHC where in October 2003 he received a reprimand, a much lower level of discipline.

High Profile Disciplinary Cases

For the most part, the Disciplinary Hearing Commission labors in relative obscurity. But that is not always the case. Several high-profile trials of alleged prosecutorial misconduct focused the spotlight of media attention on the State Bar. Those cases helped the Bar hone its public relations skills and brought greater transparency and accountability to the Bar's disciplinary procedures.

Bar Executive Director Tom Lunsford explained, "For the first 10 years of my tenure as executive director we were seldom, if ever, subject to public scrutiny or media interest. Generally speaking, we were not on the radar of most major media outlets in the state. But that all changed with the *Hoke* and *Graves* matter."

In the fall of 2004, controversy erupted following the disciplinary hearing against former Assistant Attorneys General David F.

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LAWYERS STRUCTURED SETTLEMENTS **LAWYERS MUTUAL**

Hoke and Debra C. Graves. They were reprimanded in September 2004 by the Bar's Disciplinary Hearing Commission for failing to turn over materials in a 1998 murder trial. That relatively light sanction for misconduct in a death penalty case, and the manner in which Bar lawyers presented their evidence, drew negative reactions from the press and members of the public. That prompted State Bar President Bud Siler to appoint a committee to review the Bar's disciplinary system. The committee, chaired by State Bar President-Elect Calvin Murphy, reviewed the *Hoke/Graves* case as well as the rules and procedures for dealing with ethical misconduct. Following a series of public hearings, the committee in July 2005 recommended some procedural changes, including a protocol for handling high-profile disciplinary cases, especially those involving public officials. The committee also proposed a redraft of ethics Rule 3.8 to bring the duty of prosecutors to disclose evidence in line with US Supreme Court precedent.

The next prosecutor misconduct case to generate widespread publicity focused on the Bar's procedural rules. The case also contained

allegations of withheld evidence, this time in a 1996 murder trial. At a 2006 disciplinary hearing, the DHC panel found that the charges were time-barred by the State Bar's six-year limitation rule. Even though the state appeals court affirmed the DHC in a May 2007 decision, some members of the public criticized the outcome as a dismissal on a technicality rather than the merits.

Those two cases served as a warm-up for the disciplinary case against Durham County District Attorney Mike Nifong, whose office in 2006 filed sexual assault charges against three Duke University lacrosse players. The Duke players were eventually declared innocent by NC Attorney General Roy Cooper. While the players were cleared of wrongdoing, Nifong's conduct cost him his law license. The State Bar filed multiple ethics charges against the Durham prosecutor, alleging he made prejudicial pre-trial statements, failed to turn over potentially exculpatory DNA evidence, and lied to the court.

Nifong's June 2007 disciplinary hearing attracted international media attention. TV satellite trucks were parked up and down Raleigh's Fayetteville Street and the story

made the evening news on all three major networks. The DHC hearing began on June 12 in Raleigh with F. Lane Williamson serving as chair. After a five-day hearing, the DHC panel voted unanimously to strip Nifong of his law license, citing him for 27 ethics violations. The DHC received high marks for its deft handling of the case, and the State Bar was praised for its openness in advance of the disciplinary hearing.

Steven D. Michael, the State Bar President at the time, issued a statement the very day of the disbarment. "I am satisfied that justice was done in the Nifong case and am proud to say that our system of self-regulation worked well," Michael said. "Mr. Nifong received a fair trial. All interested parties—but especially the citizens of North Carolina—were finally able to see all the evidence relating to this extremely unfortunate case of professional misconduct. I was very impressed with the effective and thoroughly professional presentation made by the State Bar's lawyers, Katherine Jean, Doug Brocker, and Carmen Hoyme. I also thought Mr. Nifong was well represented. The members of the DHC's Hearing Committee deserve thanks and commendation as well. They presided over a very difficult case in a fair and extremely competent fashion."

That case demonstrated the great strides the Bar had made in explaining its role in policing the state's lawyers. Said Tom Lunsford, "Certainly, one byproduct of our involvement in these high-profile cases has been the development of a much more sophisticated approach to the media. We have become more proactive in terms of issuing press releases and we have diligently sought to make our website as informational and user-friendly as possible for those members of the public and members of the media who have questions about what we do."

Reinstatements

The flip side of the disciplinary coin is reinstatement. Bar disciplinary rule .0125 gives disbarred attorneys the right to petition for reinstatement after five years. However, statistics show that in the past decade the tide has turned against disbarred lawyers seeking readmission to the Bar. Once a lawyer's license has been lost because of misconduct, the Bar Council, which votes on each reinstatement, has grown increasingly reluctant to return it, especially when the underlying offense involves the

mishandling of client funds.

From 1988 to 1994, 18 of 24 reinstatement petitions were heard by the Bar Council, which voted to reinstate 11 petitioners. In contrast, in the ten-year period from 1995-2004, 25 reinstatement petitions were filed but only six were brought before the council for a hearing—and reinstatement was granted in only one case. Said Raleigh lawyer Alan Schneider, who represents lawyers at DHC hearings, "Since 1994 or 1995—which was the last time an attorney who had been disbarred for misappropriation was successfully reinstated—not one attorney who has been disbarred as a result of misappropriation has successfully petitioned for reinstatement."

A Push For Diverse Leadership

For years the State Bar Council has pushed for greater diversity among its ranks. As the Bar headed into the 21st century, those efforts reached fruition. In 1999, Cressie Thigpen, a Raleigh lawyer in private practice, became the Bar's first African American president. He had served as a State Bar Councilor representing the 10th Judicial District since 1989.

Thigpen said one of his goals during his year in office was to recruit a more representative group on the Bar's governing body, which at the time had only five African Americans and seven women. Thigpen said representation on the council should more closely reflect the state's legal population as a whole.

"The thing about diversity is that it's not just racial or gender-based," he said. "For instance, it's also geographical. We are all products of our own experience. If we have people who have basically experienced the same things, then you're lacking input that you'd ordinarily get. With diversity, you aim for persons with different experience. We have people from large firms, from small firms, from large cities, and small towns. We have females and minorities. That's the kind of mix I'm looking for." One of Thigpen's initiatives as president was the Emerging Issues Forum for studying legal trends.

The next year brought another first for the State Bar when M. Ann Reed was elected President, becoming the first woman and the first public sector attorney to hold that office.

Reed, who had been with the North Carolina Department of Justice for nearly three decades, was a senior deputy attorney general at the time of her election. Among other positions, she served as chair of the Grievance Committee for two years and was the State Bar's appointee to the North Carolina Courts Commission.

Following Thigpen's lead, Reed said she would push for greater diversity on the Bar's Council. "I think the State Bar is making the statement that we do value diversity, and in my mind that's an important statement that we need to make," Reed said. "Obviously, if the practicing bar is about 30% women, then we need more than seven women out of 55 lawyer councilors. But we're heading in the right direction. It used to be that only the large multiple-councilor districts—Wake, Durham, Mecklenburg, Forsyth, and a few others—were the ones electing women or African Americans. Now we have women from a variety of single-councilor districts."

Reed converted her predecessor's Emerging Issues Forum into a committee for addressing topics such as multi-disciplinary practice, multi-jurisdictional practice, and the unauthorized practice of law. "The practice of law is changing all over the country," Reed said. "We need to be prepared and ready to make intelligent and informed choices for our members and the legislature. If we don't, those choices will be imposed upon us from the outside."

State Bar Building: Renovation and Relocation

The State Bar spent \$750,000 in the late 1970s to purchase and renovate the three-story structure it currently occupies on Fayetteville Street in Raleigh.

The renovation was praised in a 1979 *Raleigh Times* article for its architectural



Cressie Thigpen



Ann Reed

In 1999, Cressie Thigpen, a Raleigh lawyer in private practice, became the Bar's first African American President. The next year brought another first for the State Bar when M. Ann Reed was elected President, becoming the first woman and the first public sector attorney to hold that office.

design, which featured a glass exterior and the recycling of elements from other razed buildings. At one time, the Bar building had served as home to a Hudson-Belk department store. Touches from the building's former life were incorporated into the redesign. Architects retained the polished maple floors on the second and third stories. Three-sided mirrors from the old department store were installed in the women's restrooms, while old clothing racks were converted into bookcases in the mezzanine area.

Other elements from downtown Raleigh's storied past were also used by the architects—including 165 feet of staircase railings bought for \$5 per foot from the old Carolina Hotel. However, one architectural detail had apparently been overlooked—a second inner stairway to the building's two upper floors. Without those stairs, the building posed a potential firetrap.

"The primary problem is that the building's two upper floors have one single central stairwell on the interior of the building," said Executive Director Tom Lunsford. "Under the building code, there must be two fire-rated stairways that communicate directly to



(Above) Ribbon cutting for the new State Bar building (above) in downtown Raleigh, 1979. From left to right: Woody Teague, Governor Jim Hunt, Bob Hutchins, and E.K. Powe. Secretary of State Thad Eure is in the background (with the bowtie).

the outside. The fire marshal told me that we didn't have a stairway, what we had was a chimney."

In the summer of 1997, the Bar was ordered to immediately stop using the 2,600 square-foot third floor council chambers. As many as 80 people, including councilors, officers, staff, and guests, attended each quarterly meeting. The loss of the chambers forced the Bar to begin holding its quarterly meetings elsewhere. The October 1997 meeting was held at a nearby hotel in Raleigh. The hotel and the State Capitol have been used for Raleigh meetings ever since.

