

THE NORTH CAROLINA STATE BAR

# JOURNAL

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We can help if you get in touch with us.



FOR THE ISSUES OF LIFE IN LAW

# Our Bar, Our Building

BY JAMES R. FOX

Below you will find a few remarks I recently made at a “topping out” ceremony for our new State Bar building. Until shortly before the ceremony, I must admit I was not familiar with this custom. For those of you who are likewise unaware, I offer a few words of explanation.

Topping out is a ceremony held when the last beam is placed at the top of a building. It is also used to refer to the overall completion of the building's structure or some important intermediate event. Generally, the beam is signed by those participating in the ceremony, and is then hoisted



into place as the last piece of structural ironwork. Along with the beam, a tree or leafy branch symbolizing good luck is fixed in place, accompanied by state and local flags.

If you have an interest in the history of this practice, it is often traced to an ancient Scandinavian religious custom of placing a tree on top of a new (mostly wooden) building to appease the tree-dwelling spirits of ancestors displaced by the construction. For our topping out ceremony we used all three symbols involved. We signed the last beam, which was hoisted to its final resting place at the top of the building's framework, accompanied by an evergreen tree and North Carolina and American flags. I do not know if we were able to propitiate any outraged tree spirits, but the ceremony was a media event of sorts to which Bar members, potential donors, and various luminaries were invited. It was both meaningful and enjoyable. (You can check out the pictures on the State Bar's website of the event and construction progress.)

On a more practical note, as I write this in late July, the building is approximately one third finished and on schedule for completion and dedication by our quarterly meeting next April. We have also received all \$600,000 of earnest money due on the \$2.7 million pur-

chase of our old building, with closing to occur in the next month or so. Staff will continue to occupy the old headquarters under a leaseback arrangement until the new building is complete. In another piece of good news, the State Bar Foundation, formed to raise fitting and finishing out money for the building, is making great progress. Thanks to all the fundraisers and all of you who will contribute or have already done so.

We look forward to seeing any who can make it at the dedication next April.

The history of the State Bar is the history of public spirited people working through adversity toward a common goal.

It seems that nothing worthwhile is ever very easy. So it has been for this organization. Even its very formation was born in controversy. Efforts to organize the Bar in North Carolina began as early as the 1880s. But organization was a contentious issue, and it took 50 years—until 1933—for legislation to be introduced to incorporate the North Carolina State Bar as a state agency. The bill passed only after hot debate. According to a fine article by John McMillan in the fall 2008 issue of the *Bar Journal*, the bill resulted in legislators calling each other out as liars on the floor of the General Assembly. A major issue was dues, with one legislator colorfully taking the position that “[a]nything you want me to join that costs over \$1, I don't want it unless I can eat it or wear it.” Nevertheless, finally on April 3, 1933, the legislation establishing the North Carolina State Bar passed.

My purpose in asking you to endure this historical footnote is simply to note the parallel between the effort required to establish the North Carolina State Bar and the effort required to move this building from concept to reality.

Any enterprise with so many moving parts is bound to have its ups and downs. This project started in the presidential year of Hank Hankins, who was instrumental in supplying it with the needed momentum. Hank appointed our Facilities Committee, which started on the difficult work of finding an appropriate location. One was found, and a 99-year lease was obtained on it from the state. This was a very time consuming exercise and brought with it oversight issues that inevitably slowed the project even more.

Similarly, sale of our current building had its challenges. The first contract fell through, but persistence and hiring of a good broker allowed us to find another purchaser. Our architects, CJMW Architecture, provided us with a beautifully designed building, but then we were required to reconfigure the building on the site which, in turn, required modifications to the design. Unexpectedly, we also had to compensate the state to reconfigure parking spaces on other parts of the block where the building was to be constructed.

These are but some of the difficulties encountered. Happily, we probably emerged with a better building as a result of some of these issues. In that regard, we appreciate the input we have gotten from the Department of Administration, the State Construction Office, and our architects.

This project owes much to wise leadership and administration over the years, which has left us in sound financial condition and able to finance this project without a dues increase. Tom Lunsford's stewardship and that of a long line of past officers is largely responsible for this. I also want to mention the members of our Facilities Committee and in that connection past Facilities Committee Chair Keith Kapp, who ably chaired this committee through some very choppy waters. It is also incumbent upon me to single out John McMillan, chair of the North Carolina State Bar Foundation Board of Trustees, and the other trustees for their fine effort and the

great results they are getting in raising funds to put some finishing touches and a few additional amenities into the building. The trustees are a distinguished group of former presidents of the State Bar. The Foundation Campaign Leadership Team is an equally distinguished and public spirited group of people. Thank you all.

We should also reflect for a moment on the people and programs that make this building necessary. We have 25,000 members and grow at a rate of 3-4% a year. The self regulation privilege we enjoy carries with it the obligation to exercise that privilege effectively, and we do so through a grievance process that processes 1,500 or more grievances a year. Just performing the grievance process requires 46 councilors and public members, five non-attorney staff, and 14 lawyers. They have never in my institutional memory of about 20 years had adequate physical facilities to do their jobs. The completion of this facility cannot come too soon for them, as well as the additional councilors and staff who pursue the missions of our Authorized Practice and Ethics Committees.

We also need to keep in mind the functions the staff carries on in addition to their regulatory responsibilities. Just as those responsibilities can't be properly carried out in a building that is bursting at the seams, neither does such a facility allow for effectively delivering a lot of other benefits the lawyers of North Carolina enjoy.

Without the new building we couldn't effectively:

- Run the Attorney Client Assistance Committee, which last year answered over 14,000 telephone calls, 2,300 letters, and 550 email messages, thereby avoiding the filing of a large number of grievances.



- Administer the Bar's CLE program.
- Certify and regulate North Carolina paralegals.
- Provide a means for various North Carolina lawyers to be certified as specialists in their chosen areas of practice.
- Oversee an IOLTA program, which since 1983 has made more than \$68 million in grants to legal services programs.
- Manage a Client Security Fund, which over its existence has paid out over \$9.2 million in compensation to injured clients of dishonest lawyers.
- Reduce the incidence of misappropriation of client funds by conducting random audits and making available a *Trust Accounting Handbook*.
- Handle a fee dispute resolution program, which annually forestalls a large number of grievances.
- Run a highly successful Lawyers' Assistance Program, which has provided cru-

cial and timely assistance to lawyers suffering from substance abuse and mental health problems.

These are just the major non-regulatory services the North Carolina State Bar provides for its members and the public. Trust me, many of these programs have been near the breaking point for a long time. At a minimum they would have sharply reduced effectiveness without this new building. So while what you will shortly see on this street corner is a properly imposing symbol of our profession, it is much more—a remarkable accomplishment in the best traditions of the State Bar, that is, as I said at the outset, the product of well-intentioned people working together to meet critical public and professional needs. ■

*James R. Fox is a trial lawyer and senior partner in the firm of Bell, Davis & Pitt, PA in Winston-Salem.*

In conjunction with the topping out ceremony, the NC State Bar Foundation, Inc. publicly announced that it had raised close to \$2 million in private funds to assist with construction. However, since that announcement, the campaign has surpassed the \$2.1 million mark in commitments.

The NC State Bar Foundation, a 501(c)(3) charitable corporation formed in 2010, exists for the sole purpose of raising funds for the new building. The Foundation's Board of Trustees is made up

of seven past presidents of the State Bar from across the state. The foundation's campaign is chaired by Hank Hankins of Charlotte and Bonnie Weyher of Raleigh, two of the foundation's trustees.

Efforts to achieve the \$2.5 million campaign goal were led by an initial gift of \$500,000 from the NC Board of Paralegal Certification. Over the past several months, many of the state's law firms have followed suit to surpass the \$2 million mark.

"The most gratifying aspect of the campaign is the enthusiastic participation of the

lawyers who know best the work of the State Bar," said John McMillan, chairman of the Foundation's Board of Trustees.

The campaign is now statewide and offering a broad group of organizations and individuals the opportunity to participate. Funds raised by the foundation will be used primarily to assure Gold LEED certification in the building, and to enhance the building's technology and meeting capabilities.