In January 1998, the council gave a Raleigh architect the go-ahead to draw up plans for \$1.15 million in renovations and repairs. Unfortunately, the plan called for the elimination of the council chambers.

"The only place to put stairs in the front of the building is the council chambers," said Raleigh lawyer Howard Satsky, who chaired a subcommittee overseeing the renovations. "Once you put the stairwell in, it will reduce the room's size by about one-fourth. If you eliminate ten seats, there just won't be enough seats for the council."

Besides bringing the building up to code, Bar officials used the opportunity to add offices and conference rooms for anticipated staff increases. At the time, the Bar had 41 staff members. Renovations allowed for another 30 personnel. "Since we're doing all this work and eliminating the council chambers, we decided to take a look at the building to see if we could meet the needs of the Bar for the next ten to 15

years," said Satsky.

A courtroom for disciplinary hearings and other meetings was added on the third floor. A second 20-person hearing room was added on floor two. On the aesthetic front, the glass facades that had been installed in the renovation two decades earlier were removed. The building's original brick facade was restored for a look more in keeping with the row of historic structures lining Fayetteville Street. The renovations were completed in 1999.

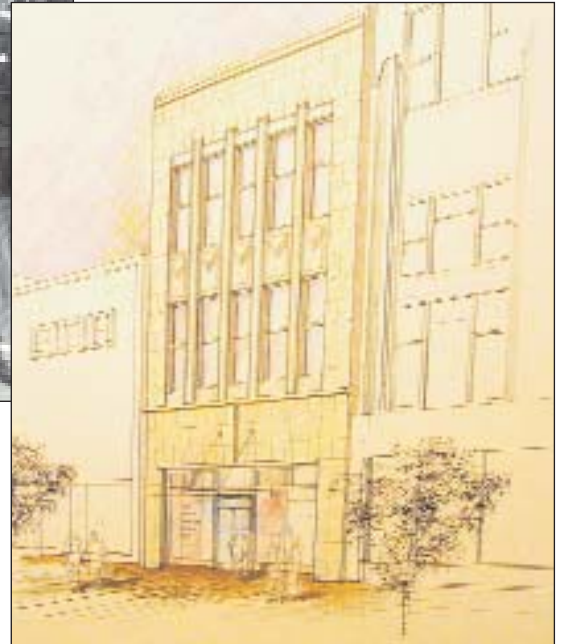
2008: Relocation Plans

When Executive Director Tom Lunsford began working for the Bar in 1981, the agency had 13 employees. In 2008, as the State Bar moved into its 75th year, the number of employees stood at 73. In just nine years, the State Bar staff had filled the newly renovated 28,000 square-foot Bar building to capacity.

"The fact is that we've outgrown the building we're in," Lunsford said. "We've even rented space in another building to accommodate the overflow."

Bar officials decided the time was ripe to search for a new home. In January 2008, the Bar's Facilities Planning Committee met to consider seven properties as possible sites for a future headquarters. The Facilities Committee has determined about 50,000 square feet of space will be needed. The State Bar had 22,255 active members at the start of 2008, with annual growth of 3.5% over the previous five years. That means that the Bar's membership might double within the next 19 years, according to Lunsford, requir-

(Below) Architectural rendering, 1998 remodel of the North Carolina State Bar building.



ing nearly 80 more staff members to accomplish its future workload. A move to a new location is expected to take three to five years.

Conclusion

As is evident from Louis Fisher's 1983 predictions (see article on page 33), it is not always easy to forecast the future. However, some events in the State Bar's future can be predicted with near certainty. The number of lawyers in North Carolina will continue to grow and there will be a corresponding increase in geographic, racial, and gender diversity. The impact of the Internet and the electronic community will continue to be felt. Members of the Bar will continue their vigorous debates as new legal and ethical developments emerge. And the State Bar will continue to be a deliberate and visionary organization to address those changes and other unforeseen events. ■

Michael Dayton is the content manager for Consultwebs.com, a Raleigh-based web design and consulting company for law firms. He is the former editor of North Carolina Lawyers Weekly and South Carolina Lawyers Weekly and co-author of a book on the history of Wake County lawyers, published in 2004. Some materials in this article are drawn from stories he wrote for Lawyers Weekly and are reprinted with permission.

Fisher's Vision of the Future: Experts Weigh In on 1983 Predictions

BY MICHAEL DAYTON

In 1983, State Bar President Louis J. Fisher Jr. used the occasion of the Bar's 50th anniversary to make predictions about the Bar's future. Gazing into his crystal ball, Fisher opined on a



variety of subjects, from automation in the law office to truth-telling machines that would make juries obsolete. As you'll see, some predictions were right on the mark. Others missed wildly. Read on to see selected predictions from his 1983 "President's Message," followed by analysis from legal experts around the state.

Prediction: The high costs and delays of litigation will result in increased reliance on mediation, arbitration, dispute centers, administrative agencies, and other non-trial dispute resolution concepts; most often without lawyer participation.

Response: I've had the unique opportunity to both help bring about and observe the fulfillment of Mr. Fisher's prediction about ADR. Mediation has truly revolution-

ized the civil procedure of our trial courts and has prompted lawyers to try ADR procedures before resorting to litigation. Mr. Fisher's predictions about the increased use of ADR mechanisms, particularly mediation, were more accurate in North Carolina than he could ever have imagined. The only thing he got wrong was his notion that most disputes would be settled without lawyers. In fact, lawyers have embraced mediation fully

and participate in it with their clients. No longer are lawyers seen as an impediment to settlement nor mediation as an alternative to litigation. ADR in North Carolina is fully integrated into the world of practicing lawyers.—*Andy Little, current full-time mediator and president of Mediation, Inc., Chapel Hill, NC.*

Prediction: Paralegals will be defined;

will increase in numbers, responsibility, and competence; will be licensed; and will become independent of lawyers within ten years.

Response: In 1983, the paralegal profession was considered one of the fastest growing professions in the country. No question, Mr. Fisher made the safe prediction when he suggested an increase in numbers, responsibility, and competence. Certainly, the profession has become more defined over the past 25 years. Most of our paralegal associations were created in the early 1980s, including the North Carolina Academy of Trial Lawyers Legal Assistants Division. Since that time, membership has increased across the board in all of the local and state associations, and the North Carolina Bar Association took the step of creating their Legal Assistants Division in 1998. More importantly, North Carolina adopted a certification program for paralegals in 2004—capping off years of research, hard work and lobbying by the tenacious paralegals of our state. Examine our national certification numbers. The National Association of Legal Assistants began offering the Certified Legal Assistants (CLA) exam in 1976. In 1983, there were fewer than ten in the state. As of May 2008, there are 424 CLAs in North Carolina. Only five states have more. There is no driver in North Carolina for paralegals to become independent of lawyers. Paralegals by definition are required to work under the supervision of a lawyer; however, most paralegal job descriptions have expanded over the past 25 years resulting in many long-term career paralegals who view their jobs as very fulfilling and challenging.—*Camille Stell, business development manager with K&L Gates (formerly Kennedy Covington Lobdell & Hickman, LLP), Raleigh, NC.*

Prediction: Criminal trial practice will undergo radical change with the decriminalization of most present crimes. First to go will be less serious traffic offenses and domestic offenses. Ultimately, only serious injury to persons, property, the environment, and governments will remain crimes.

Response: Sadly, President Fisher completely missed the mark. Instead of decriminalizing most crimes, we have moved the other way and seem to be in the middle of criminalizing even the most mundane of societal offenses. Not only that but we have a sentencing procedure that allows little

room to take a person's life into account by individualizing an appropriate sentence for the individual convicted of crime, and instead just puts every offender in prison whether they need it or not. These draconian changes, as opposed to the sensible ones he predicted, are destroying the efficiency of our courts, busting our state's budget, and creating social problems that only the true demagogic uncaring politician could love.... Had President Fisher's predictions come true we would be living in a much better state.—*Joseph B. Cheshire V, criminal defense attorney with Cheshire Parker Schneider Bryan & Vitale, Raleigh, NC.*

Prediction: Law schools and the Bar will acknowledge the wisdom of, and we will copy to a large degree, the English system of Barristers and Solicitors (trial lawyers and office lawyers).

Response: The general spirit of this prediction is increasingly true, i.e., members of the legal profession are increasingly specializing. Moreover, in fact, many lawyers do engage largely in either trial work or transactional work that corresponds roughly to the Solicitor (transaction work) and Barrister (litigation) division found in the UK and in other common law countries, such as the larger states in Australia. However, this distinction is one of fact and trend rather than law such as it is in the UK. The prediction is less accurate in regard to law schools where the curriculum continues to be dominated by litigation and appellate decisions with only a minority of "transaction" type subjects on offer. Again, there are exceptions, for example, the growing trend for law schools to offer some 'specializations,' many of which are transactional in nature.—*Gene Clark, dean of Charlotte School of Law, Charlotte, NC.*

Prediction: Ninety percent of the Bar will be board-certified specialists in 25 years.

Response: As of June 2, 2008, the date upon which I am writing this response, there are 22,337 active members of the State Bar. Of these active members, only 681 are currently certified as specialists by the State Bar's Board of Legal Specialization. Obviously, Mr. Fisher's prediction has not come to pass. Nevertheless, Mr. Fisher was prescient in one regard: the days of the ubiquitous general practitioner have passed; if polled, I would not be surprised to find that 90% of State

Bar members would identify themselves as *de facto* specialists—limiting their practice to one or two areas of law. So why haven't these lawyers applied to be certified as specialists in the areas of law in which they practice? One obvious barrier to certification is that only eight areas of law are currently recognized as designated specialties by the State Bar (to wit: bankruptcy, criminal, estate planning, family, immigration, real property, social security disability, workers' compensation). A lawyer who limits her practice to personal injury trials, environmental law, employment law, administrative law, securities, banking, etc., could not be certified by the North Carolina State Bar even if she wanted to be. (Rule of Professional Conduct 7.4 does allow a lawyer to advertise certification by an ABA accredited organization, but there are only a few such organizations and they do not add significantly to the number of specialties in which a lawyer might obtain certification.) Another barrier is the resistance to the concept of specialization by the bar at large and, despite its adoption of the specialization program in 1987, by the State Bar Council itself. This resistance seems to go hand in glove with the continuing hostility to lawyer advertising, which discourages publication of information promoting a lawyer's practice however objective that information may be.... Consumer awareness of legal certification grows each time a lawyer is certified. Over time, consumer demand for certified legal specialists will increase. The vast majority of State Bar members were licensed in the last 20 years, after the adoption of the Plan for Legal Specialization by the State Bar Council in 1987. These younger lawyers may not be reluctant to be tested nor resistant to change: they are familiar with the concept of board certification and have incorporated it, like legal advertising, into their concept of the profession and their understanding of tools available to establish a thriving legal practice. Ultimately, it remains to be seen whether board certification will be embraced by the next generation of lawyers but I am willing to predict that 25 years from now a majority of the eligible members of the State Bar will be board certified.—*Alice Neece Mine, assistant executive director and director of CLE, Specialization, and Paralegal Certification, NC State Bar, Raleigh, NC.*

Prediction: In 30 years most of our state

laws will be "nationalized" either through state adoption of model codes or by federal laws which displace state laws. Most lawyers will be admitted to practice in multiple states.

Response: I think Louis Fisher got it partly right. Lawyer regulatory rules among the various states are more similar than they were 25 years ago. North Carolina's version of the Rules of Professional Conduct follows the Model Rules adopted by the American Bar Association more closely today than at any time in our past. Even New York, the last holdout, recently enacted something close to the ABA's Model Rules. But important differences remain. North Carolina has refused to adopt ABA Model Rules that made no sense to us, and some of our rules are more progressive than the ABA's version. For example, our Rule 1.6(b), which sets out exceptions to the general rule of confidentiality, is significantly broader than the Model Rule, permitting North Carolina lawyers the ability to tell their clients, "do right or expect me to do it for you." California, by contrast, has essentially none of our confidentiality exceptions; clients there are apparently free to commit fraud without fear of their lawyer's intervention.

Louis's prediction that most lawyers will be admitted to practice in multiple states has not come true, although more of us have multiple admissions today than 25 years ago. Surprising to a perspective of a quarter-century ago, multistate law firms have opened offices in all of North Carolina's larger communities, typically by hiring a few local veterans and then sending a platoon or two of lawyers from the home office. Some of them are fine attorneys even though they have no interest in undergoing a certain test administered by the North Carolina Board of Law Examiners.

Ten years ago, someone making predictions about North Carolina law practice in the first decade of the 21st century would have expected to see large segments of the bar engaged in multi-disciplinary practice, rendering services in law-related fields, such as accounting, financial services, tree surgery, and the like. Then Arthur Andersen imploded and the MDP movement evaporated, at least in North Carolina. I hope it stays that way; I have no interest in fitting hearing aids. —*E. Fitzgerald "Jerry" Parnell III, civil defense and appellate lawyer with Poyner & Spruill, LLP, Charlotte, NC.*

Prediction: Attempts by the Federal Trade Commission to obtain control over licensing and discipline of lawyers will fail, but the continuing threat will result in state administered (but federally monitored) national bar exams in various specialties. Passing the exam (or a series of exams) will qualify the applicant to practice his or her specialty in all states.

Response: The patent bar exam, which existed in 1983 and still exists today, is national in scope and those who pass can practice patent law nationwide. However, there has not been a trend to copy that example by administering mandatory national tests for admission to a national practice of law in other specialized fields. Instead, there is a continuing trend towards standardizing the general admission process nationwide. That impetus is not coming from the Federal Trade Commission but from the increasingly multistate nature of law practice and the efficiencies that states can achieve by sharing exam expertise where that makes sense.... Most states take the position that differences in state laws require examination components that are state-specific, and they add state law components to the examination, typically through essay questions. As state laws become more uniform, and as GATT requirements take effect, the trend towards a national examination protocol and a uniform admission standard is likely to increase. —*Susan Freya Olive, former chair, NC Board of Law Examiners; intellectual property law attorney with Olive & Olive, PA, Durham, NC.*

Prediction: Law libraries of books and periodicals will cease to exist. They will be replaced by computers and terminals which will access all state, national, and international laws, cases, and legal works. Access specialists will replace the traditional research assistants.

Response: Law libraries continue to exist, though the mix of owned and licensed materials has changed radically since Mr. Fisher made his prediction in 1983. Law firm libraries have aggressively replaced print materials with licensed online subscriptions; academic law libraries have chiefly supplemented their book and film collections with licensed digital products; and government law libraries have stood between these two extremes. This pattern was not clear until the mid-1990s, when the World Wide Web

became the omnipresent mechanism of delivery for digital information, the legal publishing industry consolidated into three competitive giants, and flat-rate contracts for free-text searching of licensed data became acceptable within this industry. Affordable free-text searching has changed the approach to legal research for many attorneys: their use of digests and indexes has declined and reliance on digital resources to identify fact patterns has become paramount.—*Thomas P. Davis, librarian, NC Supreme Court Library, Raleigh, NC.*

Prediction: Within the next 15 years, the recent advice of former Harvard Law Dean Erwin Griswold to the appellate courts will be heeded. Opinions will become more brief, more clear, and more conclusive.

Response: My completely unscientific analysis of Mr. Fisher's prediction leads me to the conclusion that he could not have been more wrong, at least as far as this court is concerned. I would submit that court of appeals opinions have become longer, more complicated, and less likely to be decided unanimously over the past quarter century. Let me suggest that this has occurred for the following reasons: an increase in the scope and complexity of cases on appeal in lock-step with the civil litigation giving rise to them, the addition of three judges to the court in 2000 and parity in terms of the judges' party affiliation on the court, and the growing realization by the court that its opinions are controlling precedent as to the many issues that the Supreme Court is unable to reach because of its heavy nondiscretionary caseload.—*John Connell, clerk of the NC Court of Appeals, Raleigh, NC.*

Prediction: Civil juries will be replaced by sophisticated and reliable truth detecting machines which will be (it will be believed) failsafe. Ensuring the reliability of the machine's human custodians will be the major problem.

Response: Completely missed the mark. Trial by jury is a hallmark of our justice system and not only has it not been replaced by "truth-detecting machines" (handheld polygraphs?) over the last 30 years, I don't think it will ever be replaced by machines. Establishing the truth in court is not a process subject to assembly line techniques.—*J. Nicholas Ellis, civil trial attorney, Poyner & Spruill, Rocky Mount, NC.*

Woody Teague—Celebrating 75 Years of Law Practice

BY MICHAEL DAYTON

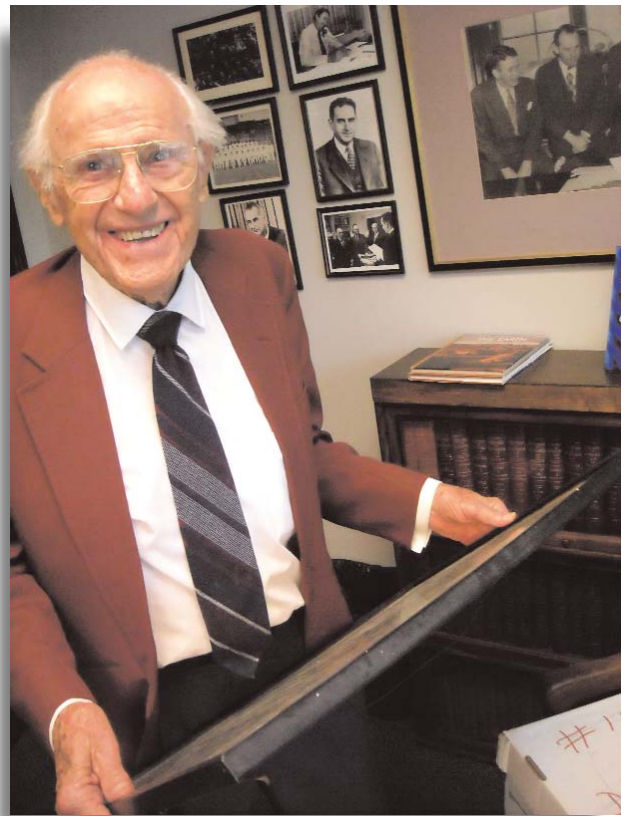
The Bar celebrates its 75th anniversary this year, and there is no better time to catch up with a lawyer who was there at the start. Raleigh lawyer C. Woodrow Teague will soon enter his 75th year of practice. On January 29, 1934, Teague, at the tender age of 20, was among the small group of lawyers who took the very first exam administered by the newly formed State Bar. Previously, the exam had been administered by the state Supreme Court.