For more information about the NC State Bar Foundation, Inc., please visit [NCStateBarFoundation.org](http://NCStateBarFoundation.org). ■

# Southern Hospitality

BY L. THOMAS LUNSFORD II

For those of us of a certain age who were raised in North Carolina, the death of Andy Griffith this summer has engendered much reflection. It has prompted us to be mindful of our own mortality, to be sure, but more significantly, it has caused us to reconsider the many moral lessons that we have learned during our periodic visits to Mayberry.

Those precepts, as has been noted in this space on several prior occasions, have profound professional, as well as personal, application. So it should not be surprising that I have yet again found an episode of the old *Andy Griffith Show* (AGS) that appears to inform the consideration of an important issue pending before the State Bar Council and the Board of Law Examiners, to wit; whether the rules and policies governing admission to practice ought to be modified to facilitate the admission of lawyers who happen to be the spouses of military personnel posted in our state.

The AGS episode that comes to mind is, of course, “Man in a Hurry.” This charming installment is a perennial favorite of the *cognoscenti*, prominently featured on every “top ten” list of which I am aware since its initial broadcast in the mid-60s. The story is pretty straightforward. It is Sunday afternoon, just after church, when Malcolm Tucker, a prominent businessman from out-of-town, experiences car trouble while passing through Mayberry. We are given to understand that he has an important appointment in Charlotte, of all places, on Monday morning, and is determined to get his car fixed immediately so as not to miss the engagement. This is the “situation.” The “complication” is that the town’s only competent mechanic, a man in whose honor Wally’s Filling Station was pre-

sumably named, will not work on Sunday. Mild hilarity ensues as Mr. Tucker, in a futile effort to regain the highway, brings to bear various means of persuasion—bluster and intimidation, mainly—that are usually effective in the big city, but are totally unavailing in the small town. Real understanding is achieved as he gradually becomes aware that neither the force of his personality nor the importance of his commercial affairs is sufficient to overbear the peaceful inertia of the community. Instead of what he wants, he is offered what he needs. Hospitality. He’s not enabled exactly, but he is genuinely welcomed and richly accommodated. He’s offered a place at Andy’s table and the use of Opie’s bed.<sup>1</sup> He receives *pro bono* auto service from a couple of simple men who want nothing more for their labor than the “privilege” of working on a fine automobile.<sup>2</sup> He’s taught how to peel an apple without lifting the knife, he’s encouraged to sing along on the front porch, and he’s made privy to Deputy Fife’s personal plans for the evening.<sup>3</sup> In the end, when his car is ready and it appears that nothing gentle can be done to restrain him, he’s given a sack of Aunt Bee’s fried chicken and a wedge of pie with the assurance that the food will be better than anything he might get on the road. The result

of all this is, predictably and reassuringly, that he learns to slow down, and to accept and appreciate a different way of life.

For us, the real lesson isn’t that bucolic is better, although it may very well be. It’s that hospitality can be, and often is, transformative for the guest and ennobling for the host. There can be real social value for all concerned

in the gracious accommodation of the worthy stranger. And there may be professional value as well. Indeed, it seems to me that the policy question referenced above presents us, the lawyers of North Carolina, with a fine opportunity to do good by being good hosts, and to be improved individually and collectively in the bargain.

North Carolina has the fourth largest population of military personnel among the 50 states. Servicemembers are constantly moving in and out of our state, remaining among us for less than three years on average before moving on to their next duty stations. Understandably, most servicemembers are inclined to relocate their dependents as they move about the country. Generally speaking, this is in the best interest of the servicemember and the country. It is well understood that, particularly in times of national emergency, the preparedness and effectiveness of our soldiers and sailors is a function of how well they are supported by their families and how well their families are supported by the broader community wherever they happen to be. Servicemembers whose families are intact, at hand, and well-integrated into the local social and economic milieu are in a much better position to succeed militarily and personally than those whose families are stressed by separation, distance, and professional disqualification.

Speaking of professional disqualification, it is now virtually impossible for the spouse of a





servicemember, who has been admitted to the Bar in one state or another, to sustain her law practice if she wishes to accompany her spouse from posting to posting across the United States. The obstacles are many and are remarkably consistent from jurisdiction to jurisdiction. The cost, as you may recall from your own dealings with the Board of Law Examiners, is considerable. In North Carolina, for instance, it costs \$1,500 to take the bar exam.<sup>4</sup> A comity applicant<sup>5</sup> is charged \$2,000. Just imagine if you had to make that kind of investment every two or three years in order to become eligible to continue pursuing your profession. The time involved in gaining admission is also problematic, as is the timing of critical events in the process. In our state, like most states, the bar examination is administered only twice a year and applications must be submitted six months in advance. Since servicemembers are typically given only a few months notice to as where they will next be stationed, they often learn of their prospective assignment in the “goodliest land under the cope of heaven”<sup>6</sup> too late to sign up for the next test. Even when the timing of events is most fortuitous, the amount of time it takes to apply, to be examined, to be advised of the results, and to be sworn-in is enormous when compared to the scant period in which the newly-licensed military spouse is likely to be around to practice among us.

Unfortunately, the comity applicant to our Bar is in no better position when it comes to delay. By rule,<sup>7</sup> the law examiners may not even consider comity applications until six months after they are filed, and my understanding is that it sometimes takes much longer for final decisions to be made. Please know that none of this is meant to be critical of the manner in which the Board of Law Examiners is doing its job. To the contrary, I am confident that the members of that Board, all of whom were appointed by the State Bar Council, are doing precisely what they are required to do in a very responsible and diligent fashion. Even so, however, it is quite apparent that the process they administer is a lengthy and expensive one that ill suits the transient military spouse.

Leaving aside considerations of time and money, it would seem that comity admission should provide a relatively easy means of accommodating applicants like military spouse attorneys, who have already been vetted as to competence and character in other jurisdictions, and are members in good

standing of at least one other State Bar. Regrettably, that is not the case because of a couple of other impediments. For one thing, admission “on motion” is only available on a “reciprocal” basis. If Virginia agrees to admit our people as a matter of comity, we will return the favor. But if Virginia insists on making our folks take their bar exam, we will follow suit. Currently, North Carolina has reciprocity with only 26 other states, not including five of the top ten states with the highest population of active duty military personnel.<sup>8</sup> Even when comity admission is available, in theory, it is often practically unavailable to military spouses because of what is sometimes referred to as the “years of practice requirement.” The North Carolina Rules Governing Admission require that the comity applicant show that he or she has been “actively and substantially engaged in the full-time practice of law” for four out of the last six years.<sup>9</sup> As applied by the Board of Law Examiners, this requirement has reference only to practice within the reciprocal jurisdiction. While most comity applicants shouldn’t have difficulty demonstrating satisfaction of that requirement, military spouses, who are obliged to decamp much more frequently than the average American lawyer, are almost always stymied.

Earlier this year, a group of lawyers identifying themselves as the “Military Spouse JD Network” petitioned the State Bar and the Board of Law Examiners to “adopt a rule easing some of the burdens of comity licensure for military spouses who are active attorneys in good standing in other US jurisdictions, and who are residing in North Carolina due to military orders.”<sup>10</sup> They submitted a proposed rule that they believe will suffice for their purpose, while ensuring the competence and integrity of any persons licensed pursuant thereto. In essence, the proposal would eliminate the reciprocity rule and the “years of practice requirement.” It would also provide for expedited processing of applications for comity admission and for a reduced application fee. There would be no relaxation of character and fitness requirements, or continuing education requirements.

In April, the proponents of the proposal presented their petition to the State Bar’s Issues Committee. Perceiving that the relief sought is most directly within the purview of the Board of Law Examiners, the Issues Committee recommended that the matter be referred to a special Joint Committee of the

Council and the Board. This committee has since been duly constituted and is presently at work considering the issues presented. A report is anticipated later this year.

My purpose in writing on this subject at this time is not to suggest any specific course of action, but simply to note that we are highly indebted to the members of our armed services and their families, and have in consequence thereof an extraordinary obligation of hospitality. That these people are, like Malcolm Tucker, reluctant guests, is quite beside the point. Invitation is incidental to hospitality, welcome is its essence. In my personal opinion, which is unofficial, as yet uninforming by opposing points of view, and not necessarily shared by the State Bar’s officers, the Joint Committee, the council, or the Board of Law Examiners, we ought to do whatever we reasonably can to accommodate these exceptionally deserving strangers, so long as the public is not imperiled. We owe it to them for their service. I think we owe it to them as our honored guests. And we owe it to our profession, which would be honored to accommodate the displaced warrior and her family. ■

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

## Endnotes

1. A not entirely selfless offer on Opie’s part, it being contemplated that his ouster would lead inevitably to “adventure sleeping” on the ironing board between two chairs.
2. In the interest of full disclosure, it is noted that Goober took the “liberty” of taking Gomer’s picture beside the car “with the hood up.”
3. Fife noted, repeatedly, that he intended to “go home, take a shower, go over to Thelma Lou’s, and watch some TV.”
4. Not to mention the staggering expense associated with the typical “cram course.”
5. Persons who have been admitted to practice in other states can be admitted in North Carolina “on motion” without having to pass our bar examination, if they satisfy all other admissions criteria. Such admission by “comity” is available only to lawyers licensed in states that have “reciprocity” with North Carolina, and agree to admit our lawyers to their Bars on the same basis.
6. North Carolina.
7. N.C. Rules Governing Admission to Practice Law, Rule .0502(2).
8. California, Virginia, Florida, Hawaii, and Kentucky.
9. N.C. Rules Governing Admission to Practice Law, Rule .0502(3).
10. Military Spouse JD Network, *Report to the Issues Committee of the North Carolina State Bar*, January 25, 2012.

# The North Carolina Racial Justice Act from Two Viewpoints

BY THOMAS J. KEITH AND ROBERT E. CAMPBELL

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## *Jarndyce v. Jarndyce*

### Drones On: A History of the Racial Justice Act

BY THOMAS J. KEITH

In 2009, North Carolina's Racial Justice Act (RJA) became the second law of its kind in the nation, and the first to allow statistical evidence—without more—to be used to prove that racial discrimination played a significant role in a defendant's death sentence. The law also applies retroactively, giving current death-row inmates the opportunity to appeal their capital convictions. Undoubtedly, the goal of the RJA and the remedy it aspires to provide is laudable and should continue to be explored. The 2009 version of this law, however, quickly proved to be unwieldy, misinformed, and woefully inadequate at achieving its noble purpose. On July 7, 2012, the North Carolina General Assembly overrode a veto of SB 416 and amended the RJA.

#### Realities of Prosecutorial Discretion

A key argument posited by supporters of the RJA and the defendants bringing claims under the 2009 law is that prosecutors have discriminated against first degree murder defendants based on their race when deciding to pursue a capital conviction. A review of these practicalities reveals that, prior to a change in North Carolina law in 2001, the United States Constitution, the North Carolina General Assembly, and the trial court had far more discretion and input into capital charging decisions while leaving very little, if any, to prosecutors. The 2001 change



*Defendant Marcus Robinson, left, sits with his lawyers during the final day of his hearing under the Racial Justice Act. NC Superior Court Judge Greg Weeks decided that the Marcus Robinson trial was tainted by the racially influenced decisions of prosecutors, and that he should be removed from death row and serve a life sentence. Photo courtesy of the Fayetteville Observer.*

in North Carolina's capital punishment laws only allowed prosecutors the discretion to decline a capital charge and did not increase their ability to pursue the death penalty. It is odd, then, that RJA supporters and defendants claim that prosecutors acted in a discriminatory manner when electing to pursue a death sentence when such decisions were, in fact, largely out of the prosecutor's hands.

In *Woodson v. North Carolina*, 428 US 280 (1976), the United States Supreme Court in a 5-4 decision found the North Carolina statute requiring death for all first degree murders unconstitutional because jurors had no discretion to award a sentence of life in prison. The Court held that death is unlike any other punishment in degree and kind, and that the changing values of society warranted a particularized review of individ-

ual defendants and their crimes before a capital punishment is inflicted in order to pass the Eighth Amendment's requirements against cruel and unusual punishment. In response to this decision and effective June 1, 1977, the North Carolina legislature set out 11 statutory aggravating factors to determine whether a first degree murder is punishable by death. N.C.G.S. § 15A-2000(e) (2012). The legislature also established mitigating factors to consider. N.C.G.S. § 15A-2000(f) (2012). These aggravating and mitigating factors are the only considerations taken into account when deciding to pursue a capital conviction. If none of the aggravating factors are present, or if mitigating factors outweigh any aggravating factors, then a district attorney is not allowed to seek the death penalty.

Additionally, the North Carolina

Supreme Court recommended in 1984 that a hearing be held shortly after a defendant has been indicted for a crime punishable by death in order to determine if any aggravating factors are present. *State v. Watson*, 310 NC 384, 388 (1984). Commonly referred to as a *Watson* hearing, this procedure has since been codified and is required by Rule 24 of the *General Rules of Practice for Superior and District Courts* for every person indicted for a capital crime. Prior to 2001, if the trial court found at this hearing that an aggravating factor was present, the district attorney was required to seek a capital punishment. As the North Carolina Supreme Court once stated, “evidence or lack of evidence of an aggravating circumstance, not the district attorney’s discretion, dictates whether the defendant tried for first degree murder will be subject to a capital sentencing proceeding if convicted or adjudicated guilty of the capital felony.” *State v. Rorie*, 348 NC 266, 271 (1998). It should be abundantly clear, therefore, that the 11 strictly defined aggravating factors adopted by the General Assembly—and not a prosecutor’s whims, as some would suggest—dictate whether or not a defendant will face a capital charge.

In effect, this “additional” prosecutorial discretion provides a mechanism to reduce the number of capital trials without the possibility of increasing that number, which is exactly what has happened. As reported in the *News & Observer* by Frank Baumgartner on January 24, 2010, the frequency of capital trials in North Carolina has dropped off sharply since 2001, even though the total amount of murders in the state has remained roughly the same. In North Carolina from 1996 to 2000 there were approximately 55 to 65 capital trials per year. In 2002 and 2003, however, there were only 35 and 22, respectively. 2008 and 2009 saw only 12 capital trials each.

In light of this, it is difficult to argue that North Carolina prosecutors have discriminated against defendants based on race during capital sentencing decisions because the strict criteria on which a capital sentencing decision is based (the 11 aggravating factors) is narrowly defined by statute, removing the vast majority of any “discretion” required to make such decisions. One answer to this criticism might be to go back to the pre-2001 days when the district attorney had no discretion whatsoever, and rely on the Rule 24 hearings to determine whether a trial will

### Katz's Patterns of Homicide

Aggravating Factor	Black on White	White on White	Black on Black	White on Black
Victim killed during robbery	67.1%	20.2%	6.6%	22.2%
Victim raped	9.8%	11.4%	3.2%	0.0%
Victim beaten	11.2%	4.1%	6.4%	3.8%
Victim witness to crime	36.4%	12.7 %	3.1%	12.5%
Execution style murder	33.1%	22.5%	7.2%	12.5%
Victim mutilated	17.5%	13.8%	2.8%	3.8%
Killing unnecessary to finish crime	37.9%	9.7%	4.6%	0.0%

proceed capitally or not. This will increase the number of capital trials and swell the number of death row inmates. I doubt this will quiet critics of the death penalty.

### Fully Understanding Racial Divergence

Studies alleging the presence of disparities in capital litigation outcomes using similarly constructed data have been presented to the courts since *McCleskey v. Kemp*, 481 US 279 (1987). In that case there was an alleged pattern of discrimination in the application of the death penalty in Georgia's capital punishment litigation. Warren McCleskey was charged in a Georgia state court with the capital first degree murder of a police officer. The officer was white. McCleskey, who was black, was convicted and was sentenced to death. The jury found two aggravating factors: (1) the murder was committed during an armed robbery, and (2) the victim was a police officer killed during the discharge of his duties. The defendant offered no mitigating evidence. The Georgia Supreme Court upheld the conviction and sentence of death. *State v. McCleskey*, 245 GA 108 (1980).