Teague has a colorful legal and political history. After graduating from Wake Forest College Law School, he worked as a claims attorney for Liberty Mutual Insurance Company, handling cases in Boston, Chicago, Baltimore, and High Point, North Carolina. He came to Raleigh in 1938 to set up a claims department for Lumber Mutual Casualty Insurance Company.

During World War II, he served in the United States Navy, and was discharged as a lieutenant commander. Following his military service, he became an associate and later a partner in the defense practice headed by J. Melville Broughton, a former governor and US Senator. Teague continued in the firm

after Broughton's death in 1949. His present firm, Teague Campbell Dennis & Gorham, is a direct descendant of the former Broughton and Teague law firm.

Teague has extensive experience defending cases in the areas of auto accidents, products liability, malpractice, and general tort litigation. He has served in various State Bar positions, including councilor, vice-president, and president. He has also served on the Board of Governors of the North Carolina Bar Association and the North Carolina Association of Defense



Woody Teague in his Raleigh office.

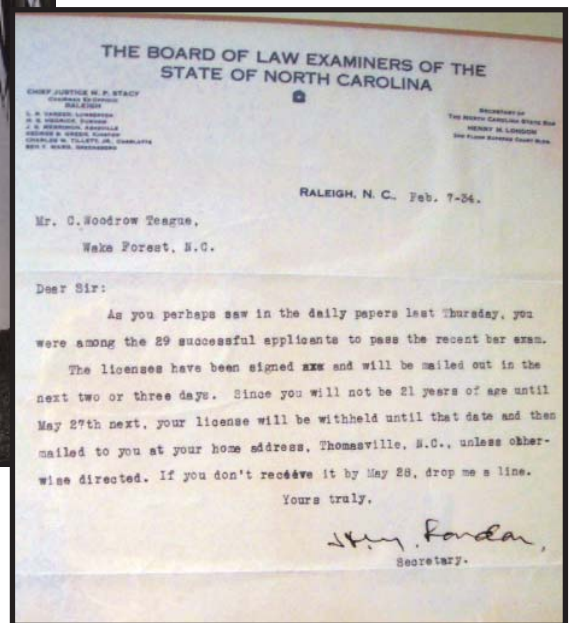
Trial Attorneys.

Q: Tell us about your education before you took the bar.

Teague: I finished high school in Thomasville in 1929, and I entered Wake Forest in the fall of '29. I took two years of undergraduate. That was all that was required—two years of pre-law. Then I entered law school in 1931. Dr. [Needham



Woody Teague displays a 1929-1930 "Bench & Bar" photo collection. While Teague did not enter the Bar until 1934, he was friends with many of the lawyers in the listing.



The letter Mr. Teague received notifying him that he had passed the bar exam.

Yancey] Gulley was the dean. He was the man who started the law school in 1894. He, Professor [E.W.] Timberlake, and Professor [Robert Bruce] White were the three professors in the law school. Dr. Beverly Lake came there in my second year, 1932.

In my first year, the only thing we had was a great big book which had all of the lessons that Dr. Gulley, Professor White, and Professor Timberlake gave. If you had that book, it was easy. Law school was a crisp course. The second year Dr. Lake came and he put the case system in. I went from 30 minutes of studying a day to four or five hours when he did that.

Q: Was law school required for you to sit for the bar exam and when did you take it?

Teague: At that time you could take the bar exam without having gone to law school. I wasn't but 19 years old when I graduated from law school so I had to wait until the next year to take the bar exam. I believe 40 took it in '34. I took it the first year the State Bar gave it. [Note: the official reporter shows that 32 applicants were successful, including three comity applicants.]

Henry London was the secretary of the Bar, and I framed the letter he sent me (pictured above). He pecked it out on the typewriter. Look how it's addressed, just "Mr. C. Woodrow Teague, Wake Forest, NC"

[Note: The letter reads: "As you perhaps

saw in the daily papers last Thursday you are among the 29 successful applicants to pass the recent bar exam. The licenses have been signed and will be mailed out in the next two or three days. Since you will not be 21 years of age until May 27 next, your license will be withheld until that date and then mailed to you at your home address, Thomasville, NC, unless otherwise directed. If you don't receive it by May 28, drop me a line. Yours truly, Henry London, Secretary.]"

Q: What kind of questions were on the exam?

Teague: It was 67 questions and you had to correctly answer 50 of them. It was part essay, part true and false. I took all day to answer it. Ed Cannon was the man who was administering it at that time.

Q: Tell us about your early years of practice.

Teague: When I got out of Wake Forest, I went to Boston as a claims attorney for Liberty Mutual. And then in October of 1937, Ralph McDonald was the general manager of a little insurance company and he came to Thomasville, where I was trying to practice law. But I didn't take in \$25 in five months. And he said, "The chairman of the Industrial Commission has recommended you to come to Raleigh and start a claims department for this insurance company and

be the attorney for them in North Carolina." I said, "How much does it pay?" He said, "\$150.00 a month, a car, and an expense account." I said, "Give me ten seconds to say the answer's yes." Oh, God, \$150.00 in 1937. So, I came to Raleigh at that time. Well, from 1937 on to '41, when I went to the navy, I was with them, traveling all over North Carolina. And I started the claims department and hired lawyers. I didn't try cases then.

Q: And after you returned from the War?

Teague: After I got out of the navy I wanted to practice law. I went to choir practice at the Haynes Barton Baptist Church, and Melville Broughton's secretary was there and told me he was looking for somebody. I went to see Mr. Broughton and I didn't know him from Adam. After we got through talking, he says, "Woodrow, when can you come with me?" I said, "Governor, I've got this lieutenant commander's uniform on. It'll take me three minutes to get it off and two minutes to put a suit on. Let's say five minutes from now." I came with him in

CONTINUED ON PAGE 43

North Carolina Superior Court Mediation—A Retrospective

BY ROY BAROFF

North Carolina lawyers participate in mediated settlement conferences each and every day. Most of us have represented clients in mediation and many of us are mediators. We started with mediation in Superior Court back in 1991 and now have mediation programs for Family Financial, Clerk of Court, North Carolina Industrial Commission, Office of Administrative Hearings, the North Carolina Court of Appeals, our federal courts, bankruptcy court, and the list goes on and on. It is safe to say that mediation is part and parcel of our legal system in North Carolina. It's now part of how we do our work as lawyers, but this was not always the case.

This anniversary issue of the *State Bar Journal* provides an opportunity to do a retrospective on court-ordered mediation even though it is only 17 years old. So, let's turn back the clock to review the beginnings of court-ordered mediation in North Carolina to consider how far it has come, and its impact on our practice as lawyers.

First, let's return to the mid 1980s and the Standing Committee on Dispute Resolution of the North Carolina Bar Association. In 1983, the committee had completed a study of various dispute resolution practices and

sponsored court ordered arbitration in district court. However, by the late 1980s the next "big thing" was mediation.

A lawyer who practiced in North Carolina and Florida, Robert Phillips, started telling folks on the NCBA Mediation Sub-committee about a mandatory mediation program in Florida. The Mediation Committee listened and then a number of members went down to Florida to learn about their program. Upon this group's return the Mediation



Subcommittee started working to make mediation in North Carolina a reality. Enabling legislation was enacted in June 1991 and rules were adopted later that year. Superior Court Judge Jim Long, now retired, from Stokes and Surry County, agreed to do a pilot program and began ordering cases to mediation in late 1991.

One important difference between the

Florida and North Carolina program centered on the Mediation Subcommittee's decision not to include a "good faith" negotiation requirement. Such a requirement was in place in Florida (later removed) and had created "second generation" litigation about "good faith" in mediation. The Mediation Subcommittee determined that if the appropriate people attended and the mediator had proper training, then the process should be allowed to work without participants second guessing (or litigating) actions taken at mediation. Thus, the focus was on attendance as opposed to requiring specific activities at mediation. This early decision paved the way for acceptance of mediation by the bar and, to this day, no one is forced to make proposals or settle their case at mediation. As a mediator, I still hear folks exclaim about someone not negotiating in "good faith." I remind them that "good faith" generally depends upon which chair you are sitting in, and then we get down to the business of settling claims. (For additional details on the origin of mediation, review *Alternative Dispute Resolution in North Carolina—A New Civil Procedure* published by the North Carolina Bar Foundation and the North Carolina Dispute Resolution Committee in 2003.)

Going back to the pilot phase, I recently spoke with retired judge Jim Long about his early experiences and he noted that, "there was considerable resistance from attorneys at the beginning who thought we were adding another layer to the litigation process." He also explained that, "as attorneys tried mediation and settled cases, they started asking that their case be ordered to mediation." Judge Long noted that he initially screened cases, trying to select those for mediation that seemed favorable toward settlement. He also described how many lawyers would ask him not to send their case to mediation, that it just wouldn't settle. Well, these same lawyers ended up settling these very same cases. They'd end up back in Judge Long's courtroom at trial calendar call saying that the case was now settled. So, Judge Long decided to stop screening and just send them all to mediation. Today most all Superior Court cases are ordered to mediation without screening.