In the appeal from the Georgia Supreme Court to the United States Supreme Court, McCleskey specifically claimed that cases with black defendants and white victims were treated differently than other defen-

dant-victim race combinations. The statistical study that was prepared and presented to demonstrate this alleged differential treatment was authored by Professors David Baldus, George Woodworth, and Charles Pulaski (“Baldus Study”). Warren McCleskey was represented in his federal claim by attorney John Charles Boger, now dean of the University of North Carolina School of Law. Boger would later claim to produce similar evidence in North Carolina of differential outcomes in a study done with Professor Isaac Unah, a Political Science professor at UNC-Chapel Hill. The Baldus Study contended that there was a disparity in receiving the death sentence based on whether the victim was white or black. The Baldus Study is cited by RJA supporters to argue that prosecutors in Georgia did not value the lives of black victims as much as white victims in their prosecutions.

In the *McCleskey* case, the state of Georgia retained Joseph L. Katz, Ph.D., to review statistics gathered by the NAACP Legal Defense Fund in their *Georgia Charging Civil Sentencing Study* (GCSS), which examined Georgia’s capital punishment system after *Furman v. Georgia*, 408 US 238 (1972). The *Furman* Court found that the death penalty was arbitrary and therefore unconstitutional, which invalidated the death penalty until state legislatures could

revise their death penalty statutes. The Court subsequently approved revised death penalty statutes in *Gregg v. Georgia*, 428 US 153 (1976), and effectively reinstated the death penalty. Dr. Katz also used the GCSS data to show that each race has different patterns of crime. The numbers and data collected by the defense team led Katz to conclude that *interracial homicides most often are the result of robberies or other serious crimes that aggravate a homicide to the level of a capital murder* (emphasis added).

A US District Court found substantial flaws in the collection of data by Baldus, concluded that no single murderer using the statistics alone could establish he received the death penalty because he killed a white victim, and dismissed McCleskey's petition. *McCleskey v. Zant*, 580 F. Supp. 338 (N. D. GA 1984). The 11th Circuit Court of Appeals affirmed, 753 F.2d 877 (11th Cir. 1985), and the US Supreme Court in their 5 to 4 decision affirmed and held that the Baldus Study (assuming that it was not flawed) did not entitle McCleskey to relief. The Supreme Court in *McCleskey* noted that the decision to impose the death penalty was not arbitrary. The jury had discretion to return a verdict of life in prison. The statewide statistics, while showing racial discrepancies, did not show that McCleskey's jury did not exercise their discretion in their verdict. Neither could the statistics presented by the defense show any significant discrimination in McCleskey's individual situation. In a follow-up article in 1991, titled *Warren McCleskey v. Ralph Kemp, Is the Death Penalty in Georgia Racially Biased?* ([www.ourpaws.info/cramer/death/katz.htm](http://www.ourpaws.info/cramer/death/katz.htm)), Katz used the GCSS data and examined four different combinations of murders by race of perpetrator and victim. He then examined the presence or absence of various aggravating and mitigating factors present in the crimes of the Georgia murderers on death row. The Georgia death penalty statute is almost identical to North Carolina's in regard to statutory aggravating factors; Dr. Katz found the distribution of aggravating factors in homicide cases in the data presented in the box on the previous page. Katz concluded:

The four defendant-victim racial combinations provide the key that unlocks the race-of-victim sentencing puzzle. *Each defendant-victim racial combination portrays a fundamentally different homicide*

*pattern* emphasis added). The black defendant/white victim cases are the most aggravated of all four defendant-victim racial combinations. In 67.1% of the cases, the homicide results from an armed robbery, whereas only 18.2% of the homicides are precipitated by a dispute. The interracial nature of this kind of homicide minimizes the possibility that the killing arose due to a family dispute, a quarrel between lovers, or arguments between friends and relatives, which are commonly mitigating factors that preclude death sentences. The victim was a stranger 70.6% of the time, and a family member or friend in only 4.9% of the cases. As this suggests, *black defendant/white victim killings are very commonly linked to felony circumstances, which legally qualifies the defendant for a death sentence* (emphasis added).

The *McCleskey* decision effectively ended the series of attacks on the death penalty in the US Supreme Court. However, the last paragraph of Justice Powell's majority opinion sets the stage for the next step in the death penalty debate.

### The North Carolina Racial Justice Act

In 2009, the North Carolina Legislature accepted Justice Powell's invitation in *McCleskey* to "evaluate the results of statistical studies in terms of their own local conditions" and passed the Racial Justice Act, SB 461. Proponents of the RJA touted the results of several unpublished studies which were given to the media and referenced in the public debate at the legislature. The studies cited included a University of North Carolina at Chapel Hill (UNC) study by Isaac Unah and John Charles Boger and an unfinished and unpublished Michigan State University (MSU) study by Catherine M. Grosso and Barbara O'Brien.

As was the case with the Baldus Study, both the UNC and MSU studies concluded that defendants were several times more likely to get the death penalty for the first degree murder of a white victim than a black victim. Additionally, the MSU study found that blacks were struck from first degree capital jury panels by prosecutors at over twice the rate of whites. The RJA provides that anyone affected could file what would become known as an RJA Motion within one year from passage. N.C.G.S. §15A-2012(2). The RJA motion would be filed as a standard

Motion for Appropriate Relief under N.C.G.S. §15A-1420 - 1422. As a result, all but three inmates on death row filed RJA Motions. As of May 1, 2012, there were 156 inmates on death row of which 81 (51%) were black and 63 (40%) were white. Of all first degree murderers in North Carolina prisons on that date, 63% were black and 33% were white; for second degree murderers, 65% were black and 31% were white. Ostensibly, black murderers on death row are underrepresented and white murderers are overrepresented as compared to the appropriate pool of non-capital first and second degree murderers in prison in North Carolina. See [www.doc.state.nc.us/rap/index.htm](http://www.doc.state.nc.us/rap/index.htm).

The most puzzling portion of the 2009 RJA is a provision that allows the defendants to use "sworn testimony of...prosecutors...irrespective of statutory factors..." as evidence that death sentences were sought more frequently on one race than another. N.C.G.S. §15A-2011(b). This means that if a prosecutor is asked to explain why he selected a murder case to be tried as a capital case, he cannot use as an explanation the decisions of the US Supreme Court, the decisions of the NC Supreme Court, or the laws passed by the NC General Assembly! This conundrum is even more exaggerated in the pre-2001 cases when prosecutors had no discretion to decline seeking a capital sentence, because if any statutory aggravating factors were present, the prosecutor had to try the murders capitally or as a second degree. The prosecutor could not try them as non-capital first degree cases. This is truly a "Catch-22" for prosecutors because any decision made will be wrong.

Anyone filing a 2009 RJA Motion can use "statistical evidence" in order to help prove their case "at the time the death was sought or imposed." N.C.G.S. §15A-2011(b)(1). There is no explanation as to what kind of statistical evidence or how long a time period is permissible. These issues are just a sampling of the poor legislative drafting that has thrust the North Carolina legal system into an epic struggle to define and interpret the meaning of the RJA amid the constant volley of differing viewpoints from prosecutors, defense attorneys, legislators, pundits, and civil rights groups.

### 2009 Racial Justice Act Deficiencies

The state contends that the language of

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the enabling section of N.C.G.S. §15A-2011(a) (“that race was a significant factor in decisions to seek or impose the sentence of death”) is too vague to apply consistently and intelligently. This ambiguous and inconsistent drafting will—and indeed has—led to completely different interpretations by the courts in two RJA cases that have moved forward to date.

In their effort to prevail on their 2009 RJA motions, the defense argues that statistics dating back to 1990 (as far back as the Administrative Office of the Court’s computerized records go) will show that murderers of one race across the state were significantly more likely to receive the death penalty than murderers belonging to another race. Alternatively, these defendants posit that prosecutors used racial bias in jury selection. No doubt the sponsors of the RJA, the witnesses before the subcommittees, and the senators and representatives who spoke in favor of the bill thought they were correcting the ills identified in the UNC and MSU Studies. Unfortunately for lawmakers, the RJA’s vague classification of basic concepts and procedures has

turned the RJA into a law not about discrimination, but about stalling a defendant’s death sentence. While the Equal Protection Clause of the US Constitution would not allow the RJA to contain race-specific legislation, the purpose of the act does not seem to be served when members of one race are able to use alleged discrimination of another race to escape their death sentences.

The 2009 Racial Justice Act also provides a time period for the defendant to use statistical evidence of discrimination. However, as is the case with most of the act, the law only provides for evidence “at the time the death sentence was sought.” There is a considerable problem in the application of this ambiguous portion of the statute. The state contends that the clause “at the time the death sentence was sought” means a year of statistical evidence proving discrimination. A Forsyth County judge has ruled that the part of the statute in question means five years. The defense would argue that this time period is a 20-year span.

Not only does the 2009 RJA present a valid constitutional challenge based on the

vagueness of the statute, but it also suffers from the exceeding breadth the defense has to use statistical evidence in their clients’ cases. The 2009 RJA statute provides that the defense can use statistics from the county of conviction, prosecutorial district, judicial district, or state as a whole to prove discrimination in charging decisions or jury selection, irrespective of whether it had any effect upon the defendant’s conviction. Again, the defense maintains that the 2009 RJA provides them relief even if the alleged discrimination did not affect the defendant’s case in any way. N.C.G.S. §15A-2011(b)(3). Appropriately, the state contends that discrimination must be case-specific. The death row inmate must show actual racial discrimination in the county or prosecutorial district of conviction, at the time the death sentence was sought or imposed, and that such discrimination was a significant factor in the defendant’s own case. The state’s contentions have not fallen on completely deaf ears. In the Forsyth County cases of *State v. Moses* and *State v. Moseley*, the judge agreed with the state on case-specific discrimination.

## UNC Study

A source frequently cited by RJA proponents is a research project done by UNC Professors Unah and Boger. The UNC Study examined a subsection of capital cases in North Carolina from 1993 to 1997. Unah and Boger's research and analysis has evolved into different iterations, but all are based on the same underlying data initially collected. In their 2001 paper, *Race and the Death Penalty in North Carolina: An Empirical Analysis*, Professors Unah and Boger state the following in their preliminary findings section:

Our principal finding to date is that racial disparities continue to plague North Carolina's capital punishment system in the 1990s—especially discrimination against defendants (of whatever race) whose murder victims are white. This finding is confirmed by numerous individual analyses we have conducted, employing different methods, and *looking at various decision points throughout the capital charging and sentencing system.*

*Race matters in the initial decision whether to charge a defendant with first degree murder, second degree murder, or manslaughter; it matters in the decision whether to go forward to trial; it matters in the decision whether to seek a death sentence; it matters in the jury's life-or-death decision at the penalty phase of a capital trial (emphasis added).*

The 2001 report contends that black and white defendants who murder persons of different races than themselves receive the death penalty at different rates. These results were presented to the North Carolina General Assembly and the media in support of the RJA; however, none of the underlying data was released. Reading through these reports reveals that part of the disparity was based on a selection of all murders within the UNC study and not those cases with statutory aggravating factors, which are the only cases eligible for the death penalty. Table 1 in their paper gives the death-sentencing rate among all cases, whereas Table 2 shows the results from death-eligible cases. Neither set of results is a controlled analysis and does not take into account the combinations of statutory factors involved in any of the particular cases. Interestingly their 2009 paper, *Race, Politics, and the Process of Capital Punishment in North Carolina*, which was presented at the North Carolina Political Science

Association Meeting in Greensboro, contained a different set of conclusions in terms of assessing the prosecutors in North Carolina. This report was based on the same data set as the 2001 report:

State prosecutors who once made primarily race-conscious decisions to “go for death,” now appear race-neutral. *Our analysis also displays evidence of continuity, pointing to politically unaccountable jurors rather than to elected prosecutors as the actors most culpable for racial disparity in capital sentencing in North Carolina.* Broader implications of these findings are discussed.

Indeed, our study provides reasons to believe that prosecutors are more race-neutral in the 1990s than they were when Baldus et al. first conducted their study. Adaptation to a new political landscape that includes politically attuned and active minority voting populations makes this insight plausible.

*Our key finding that racial disparity does not reside in the prosecutorial stage would surely seem counter-intuitive to many because it contradicts the old-style racism thesis, and it contradicts conclusions reached by the Baldus study. However, we think our finding makes theoretical sense... the most surprising finding is that prosecutors are not exhibiting racially conscious tendencies in their decision to seek the death penalty.* This represents a change from the traditional view of North Carolina prosecutors. Of course, individual districts might not exhibit the same tendencies as we report, but overall we are confident that North Carolina prosecutors as a whole are exhibiting signs of change (emphasis added).

It is strange, then, that the same set of data taken from the same set of cases could lead to such divergent conclusions.

## Michigan State University Study

In addition to the UNC study, RJA proponents and defendants cite another statistical study to support their claims of racial discrimination in capital litigation. This second study was conducted at the University of Michigan by Professors Barbara O'Brien and Catherine Grosso. Dr. George Woodworth, who assisted the defense in the *McCleskey* litigation, contributed to O'Brien and Grosso's work. The criminal discovery in the MSU study is composed of over one

million pages, 300,000 of which pertain to jury selection. The drafters of the MSU study came up with over 200 factors, similar to what was done in the Baldus Study used in *McCleskey*, to explain why black defendants are 2.6 times more likely to receive the death penalty than white defendants in interracial homicides. The state will never be able to examine the basis for these conclusions since the access codes to the 300,000 pages of jury selection data were deleted by the authors of the MSU study.

Professor David Baldus also helped Professors Grosso and O'Brien in constructing the MSU study. The MSU study suffers from the same cherry-picking problems as the UNC study in terms of the cases included in the database. As the researchers testified to on the stand in the Cumberland County hearing, the dataset was “not a random sample of capital cases.” In fact, O'Brien testified that “it was a judgment sampling” based on “a practical consideration.” As Professor O'Brien stated, the cases that were used in the research—the 173 proceedings for all the defendants on death row at the time the study started and had to be completed—did not include inmates executed, those who were tried capitally but received a life sentence, and those who were removed from death row for many other reasons. Though their charging and sentencing study identified over 5,000 cases from the 20-year time period that was under consideration, only 173 cases were included.

The MSU researchers made their own determination as to whether the state had a valid reason to strike a juror, basing their modeling and constructed variables on ones similar to those Professors Baldus and Woodworth used. This reliance on a simplistic approach led to some troublesome results in their dataset. The law students recruited to read the jury selection transcripts counted some black jurors excused by the state for valid strategic reasons, such as opposition to the death penalty, but upon review by the state left out many more with similar viewpoints. In many instances these valid, race-neutral strikes were counted by the MSU study as racially biased attempts to keep non-white jurors off the panel when in fact there are other explanations that prosecutors provided. These direct explanations were eschewed by the MSU researchers, who instead relied on a much broader level of analysis that improperly gave them a race-

based explanation.

The individual variables that the researchers constructed to measure various attributes of potential jury members are rife with problems. For example, one variable meant to capture whether or not a potential juror has a criminal record failed to distinguish between a person who had been convicted of speeding and one who had been convicted of murder. In the MSU study these people were treated the same! Yet another example is a classification that describes potential jurors based on their relationships with people involved in the court system. The variable employed to capture this factor treated people who had a prosecutor in the family the same as one with a defense attorney in the family. Numerous examples such as these highlight the MSU study's lack of useful categorization, though these inherent problems in the study's statistical method is buried in the 300,000 pages of materials turned over to the state. The researchers have admitted that there was no way in which their model could capture good reasons to strike jurors that were only true in a few cases. They constructed their model and analysis to generate results based on large characteristics present in the data—such as race—regardless of whether it explained anything.