Additionally, one of the early concerns for the program was whether there would be enough mediators. However, this proved not to be an issue as training programs filled and continue to do so today. According to the NC DRC list of mediators, there are currently (as

of 6/10/2008) 1,169 superior court certified mediators in North Carolina. Further, many attorneys complete the mediation training to augment their representation in mediation and negotiation skills. Moving forward in time, mediation expanded to additional judicial districts in 1993 and then went statewide in our superior court in 1995. Since then, based on statistics from the AOC, it is this author's belief that over 60,000 mediations have been completed since the program began in 1991.

In conjunction with the development of the mediation program, a governing body, the North Carolina Dispute Resolution Commission, was created to oversee mediator certification and program oversight. In its most recent statistical report covering 7/1/2005 - 7/1/2006, the DRC reported that there were 6,686 mediations with 55% of completed mediations reaching settlement at the conference. While rates of settlement are not the only measure of mediation success, this figure coupled with cases still pending suggests that the program is quite effective in helping resolve cases.

Representing Clients in Mediation - A Tale of Two Approaches

It was in the early days of mediation, back in 1992, when I was appointed mediator in a land condemnation case. Bill Thorp, a highly respected attorney for land owners (now deceased), represented the landowner and an experienced Department of Transportation attorney represented the condemning agency. I got a call from counsel for the DOT. It seemed that he and Bill wanted to meet with me before scheduling mediation to learn more about this new "mediation" process.

So, one afternoon I went over to Bill's office and met with him and the DOT attorney. I explained how mediation worked—how we would meet together and then meet separately to discuss the case and how it might be resolved. I explained that the entire mediation was confidential and also noted that when I met with folks privately, then any information shared would stay private unless they gave me permission to share it. (This is my approach to caucus confidentiality, while mediators also use other approaches.)

With that description, the DOT lawyer good naturedly exclaimed, "You know, I'm not going to tell you about my case in a private meeting. Because even if you keep it to yourself, when you walk into Bill Thorp's

room, he is going to see a gleam in your eye and learn something about my case!" That was that. We reviewed many other aspects of mediation, but this is the comment that stuck.

When we met for mediation several weeks later, Bill and the DOT lawyer took very different approaches to their representation. Bill brought his land planner and basically presented his case to the DOT lawyer and his colleague from Right of Way. And the DOT lawyer, true to his word, never told me about his case, even in private caucus. I would meet with Bill and his client, we would analyze some aspect of the case, I would head over to the DOT room, explain Bill's reasoning, raise a question or two, and then I would be sent out of the room. I'd be called back in and another counter offer made. I never did learn anything about the case from the DOT, but they reached a settlement.

Thus, even with two very different approaches, the mediation process was and is flexible enough to accommodate all. Today, most attorneys recognize mediation as a powerful opportunity to make choices about their cases. Obviously, the main choice may be to settle the case; however, mediation can also help narrow issues in a case and provide an opportunity for parties to take an active role in discussing their case. In our current mediation practice, attorneys are generally quite thoughtful about how to use their time in mediation. They approach their representation in many different ways and each can work in mediation.

While the mediation described above was the first mediation between Bill and the DOT attorney, there were many more to come. They asked me to serve as mediator in a number of cases and along the way I saw the interactions between these fine attorneys change. When we started they were hard and fast adversaries with very little trust. As we mediated cases, they began to interact in a different way. They were cordial to each other and worked together to get information ready for mediation. We shared lunches at mediation. And soon enough, they started to exchange their thinking on the case. The DOT lawyer even shared his thoughts with me!

I believe that the mediation process helped change their relationship. They met face to face with a third person with the prescribed goal of discussing a settlement. They learned to trust each other and showed genuine warmth and respect even while they disagreed

Through mediation, [lawyers] have a chance to meet face to face with their colleagues in a setting that, while adversarial, is focused on settlement, and you have a mediator to help smooth out the communication "bumps" along the way.

strongly over the issues in dispute. I very much appreciated working with these and many other attorneys across North Carolina. They have taught me a lot about representing a client's interests, about being a mediator, and about the power of mediation to impact the relationships of lawyers.

Thus, I believe lawyers in North Carolina are more civil, professional, and collegial with each other as a result of the court-ordered mediation programs. Through mediation, they have a chance to meet face to face with their colleagues in a setting that, while adversarial, is focused on settlement, and you have a mediator to help smooth out the communication "bumps" along the way.

Mediation Case Law and Implications for Practice

Since its beginnings in 1991 to statewide expansion in 1995 and continuing today, a growing body of case law has developed concerning mediated settlement conferences. An examination of appellate cases that use the word mediation or some variant, i.e., mediator, mediated, etc., (see Table 1 below) show the growth of jurisprudence in this area. (Note that these figures include mediation related cases from the North Carolina Industrial Commission and Family Financial matters as well as superior court mediation.)

<u>Date Range</u>	<u>Number of Cases including "mediation" or a variant thereof</u>
1991 - 1995	5 cases
1996 - 1999	15 cases
2000 - 2005	67 cases
2006 - 5/27/2009	90 cases

Several of these cases are worth noting. With respect to sanctions in mediation, we turn to *Triad Mack Sales v. Clement Brothers Co.*, 113 N.C. 405, 438 S.E. 2d 485 (1994), where a representative of defendant did not attend the mediation and the trial court entered a default as the sanction. As a result of this case, the Rules for Mediated Settlement

Conferences were amended to only allow for monetary sanctions for failure to attend. Another case that impacted the rules concerned how to memorialize a mediated agreement. In *Few v. Hammack Enterprises*, 132 N.C. 291, 511 S.E. 2d 665 (1999), where there was a dispute about enforcement, the trial court allowed evidence from the mediator concerning the substance of the mediated settlement agreement. Subsequent to this case the Rules were again amended to provide that mediators could not provide evidence concerning what occurred in mediation other than to attest that an agreement was signed in their presence. The goal of this rule change was to solidify the confidentiality of mediation on the part of the mediator.

While there are many other cases of interest, three others stand out with implications for practice. In *Chappell v. Roth*, 353 N.C. 690, 548 S.E. 2d 499 (2001), the court focused on whether all "material terms" were included in the mediated settlement agreement where the parties reached settlement at mediation; however, post-mediation, when the release was presented for claimant to sign, it included a "hold harmless" clause that had not been part of discussion at mediation. Claimant declined to sign and the court held that the "hold harmless" clause was a material term and since it was not included in the mediated settlement agreement, then the parties did not reach a meeting of the minds and the settlement agreement was not an enforceable contract. Since then mediators and counsel have paid closer attention to the specifics of the mediated settlement agreement, even going so far as to write out specific release language.

More recently, the specific actions to be taken via a mediated settlement agreement received scrutiny in the unpublished opinion of *Bowen v. Parker* (COA05-1340 - May 2006) where adjoining landowners on Topsail Island had a dispute about the use of a walkway and pier on one of the properties. The mediated settlement agreement in question called for the defendants to seek permission from the Coastal Area Management Act

(CAMA) to dock a total of five vessels at defendants' pier and dock and to add two boat slips for the benefit of plaintiffs.

The court of appeals affirmed the trial court's dismissal per Rule 12(b)(6) holding that the language in the mediated settlement agreement providing that defendants "agree to cooperate with plaintiff's efforts to obtain such CAMA permit" did not require the defendants to submit multiple CAMA permit applications nor revise the location for additional dock slips. The defendants had submitted an initial CAMA permit application per the Mediated Settlement Agreement, but then declined to submit additional applications when the first CAMA review rejected the application and required revision to the dock location and number. The court explained that "[t]he agreement consistently refers to the permit and permit application in the singular tense, and does not refer to multiple permits or applications." Thus, in mediation practice, drafters of mediated settlement agreements are now paying even closer attention to the language and acts required by the agreement.

Finally, a case that shows the flexibility of the mediation process is *Gannett Pacific Corp. v. City of Asheville and County of Buncombe*, 178 N.C. App. 711, 632 S.E. 2d 586 (2006). In this case the court held that mediation conducted between the city and county concerning their Regional Water Authority Agreement did not violate North Carolina's Open Meetings Law. The parties and their mediator created a process where the two boards met separately in closed meetings to "consider and give instructions to an attorney concerning the handling or settlement of a claim, judicial action, mediation, or arbitration" per N.C. Gen. Stat. § 143-318.11(a)(3)(2005). Once the closed meeting was finished, one representative from each board and their counsel would meet with the mediator. During this time both boards stood in recess and conducted no official business. This process continued until a settlement was reached around midnight.

The court noted that since no more than

one member of each board met with the mediator, then these sessions were not "official meetings" under the law. This coupled with the attorney-client privilege outlined in section N.C. Gen. Stat. § 318.11(a)(3) provided the basis for the court's decision. Thus, in today's mediation practice, counsel and mediators are partnering to develop case specific processes.

Future Mediation Issues and Conclusion

So, what's the next "big" thing as it relates to mediation? In terms of developing case law, while there will always be a new issue for the courts to review, for the most part the program Rules are now well settled. As for our practices in mediation, I believe we will see greater partnering between counsel and mediators in devising a process that is case specific. It will still look, feel, and sound like mediation, but as the *Gannett* case demonstrates, there is much flexibility in the process.