### Batson Challenges Are Sufficient

The Supreme Court in *Batson v. Kentucky*, 476 US 79 (1986), found that peremptorily excluding potential jurors from serving on a petit jury based on the venire member's race violated the Constitution's Due Process Clause.

According to *Batson*, a defendant who believes that the state is excusing potential jurors based on race may make a motion alleging as much at the time the peremptory strike is made, in front of the trial judge and while the questioned juror is present. This is an excellent practice because any claims of racial discrimination are made before the same judge presiding over the case and jury selection and are made immediately once racial discrimination is suspected, not 20 years later after the nuanced particularities of a capital trial have all but been forgotten.

It is noteworthy, too, that Marcus Robinson, the first person removed from death row under the RJA and who was tried in Cumberland County in 1994, never challenged any of the state's peremptory strikes.

In fact, in a majority of the capital trials and jury selections on which the MSU study relies, no *Batson* motions were ever made. The most likely reason for this lack of *Batson* challenges is because the defendants' attorneys did not think race was an issue. Furthermore, there has never been a capital case in North Carolina in which a *Batson* claim was made that has been reversed by the North Carolina Supreme Court, and to date every *Batson* challenge that has been made has already been litigated before the North Carolina Supreme Court. This alone should be sufficient to bar the present MSU accusations of juror strikes based on race by precluding the issue.

Those making claims under the RJA contend that the defense attorneys across the state were intimidated by the state and that the trial judges did not do their job to catch race-based juror strikes. Such claims cannot be taken seriously. At least one defense attorney who is currently assisting a defendant to bring a claim under the RJA represented a different client in a capital trial that was included in the MSU jury study. The Cumberland County judge who granted Marcus Robinson's RJA motion and accepted the MSU study actually presided over a trial that was included in the study's dataset. Not only are our state prosecutors being improperly accused of racial bias, but these RJA claims implicitly accuse the state's superior court judges and our supremely competent capital defense bar of systematic incompetence.

### 2012 Amendment

The 2012 amendment attempted to cure many of the problems with the 2009 version of the RJA. The applicable time period for establishing a history of discrimination is now ten years before the offense and two years after. The defendant can only use data from the county of conviction or prosecutorial district where convicted. Statistical evidence alone is insufficient to meet the defendant's burden of proof. Judges can testify for either side, reversing the trial court's opinion in the *Robinson* case in Cumberland County. The *State v. Bowden* problem was addressed so if an RJA defendant prevails, he cannot claim his pre-1993 life sentence means anything but life in prison without possibility of parole. The 2012 law would apply to all cases unless there was an evidentiary hearing as in *Robinson*. However, if *Robinson* is

reversed, then the 2012 law would apply. Understandably, this amendment opens up whole new areas for appeals based upon allegations that the 2012 RJA is applied *ex post facto*, it violates due process, and it is a Bill of Attainder.

### Conclusion

The decision to seek the death penalty cannot be quantified by complex statistical models. The patterns of crime by race and their interaction with North Carolina's statutory aggravating factors explain any racial disparities on death row. Common sense explains why the state peremptorily strikes black or white jurors alike who initially express doubts about their ability to vote for the death penalty. The fact that no death penalty case has ever been reversed on a *Batson* challenge should end the discussion about any conspiracy between prosecutors and judges to keep black jurors from being on a North Carolina jury panel or white defendants off death row.

The state cannot develop any statistical method to try black defendants for capital murder that does not smack of racial quotas. Such quotas would probably require the state to try more murderers in order to achieve a perfect one-to-one ratio. Nor could the state ever receive a fair trial without striking white or black jurors who initially express reservations about the death penalty.

The 2012 amendment allows a defendant to press any claim of racial discrimination using statistical evidence in the county or prosecutorial district of conviction over a twelve year period. However, the families of the murder victims will have to wait for another generation of lawyers to be born and trained to argue all the legal issues arising out of the 2009 RJA and the 2012 amendment, which is exactly what the proponents anticipated: a *de facto* moratorium on the death penalty. Charles Dickens would understand. ■

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## “Skip a Rope”

BY ROBERT E. CAMPBELL

I wonder what the children had to say, running through the streets of Salisbury, as three men hung there, bleeding and dead, tortured by an angry mob of killers. The three black men had been charged with the brutal killing of a white family in Salisbury in 1906. The death of this family stirred the emotions of the community such that a large group of citizens stormed the jail, overpowered the captors, and ultimately lynched three of the six defendants charged in the case. There was no trial to determine their guilt or innocence. The three remaining defendants' cases were transferred to nearby Iredell County, where they were ultimately acquitted.

When the Racial Justice Act (RJA) passed in 2009, I recall being in the “back room” of the Alexander County Courthouse, a room where the lawyers gather to discuss their cases with the assistant district attorney assigned to the one day of criminal court our small county has each week; a room that has no doubt been seen and heard a lot in its time. As we gathered before court, I had a brief conversation about the recent legislation with a friend, a black lawyer from Statesville, who immediately recommended that I read *A Game Called Salisbury*. Before the next week had passed, he had given me the book.

The book was written by Susan Barringer Wells. She explores in great detail the Lyerly murders and the lynching of three of the six defendants charged with their murders. The book is a captivating historical investigation about then existing racial attitudes, politics, and the media's influence on public perception about the facts of the case. The author tells—in graphic detail—about the brutal axe murders of Isaac Lyerly, his wife, Augusta Lyerly, and their two youngest children.

The author begins the book by describing the events of a children's game mimicking a lynching. The stories are from newspaper articles in the state describing children playing lynching games in the aftermath of the events in Salisbury. The author uses a quote by James Baldwin to drive home the point that children learn from their elders: “*Children have never been very good at listening to their elders, but they have never failed to*

*imitate them.*”

After 20 years of practicing law, I pause and question the evolution of my views about race and the death penalty. As a white Republican from a small rural town in the South, my views about race and the death penalty have been varied. While in college, I held a very “conservative” and supportive view of the death penalty. When hearing arguments about racial discrimination and its impact on those in the criminal justice system, I had a disinterested view and merely thought of such as “race card” arguments. On the side of an abandoned building in my home county appeared the words “**COLORED ENTRANCE.**” When I first started my law practice in the early 90s, people claiming to be Klan members held a rally over the arrest of a black male high school student who was caught having sex with another student. Although the sex consisted of a mutual, consensual act, he was charged with crime against nature. The willing co-participant, a white female, was not charged, even though she was equally guilty of the rarely charged crime. As I represented this young man, I saw the unfairness of being charged merely because of the color of his skin.

Historically, black Americans have been treated unequally and unfairly, from the days of slavery and the Jim Crow laws to the many civil rights violations that occurred in the past. *The question remains: has our society evolved to the point where historical racist views are absent from the criminal justice system and, particularly, absent from the capital punishment process?* In 1906, fueled by hatred, an angry mob of white people hung three black defendants who were likely innocent. Not only were they killed, but they were also tortured, which demonstrates the high level of hatred that existed on that night in Salisbury. That hatred and bigotry has no doubt lessened with the passage of time; *but has it disappeared, or is it the “elephant” in the jury box that no one wants to talk about?*

To answer this question, we need only look around. On May 26, 2012, in Harmony, NC, the Ku Klux Klan held a rally, complete with a flyer advertising the gathering. Certainly people have a right to assemble and express their views. This freedom is the foundation of our free society. We live in the oldest constitutional democracy in the world. The rule of law and the

maintenance of our freedoms are the reasons our democracy has survived. Although the right to assemble in this fashion cannot be challenged, the underlying current and purpose of such a gathering can be examined in the debate over the Racial Justice Act. The generations that have followed those that enslaved people of color, those that denied basic freedoms and civil rights, and those that participated in the 1906 lynchings in Salisbury have continued to advance racial biases through the years. “*Children have never been very good at listening to their elders, but they have never failed to imitate them.*”

The perpetual bigotry that still remains undoubtedly exists in our criminal justice system. The following paragraph is an excerpt from a brief of *Amici Curiae* of historians and law professors prepared by April G. Dawson in *State vs. LeGrande*:

As recently as May 2010, the *Statesville Record and Landmark* published comments that openly called for lynching a black man accused of killing two whites. One writer urged, “just stand him up... and let family members of those he killed so cowardly have at him.” Others wrote, “he should have been hung before sundown on the day of his arrest” and “save the tax payer money...bring back HANGING.” Bluntly racist comments included “HANG THAT MONKEY!” Another writer provided a terse, but richly symbolic expression of the past's vigorous influence on the present: “I wish I were in Dixie.”

These stark examples in today's society confirm that vestiges of racism still exist. The footprints of racism don't stop at the courthouse door. In an effort to ensure that a person's race does not play a significant factor in the imposition of the death penalty or jury selection, the legislature passed the Racial Justice Act in 2009. Under this act, no person shall be subject to or given the death penalty on the basis of race. Evidence to establish that race was a “significant factor” in a death penalty case may include statistical evidence showing that race played a role in decisions to exercise peremptory challenges during jury selection.

Researchers at Michigan State University, after studying murder cases from 1990 to 2010 in North Carolina, determined that, statewide, qualified black jurors are more than twice as likely to be dismissed by prosecutors than qualified white jurors. This study



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was used in the first case to be heard under the Racial Justice Act, *State vs. Robinson*, Cumberland County. In this case, the Honorable Gregory A. Weeks held the following:

- Statewide from 2005 through 2010 the State struck eligible black venire members at an average rate of 56.4%, but struck all other venire members at an average rate of only 25.4%. Thus, the prosecutors were 2.2 times more likely to strike qualified black venire members.

- Prosecutors have intentionally discriminated against black venire members during jury selection when seeking to impose death sentences in capital cases in North Carolina between January 1, 1990, and July 1, 2010.

- The prosecutor at Robinson’s trial admitted that unconscious racial bias may have influenced his jury selection.

An important aspect of Judge Week’s order is the following:

That the balance of this collective evidence and argument overwhelmingly supports a finding that race was a significant factor in jury selection statewide... The role of government sanctioned and

enforced racial discrimination against African-Americans in North Carolina during significant historical time periods—Antebellum slavery, post-Reconstruction race codes, Jim Crow, and the pre-Furman era—is likely to have influenced our jury selection procedure and culture in ways that are difficult to parse out scientifically. *That history, however, can and should serve as a caution to provide deference to the scientific evidence of discrimination in jury selection* (emphasis added).

It is our ugly history of racism that makes the statistical evidence important and worthy of such deference. Racism in the courtroom has been difficult to discover in our judicial system, before the passage of the Racial Justice Act as it existed in 2009. No one will likely answer questions posed by timid lawyers about race in a courtroom setting honestly. Do jurors (and prosecutors alike) have the presence of mind and self-awareness to remove all bias from cultural norms that “they have never failed to imitate?” There are those people who have grown up in the South—in our culture that gave rise to

hatred and bigotry—who have feelings based on racial bias even today. Yet no one wants to talk about it, and certainly very few will admit their own racial prejudices in the jury box in the presence of judges and other court officials. It is the “elephant” in the jury box. If people are not likely to admit their failings in this regard, how do we then decide if it exists? The most accurate method is to examine the statistical data. Prosecutors and others opposed to the Racial Justice Act argue that statistical data should not be allowed as evidence of race as a significant factor in the capital punishment process. Researchers at Michigan State University discovered that prosecutors were more than twice as likely to strike *qualified* black jurors as other jurors.

To discover the true extent of hidden racial bias with the death penalty, one only need go as far as the Department of Corrections’ website, which contains information on all of the executions since 1910 in North Carolina. There have been 43 executions since 1984. The race of the victim is recorded by the Department of Corrections in each case. The victim was black in only 8 cases out of 43 (6 black females and 2 black

males). The racial discrimination from this statistic alone is clear. There are two racially significant possibilities that can be derived from this statistic. First, predominately white juries are not likely to hand down a sentence of death when the victim is black (particularly a black male). Second, prosecutors do not seek the death penalty as often when the victim was black. How many black male victims have been brutally murdered since 1984? Yet only two such defendants have been executed for killing a black male since 1984.

Also of particular interest from the Department of Corrections' website are the statistics from individual counties for persons executed since 1910. For instance, from 1910 to 1992, 19 people were executed in Forsyth County and *all 19 defendants were black*. Since 1992, four defendants have been executed in Forsyth County and 50% of those were black. *Remarkably, since 1910, 21 out of 23 defendants executed in Forsyth County have been black. Therefore, 91% of the people executed from Forsyth County since 1910 have been black.* These statistics can be found at: [doc.state.nc.us/dop/deathpenalty/personsexecuted.htm](http://doc.state.nc.us/dop/deathpenalty/personsexecuted.htm).

After Judge Weeks' order, my fellow Republicans amended the Racial Justice Act to strip the law of its effectiveness. The amended law limits the use of statistical evidence. The act includes the following language: *“statistical evidence alone is insufficient to establish that race was a significant factor under this Article.”* The change also limits the review of race to the individual county and prosecutorial district involved in the trial of the case and removes any review of racial discrimination state-wide. The debate which surrounded the efforts to change the Act was political in nature. Missing in this debate were discussions of historical and current attitudes involving racism (such as the advertising of a Klan rally in Harmony this year). Rather than seek the opinions of those who witness the unfairness of racism and the degree of its existence in the court system, the politicians running for office opted to center the debate on fear. First, the politicians argued that the implementation of the Racial Justice Act would cause murderers to walk free. Next, the politicians argued that the Racial Justice Act was an attempt to abolish the death penalty. Rather than focus the debate on the real problem of removing racism in the death penalty

process, various legislators chose to use political rhetoric to bolster their positions.

District attorneys also argue that the cost is too great and the time needed to defend RJA claims is too extensive. If our society is going to have the death penalty as a form of punishment for the worst of the worst, then the process has to be fair. Decisions about life or death and the process of selecting those who make that decision should never be based on race; not in a free society and not in a society that has a cornerstone principle that all men are created equal. Cost and time to determine the guilt or innocence in a traffic matter or even a minor misdemeanor might be a factor; but when the punishment is life or death, the “cost and time” argument falls pitifully short.

The last few years have seen significant problems with various results from the SBI Laboratory in criminal cases, which have led to guilty verdicts for innocent people. People have been locked up for years, claiming their innocence, only to learn that the state's crime lab got it wrong. Is it too costly and too time consuming to fix those cases? For years, the culture in our system was to place the SBI Laboratory results on a pedestal, free from fault or misdoing. It was difficult to shed light on the problems with the SBI Laboratory because of the culture of belief in the practices of the state's forensic experts. Without the time and expense involved in the exposure of the failings of the laboratory, the grave problems that led to unreliable results would have never been discovered. Similarly, there is a culture of disbelief that racism exists in jury selection and the process surrounding the prosecution of death penalty cases. Death as a punishment is different. The ears of justice must be more attune to inequities involving race when death as a punishment is on the line, and time and expense arguments must fail.

*The question remains: has our society evolved to the point where historical racist views are absent from the criminal justice system and, particularly, absent from the capital punishment process?* In addition to Klan flyers, racist comments published in newspapers, and statistics that reveal the naked truth, we must only listen to what the “children” say (the children of a historically racist society). I once heard an assistant district attorney in Winston-Salem say “the reason we are seeking the death penalty is because the victim's family said we don't seek the

death penalty enough when the victim is black.” Was race a significant factor in the decision to seek the death penalty in that case?

The game played by children surrounding the lynching of innocent men in Salisbury reminds me of a song titled *Skip a Rope* by Henson Cargill. The song deals with issues such as domestic violence, honesty, and racism, and ends with blaming what children do and say on their parents.