I also believe that we will see more volun-

tary mediation at an earlier stage of the case, i.e., before a lawsuit is filed. There may also be more mediation conducted where the parties are present by phone or video conferencing. There is a new wave of online mediation, quite different from our superior court form that may impact the shape of mediation in the future. This coupled with the price of a gallon of gas may encourage parties to seek ways to reduce costs and still have an effective mediation process.

In conclusion, mediation has fit quite well into our legal system and continues to reap benefits of both case settlement and collegial relations. While a retrospective cannot capture all the significant points of interest, the tapestry that is painted by mediation is rich with history and continues to hold a bright future for North Carolina attorneys and their clients. ■

Roy Baroff is an NC DRC certified mediator from Pittsboro, NC, who has been mediating since 1992. He was a member of the NCBA

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Mediation Subcommittee dating back to the later 1980s and into the early 1990s, and a former chair of the NCBA Dispute Resolution Section. He is the current chair of the NCBA Lawyer Effectiveness and Quality of Life Committee and a member of the North Carolina Academy of Superior Court Mediators.

Woody Teague (cont.)

April of '46. I had not tried any Superior Court cases then, but my background in insurance got me in with these insurance companies and insurance work. It was three or four years before I started trying lawsuits anywhere. In about 1951 or 1952, we started trying lawsuits in eastern North Carolina. There weren't many law firms in eastern North Carolina at the time doing defense work. And so these companies would get me. I tried cases all over Goldsboro, Kinston, Little Washington, Wilmington, not too much Elizabeth City, but Nashville. I tried a hell of a lot of cases, so, that was the time I enjoyed the most until I just got too old.

Q: Your memory seems incredibly sharp on all of these details. Your secret?

Teague: Yeah, I ain't but 95, see. One thing I learned in trying lawsuits and in being a trial lawyer is that you need a good memory. Back then, I didn't have a computer where I could push something and have it come back up. I had to keep it up here. And you had to remember what the man had said the day before. You had to make yourself have a good memory. In my opinion, memory is trained. It's something you learn to do.

One of the tricks of memory is to tie events to ten things you do when you get up. Let's say you brush your teeth, you do this, and you do that. Whenever you want to remember something, you tie that thing to one of the ten. And then, when you want to remember it, you go back and it will flash out at you.

Q: Any secrets to the practice of law?

Teague: One thing I found in the practice of law is that most people don't listen. While you're talking to them, they're thinking about what they want to say in response to what you just said. You learn to listen by just concentrating on what somebody is saying. Lyndon Johnson said you've got two ears and one tongue. You ought to listen twice as much as you talk, which is true. Particularly in court testimony, listen to what the witness is saying or what the judge is saying. And put it back there so you can pull it back out. I'm single minded. If I'm doing anything, I'm doing that thing, the hell with anything else. Concentrate on that thing, and you will remember what you did. That's the truth.

Q: You have seen the practice of law evolve. Do you see good things ahead in the next 25 years?

Teague: Up until maybe five years ago, I

was on the Board of Visitors of Wake Forest Law School. If you asked a first year law student why they wanted to practice law, they would say it was because of money. But in the last five years, I think that has turned around. I believe now they want to render a service. Also, a lot of people who take law now go into business. They don't want to try cases. I think the practice of law, insofar as using it in business, is going to increase. The study of law has changed and is going to continue changing dramatically. It's going to go from Blackstone and all the old stuff into brand new areas. That law library we have around the corner is useless now, completely useless. Nobody goes in there; they all have computers. If they want to know how many fall-down cases occurred in the last ten years, they punch it in the computer and it spits out the answer. You don't have to Shepardize it like you used to.

I don't think the practice of law is going to be as pleasant in the next 25 years. I think I practiced law from 1955 to 1975 or '80 in the Golden Age. One of my partners here says I wouldn't like it now. It's not civil and you don't trust the man on the other side and it just isn't as pleasant as it was. Old Willis Smith Jr. and I had a hell of a time. We had a damn good time trying cases. We really did. ■

Claiming Woodrow Wilson as One of Our Own

BY ARTHUR S. LINK III

Thomas Woodrow Wilson, 28th president of the United States, is mainly remembered for his leadership during World War I and his subsequent efforts to establish the League of Nations, precursor to the United Nations of today. At the same time, Wilson's first term was marked by a period of extraordinary legislative productivity, including establishment of the Federal Reserve, labor reform, and the expansion of farm credit. We remember Wilson as an academic; Wilson once said that compared to academic politics, national politics was mere child's play.

However, Wilson did not begin his professional life as a professor. Wilson was a lawyer first, by training and avocation. While Wilson studied and practiced the law his family lived in Wilmington; and while Wilson's law practice was centered in Atlanta, he maintained his ties to the Tarheel state. Wilson attended Davidson College for a year, lived in Wilmington for a time, vacationed in the mountains near Hendersonville, and proposed to his future wife, Ellen Axson, after a

chance meeting in Asheville.

Even though Wilson spent only two years as a practicing attorney, and spent a limited amount of time in North Carolina, it is fair to say that the experiences of that time in his life left a lasting impact on his character. As professor and president, Wilson analyzed problems as a lawyer; he had a remarkable ability to identify issues, and once he made a decision, he fought as any attorney should for a client—tena-



Circa 1910: Woodrow Wilson (1856 - 1924), 28th president of the United States of America. (Photo by Stock Montage/Stock Montage/Getty Images)

ciously. Likewise, if Wilson had not encountered Ellen Axson by chance in Asheville, his life would have been very different, indeed. Although he was born in Virginia and lived most of his life as a Princeton educator, Woodrow Wilson was also a North Carolina lawyer. We can claim his as one of our own.

Wilson's life experience in North Carolina began in the fall of 1873, when he left his home in Columbia, South

Carolina, to attend Davidson College. Wilson's father, Joseph R. Wilson, was a Presbyterian minister and scholar, and the family likely chose Davidson for its academic reputation, strong ties to the Presbyterian Church, and close proximity to Columbia. Wilson made good grades at college and was active in the student debating society, but he left the school after only one year. The ostensible reason for his departure was his health; but it is also possible that he returned to Columbia out of ordinary homesickness. Also, the Wilson family was going through a difficult time. Joseph Wilson found himself on the losing end of an academic feud at Columbia Seminary and lost his teaching position. Fortunately for the family, Rev. Wilson accepted a call to serve as pastor of the First Presbyterian Church in Wilmington, where his son, young Woodrow (called Tommy), spent the following year.

Woodrow Wilson lived with his parents in Wilmington from June 1874 to the fall of 1875, when he resumed his undergraduate studies at Princeton University. He spent his days there reading, studying shorthand, and indulging a life-long passion for law making and organization. When he was a child, Wilson wrote constitutions for the clubs he formed with his playmates. Living in Wilmington, the first port of North Carolina, Wilson pretended he was an admiral, and wrote a code of rules and regulations for the fleet under his command.

Wilson's family remained in Wilmington after their oldest son went to Princeton, but Tommy always remained connected with his family in North Carolina. He would return home for the summers and wrote several essays for the public journal of the state's Presbyterian Church. He also wrote several letters to the editor of the Wilmington daily that showed a growing interest in public affairs, including one deploring the health conditions within the city. At Princeton, Tommy was active in the Whig Society, a student group dedicated to debate and discussion of government. Again, Wilson wrote a constitution for the club, and quickly became known as one of its foremost debaters. He also became a noted student essayist on American and European government.

His primary interests at school were always government and constitutional law, and Wilson decided to attend law school

so that he could pursue a career in politics. As Wilson himself said in a letter to his future wife, Ellen, "The profession I chose was politics; the profession I entered was the law. I entered the one because I thought it would lead to the other. It was once the sure road; and Congress is still full of lawyers." As historian John Milton Cooper has noted, Wilson was always interested in the question that is, what is the nature of power? Attending law school afforded Wilson the opportunity to study the basis of state power—the law. Wilson also hoped that his legal experience would provide a basis for a political career in the future.

In the fall of 1879 after his graduation from Princeton, Wilson moved to Charlottesville to attend the University of Virginia Law School. Like many 1Ls, Wilson found the studies demanding and the subject matter tedious. Wilson wrote to a North Carolina friend: "But when one has nothing but aw, served in all its dryness, set before him from one week's end to another. . . this excellent thing the Law, gets as monotonous as that other immortal article of food, Hash." If the subject matter was not overly exciting, Wilson still performed well in his classes. The only black mark on his record as a law student came when he was reprimanded for excessive absences in 1880. The cause of the absences was one Hattie Woodrow, Wilson's cousin at the nearby Women's Seminary in Staunton, whom he was courting at the time.

Wilson did not graduate with his class, but left school a semester early in 1881 to complete his legal studies at home in Wilmington, for health reasons. Such an occurrence was not unusual in those days, when a legal degree was not a requirement to sit for the bar in most states. Although Wilson's family lived in North Carolina and he completed his legal education in North Carolina, Wilson decided after consulting with his father to begin his legal career in Atlanta, Georgia. Atlanta was a boom town at the time—the city was being rebuilt after being destroyed by Sherman's armies—and money was pouring in at a rapid pace. It seemed a good place for a young lawyer to begin his career.

Wilson arrived in Atlanta in May of 1882, and hung out his shingle on Marietta Street with Edward L. Renick, a UVA class-

mate. Wilson's first client was a woman named Isabelle Pratt, who retained him in an effort to secure a lease for a boarding room. We do not know if Wilson was successful in his effort, but we do know that he was thoroughly dissatisfied with the nuts and bolts of the practice of law. He saw much of his work as futile; he wrote to his friend Robert Bridges that most of his effort was spent trying to collect on "numberless desperate claims." Also, during this time he continued to rely on a monthly stipend of \$50 sent by his parents. At the time in Atlanta, torts provided the most lucrative work for the young attorney, and Wilson had no interest in the subject. Attracting clients was difficult; indeed, Wilson's biggest cases came from family members. He was retained by his cousin-in-law Abraham T. Brower for a libel suit, and hired by his mother, Jessie, in an estate dispute with her brother-in-law.

Jessie Wilson's brother, William Woodrow, had died some years earlier, leaving his sisters an estate that included a large tract of land in Nebraska. Jessie and her sister Marion never divided the land, but instead gave power of attorney over the entire tract, which they owned as tenants in common, to Marion's husband James Bones, a Rome, Georgia, businessman. Over the years, Bones was uncommunicative and not candid concerning his management of the land, so Jessie eventually hired her son to terminate Bones' power of attorney and to sever her interest in the estate. The case grew complicated, coming to resemble something out of Bleak House. Wilson discovered that Bones, in an effort to prop up his failing business, encumbered the land with several mortgages which Jessie refused to pay. There was an ongoing dispute between Jessie Wilson and James Bones over the land to be divided, and its value. In the meantime, Marion, Jessie's sister and Bones' wife, died, leaving her husband to act as sole trustee of her estate. Wilson was eventually able to settle the case on acceptable terms, but its ultimate effect on his life was not professional so much as it was personal. While on a visit to Rome to see Bones in 1883, Wilson met his future wife Ellen Axson.

Woodrow Wilson first saw Ellen Axson when he attended services at her father's

CONTINUED ON PAGE 77

What *North Carolina State Bar v. Nifong* Was Not

BY KATHERINE E. JEAN

Since the trial of *North Carolina State Bar v. Nifong* in June of 2007, the Office of Counsel has received scores of letters from convicted criminal defendants claiming they were "Nifonged" and demanding that the State Bar secure their immediate release from prison.

One such complaint came from a man who was arrested while committing a robbery which was captured on videotape. He was prosecuted many years ago in far western North Carolina by someone other than Mike Nifong. The prosecutor made no statements to the media. DNA did not play a role in his trial. There was no allegation of discovery abuses or lying to the court. So how was he "Nifonged?" Just like the Duke lacrosse defendants, he said, he is innocent.

We also receive complaints from inmates who say they were "Nifonged" because the prosecutor "withheld evidence." When we look behind this allegation, it often turns out the inmate is not complaining that the prosecutor failed to turn over discoverable evidence. He is complaining that the prosecutor "withheld" evidence by not presenting the defendant's alibi evidence or the defendant's side of the story to the jury.

We also receive complaints from inmates saying they were "Nifonged" because the prosecutor had an improper motive to prosecute them.

These are just a few of the ways in which

the Nifong case is invoked in support of propositions for which it does not stand.

Nifong was not about whether there was sufficient evidence to justify prosecuting the Duke lacrosse defendants. When we filed the complaint on December 28, 2006, and the amended complaint on January 24, 2007, we had no way of knowing what the evidence at an eventual criminal trial might be. The attorney general did not declare the lacrosse defendants innocent until April 11, 2007, two months before the disciplinary trial began. We were not, as so many erroneously believe, asking the Disciplinary Hearing Commission to interpose its judgment for that of a judge who might allow the criminal case to go to a jury. Nor were we asking the DHC to substitute its judgment for that of a jury that might have found guilt beyond a reasonable doubt.

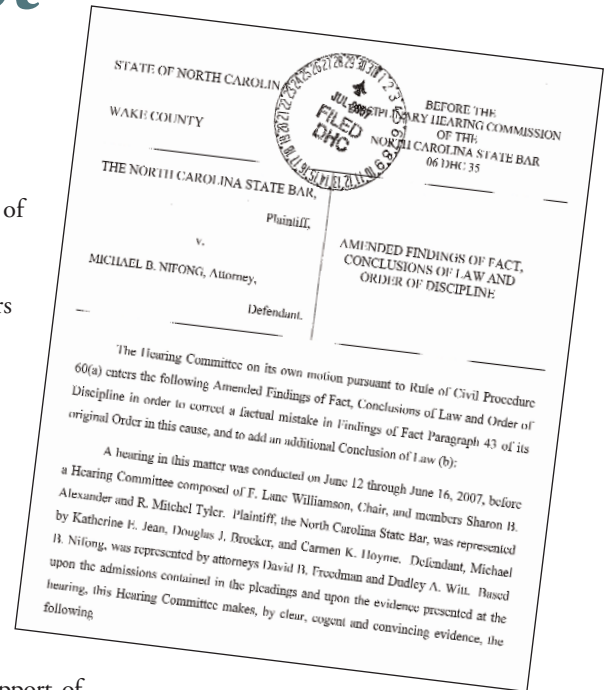
Nifong was not charged with failure to present both sides of the case to a jury. There was never an occasion in the criminal case to present evidence to a finder of fact. Furthermore, the Rules of Professional Conduct do not require a prosecutor to present a defendant's alibi evidence or other story

to the jury. The defendant can do that by presenting his own witnesses or testifying in his own behalf.

The State Bar did not charge Nifong with having an improper motive for the prosecution. Certainly, the State Bar presented substantial evidence that Nifong's motive for pursuing charges against the Duke lacrosse defendants was to bolster his prospects in a close election. However, that evidence was not offered to prove a separate rule violation; it was offered to explain why Nifong engaged in conduct that otherwise seemed inexplicable.

After a five day trial, the DHC found and concluded that Nifong violated multiple Rules of Professional Conduct by making improper statements to the media, failing to comply with obligations imposed on him by statute and court order to provide discovery, and lying to the court. For this misconduct, Nifong was disbarred. That is what *North Carolina State Bar v. Nifong* was about. ■

Katherine Jean is is counsel and assistant executive director of the State Bar.



Lost Call

BY JASON B. SPARROW

Garson Oaktree had temporarily lost interest in practicing law. However, his family had not lost interest in his continuing to be gainfully employed, and his staff had families to support as well, so Garson did his best to persevere and to not let it show.

On those days he felt like he ought to be working, but had decided not to, he always had some ostensibly good reason for why he would be out of the office all day besides just hanging out one of those "Gone Fishin'" signs on his door like his father and his grandfather before him had done. If he were playing golf out of town, he was always sure to be meeting with a client either going or coming back. If he really was going fishing, he usually invited a client along, or at the very least, a prospective client, which could be just about anyone. He was always sure to stress to his staff that despite how it might look, the primary purpose of such an outing was business and that he received no other gratification from the activity itself.

He did an excellent job for his clients and he felt he was one of the most diligent and hardworking lawyers in Clarkson County. However, he did not feel the "Call to the Bar" that his father and grandfather had often attributed to other lawyers.

When Garson had decided to attend law school, they had stated proudly and often to others that Garson had indeed been "Called to the Bar." Perhaps, at least in their minds, this had been true, but Garson wasn't sure exactly what it meant with regard to him. The angel of the Lord had never appeared to him and said: "Garson! Ye shalt come to the practice of law!"

The image of what this might look like usually made him chuckle to himself, but immediately afterwards he always felt guilty like he had been blasphemous not only

against his father and grandfather, but also against the Lord.

When he had decided to attend law school, he was spending a lot of time in bars of a different type and driving drunk so often that he was genuinely concerned he would wind up behind bars, or worse hurt someone else, if he didn't mend his ways. When he reflected on those days, he told himself that people were more innocent back then. Everyone did it and pretty much everyone that did it had gotten away with it, and only a few had been hurt. But, he felt a lot worse about it now, in retrospect, than he had then.

At the time, what seemed like a good idea was to get serious about something and maybe, somehow, that would keep him from frequenting the other types of bars, but he did not understand where his father or his grandfather had gotten the information about his being "Called to the Bar."

This was the reason he didn't hang a "Gone Fishin'" sign on his door or use some other such hokey way to alert everyone that he was taking off and he wasn't the least bit ashamed about it. Someone that is called to an altar of service in a noble profession (like a minister is called—as Garson understood it) has something inside of them that makes them a member of that profession; they have somehow crossed over to being a different kind of person based on a higher calling. Yet when he pictured an angel or Jesus or some sign telling these people which way to go, he did not laugh. It seemed plausible. Perhaps it seemed plausible because it was not Garson himself whom he envisioned being called.

If his father or his grandfather went fishing they were still lawyers. It wasn't what they did minute to minute that made them lawyers. It was who they were. If Garson left the office for the afternoon to play

The Results Are In!

In 2008 the Publications Committee of the State Bar sponsored its Fifth Annual Fiction Writing Competition. Four submissions were received and judged by a panel of six committee members. The submission that earned first prize is published in this edition of the *Journal*.

hooky and relax, in his mind, he was not a lawyer. He was just a guy slacking off—not being a lawyer. He knew his employees were aware he was out doing something other than working, but with having not been called to the bar, he just didn't have the guts to be so flip about what he felt were his duties to his staff and his clients. To Garson, if he wasn't working, he wasn't really doing his job. He wasn't doing the absolute best he could and, called or not, that was something he could control—how hard he worked and his dedication to those responsibilities.

Garson was one county over in late October of a recent year examining the title to a piece of real estate a client of his hoped to buy. He had stopped on the way back towards town at a piece of land his grandfather had left him. He told himself it would be just a little while and he would be back in the afternoon to draft his title opinion, even though it really didn't have to be done until the early part of the following week.

However, he soon found himself dressed in camouflage and climbing into one of the many permanent deer stands he had on the property. The patented camouflage pattern was called "Mossy Oak Break Up" which always made him laugh (even though he swore by it) and think about Flatt and

Scruggs' "Foggy Mountain Breakdown" which he supposed was intended by the manufacturer. He did not think that hunting when he felt he was supposed to be working was really a problem, especially since he remained connected to the office the entire time.

He had just gotten to the top of the stand's ladder when his cell phone began to vibrate. He had a pocket sewn to the inside of his shirt so that he could feel the vibration against his skin, and no noise could escape and scare his prey. As a hunter, he was ashamed to have his phone with him, but as a lawyer, he reasoned that without the phone there would be a lot less hunting. He had made the mistake in the early days of cell phones of marveling out loud at his office that he could "even get a signal all the way out there" at his grandfather's land. At the time, he could not have conceived that he would live long enough to see technology progress to the point that he could actually be talking on a cell phone that was not tethered to a car or housed in some sort of giant bag or both.

The call was from his office. One of his clients had been arrested and charged with murder.

Daniel Gibbs had been a client of Garson's on and off for a number of years—first as a juvenile and then, once he reached sixteen, as an adult.

Garson had always liked him and thought that, deep down, Daniel really was a sweet kid, but—and Garson hated to think this about anyone—he was stupid. Worse than stupid actually. Garson also liked that Daniel had never been violent, but recognized that one of Daniel's main problems was that he didn't have the sense to realize his own limitations. He was also lazy and for some reason seemed to believe he deserved better than he was able to acquire through the little honest work he performed. While an average person of much less than average intelligence would be satisfied to have a nice job with a regular paycheck, Daniel would get a new job and rob the employer the same evening. But, he still just couldn't understand why he kept getting caught.

Several years back, Daniel learned on the internet that one could make crystal

methamphetamine using household items and got arrested for stealing Vicks VapoRub. While in jail, he learned that it was actually Vicks nasal inhalers, not VapoRub, that he needed to make the meth. The first batch he made shortly after he was released from jail miraculously came together for him. However, instead of selling it as would a slightly more astute criminal, Gibbs went on a two-week bender and, in trying to cook up a second batch, while still high on the first batch, he burned his grandmother's house to the ground.

After the fire, Daniel's grandmother's church had held bake sales and taken up collections and bought her a repossessed singlewide. One member of the congregation had even donated the labor and the truck for the set-up and transport of the trailer.

When Gibbs had served his sentence, his grandmother had forgiven him and taken him in again. That's why, when a second fire burned the trailer up with sweet old Grandmother Gibbs inside of it, the sheriff had almost immediately arrested Daniel.

Garson turned the phone off and put it back into the pocket of his fatigue vest, made sure his gun was securely slung over his back, and climbed out of the stand and down the ladder.

Instead of dressing out of the trunk of the car like he had when he had put on his hunting clothes, he tore down the long drive at the property pulling off camo, throwing it into the back seat and replacing it with his two-button grey wool suit and fairly new, but slightly rumpled, blue and yellow striped silk tie.

Upon arrival into town, he pulled into the municipal parking lot, stepped out of the car, bent over and tied his black wingtips, grabbed his briefcase out of the backseat floorboard, and headed toward the Sheriff's Department and jail.

The jail smelled like a cross between an old folks home and a locker room, but like the atmosphere in a locker room before a game, when he entered the building he always felt an electric anticipation that something big was about to happen in which he would play a part.

When Gibbs entered wearing a red jumpsuit, Garson remembered immediately why he had liked the young man in the past in spite of his stupidity. He had a generous face. It projected a guilelessness that

even the innocent often have not mastered.

He looked scared. His eyes were red and swollen and there were streaks on his cheeks where the tears had cut into the dirt.

Gibbs rose to greet him and the men shook hands—both of Gibbs's hands connected by the handcuffs rising and reaching simultaneously.

"Sorry to hear about your grandmother."

"She's the only one that ever cared for me. She always forgave me when I messed up. She'd just tell me that she loved me and the Bible said forgiveness is divine..." The boy broke off.

"Do you know what happened?"

"I swear I don't. I didn't cause that fire"

The lawyer and client continued to do their regular back and forth for about an hour. The lawyer took a lot of notes, but he had no idea if any of them would help his client. He found that the interview did confirm that the boy would make a likable and believable witness, in the unlikely event he would testify in his own trial.

After Garson met with Gibbs, he drove immediately out to the scene of the fire. He had the sheriff and the fire chief meet him out there. To the extent they would let him, he took pictures of everything. He took video of the same things he photographed, asking questions of the chief and the sheriff.

While taping, the types of questions he often asked were in the nature of: "Were you one of the first on the scene of this fire? Is this what you remember the evidence looking like?" It was a who, what, when, where sort of thing that he borrowed from the one journalism class he had taken in college, but had served him well in the practice of law. Often he got answers such as: "I can't remember," or "I'm not sure," but even though Garson was ostensibly on the other team, he had worked with both of them for many years—from back when they were rookies and each knew that he was not trying to trick them. He was just making sure his client wasn't getting tricked. While the county attorney had advised them both to not participate in this kind of exchange of information, both the chief and the sheriff felt it did their cases more good than harm. It was also more effi-

cient because both sides knew that a matter was being thoroughly investigated at the front end and which facts were almost agreed upon as not being in dispute.

Garson spent the bulk of the weekend talking to Gibbs and combing over the facts. He asked Gibbs to tell his story again and again. Sunday afternoon he went out to try to find the place in the woods where Gibbs had been found by the police dogs.

There was a piece of yellow police tape marking the bottom of a ladder which had been nailed to a tree. The dogs had followed Gibbs's scent from the trailer and had treed him like a possum. Gibbs came down when commanded by the search team.

Garson went up the ladder and down the ladder several times and looked into the stand. It was large and sturdy, built big enough so that a couple of people could comfortably stretch out and shoot from the prone position. He lay down carefully on his back and rolled over one time to see if a grown man could do it without falling off. As he settled down onto his stomach, he caught the glint of something shiny on the ground below. When he came back down again, he examined it as closely as he could without touching it. It was a condom wrapper.

He called the sheriff at home who wasn't too happy about being disturbed, but he agreed that if there was new evidence it should be dealt with sooner rather than later. Garson waited until the sheriff and a number of deputies arrived, then he left to go back to the jail.

Gibbs denied knowing anything about the new evidence until Garson reminded him that with his criminal record, if he was convicted of starting the fire at his grandmother's house that killed his grandmother, he would likely be sentenced to a term that would keep him in prison for the rest of his life.

"Well, I did leave it there. It was mine, but I can't tell you who I was with."

Garson already knew whom he had been with. The only person to visit the boy other than himself was Virginia Stonewater, the eighteen-year-old daughter of the minister at his late grandmother's church.

Monday morning Garson made a call to the district attorney, the sheriff, and the fire chief, but the first thing he did was to make arrangements for Virginia Stonewater to run into him. She was a pretty girl. He knew what she looked like from church, and he

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knew she walked to school every day because he often passed her on his way to work.

He pulled his car over beside her, got out and asked if she would walk with him for a while. She obliged his request. He confirmed that she had been with Gibbs when the fire was alleged to have started. Her Daddy would be furious if anyone found out, but she had admitted what Gibbs would not. She confirmed it had been her that had been having sex with Gibbs in the deer stand in the woods, near his grandmother's trailer at the time the fire had started. They had heard the sirens and had climbed out of the stand. Gibbs had run in the direction of the sirens and she had gone in the other direction towards the dirt road where she had parked her daddy's car. Daniel Gibbs could not have started the fire.

For Garson, the case had opened in one deer stand and closed in another.

* * *

Late that Monday afternoon, the DA stopped to talk to the receptionist, Eunice, on the way out of Garson's office. He had just met with Garson, the fire chief, and the sheriff.

Due to his past experiences with Garson, the DA knew the facts, as Garson had conveyed them, would check out. He had still done his own follow-up just as a matter of thoroughness, but he was now willing to admit that the fire could have

been caused by faulty wiring or a number of other ways that had nothing to do with Daniel Gibbs. He told the other three men in the meeting he had decided to dismiss the charges. This sort of thing was rarely done for other attorneys, but then the DA felt most other attorneys did not seem to take up the mantle of their clients' causes the way Garson did.

The DA had known Eunice from when she had worked for Garson's father and grandfather before him. She had seen more law practiced than just about anyone in the county. He asked her what it was that made Garson so good. What did she think he did to get the kind of results he often got?

The elderly lady stopped looking through the top drawer of a file cabinet and thought. Then she said something the DA had not heard said about anyone in a long time. She said, "Well, he's been called. Once a man has been called to the bar there is really no stopping him."

The DA went on his way. In his heart, he knew she was right about Garson. However, he felt a tinge of personal regret. He too was doing his best, but he was practicing his profession without the blessing of having ever been called. ■

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