*Skip a rope, skip a rope! Listen to the children while they play.*

*Ain't it kinda funny what the kids all say, skip a rope!*

*Daddy hates mommy, mommy hates dad.*

*Last night you should've heard the fight they had.*

*Gave little sister another bad dream, she woke us all up with a terrible scream.*

*Skip a rope, skip a rope...*

*Cheat on your taxes don't be a fool what was that they said about the golden rule.*

*Never mind the rules just play to win and hate your neighbor for the shade of his skin.*

*Skip a rope, skip a rope...*

*Stab 'em in the back, that's the name of the game.*

*And mommy and daddy are the ones to blame.*

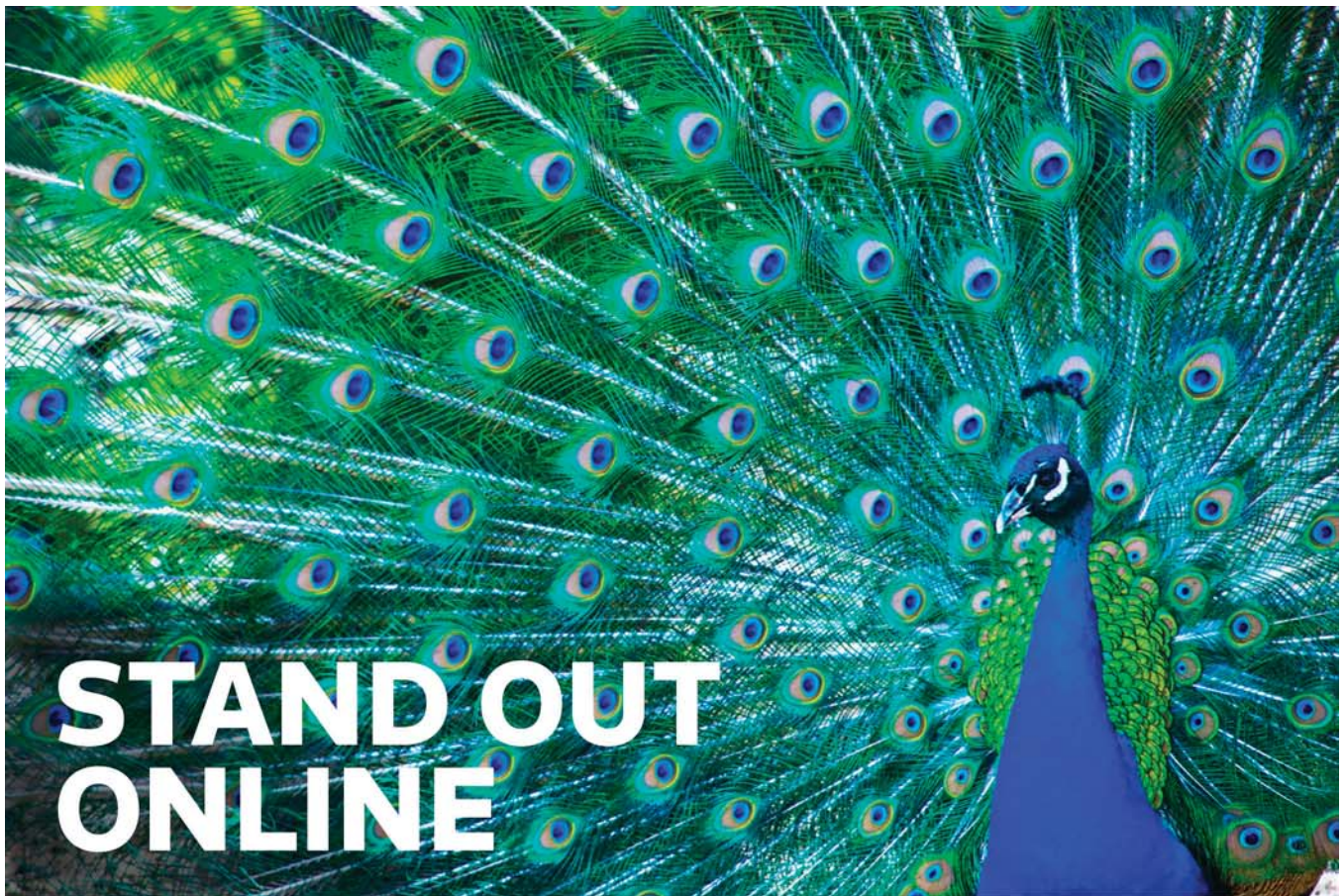
*Skip a rope, skip a rope. Listen to the children while they play.*

*It's not really funny what the children say, skip a rope.*

*Skip a rope, skip a rope!*

We are all a product of our environment and the undisputed fact is that our environment in the South has included racial bigotry and hatred. Although tempered by time, racial bigotry, hatred, and discrimination still remain, and those who continue in opposition to an effective Racial Justice Act are not being honest with themselves and continue to skip a rope. ■

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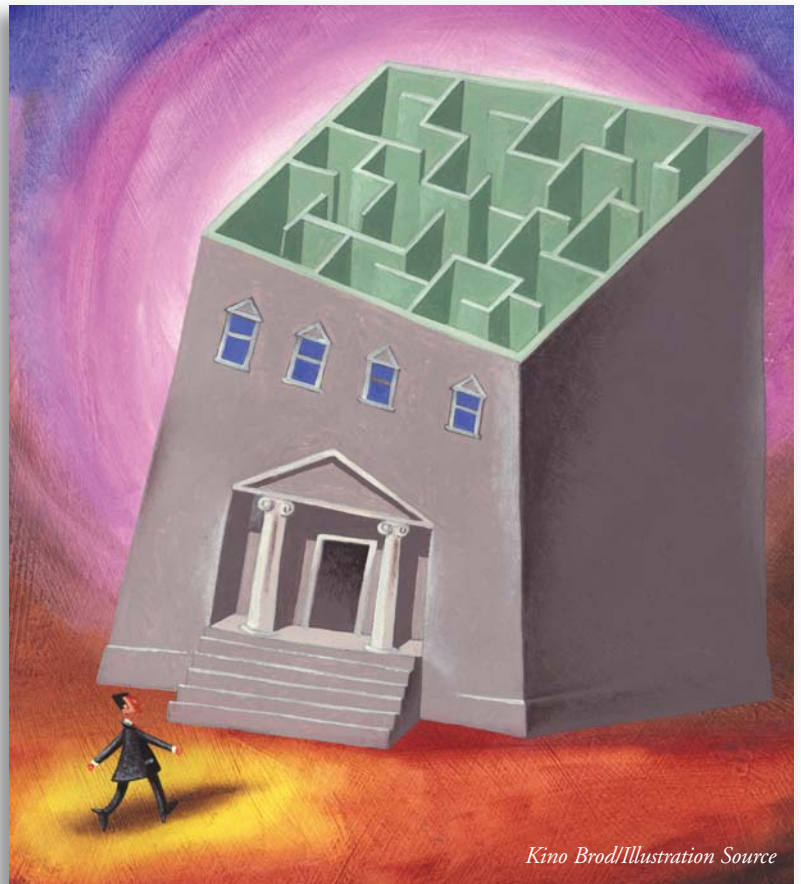
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# Undocumented Immigrants and Access to the Courts

BY DEBORAH M. WEISSMAN

**M**igration is a phenomenon intrinsic to human society. Virtually

every modern nation-state has developed out of a migration experience. People migrate for various reasons. They leave their home countries to seek new freedoms and to escape old oppressions, for economic opportunity and political security: that is, in search of a better life. The history of the United States is rich with the celebration of



immigration, with the single most enduring founding narrative of the United States inscribed in the very national icon of liberty: “Give me your tired, your poor/Your huddled masses yearning to breathe free.”<sup>1</sup>

North Carolina is very much a part of the national experience. Since the 1990s, the state has become a favored destination for immigrants, the majority of whom originate from Latin America. Recent census data serve to set in relief notable demographic shifts during the

last ten years: the Latino population in North Carolina has increased 110% and presently constitutes 8.4% of the state's total population. New immigrants during the 1990s were attracted to North Carolina by the favorable labor market and active employer recruitment.

The influx of new Latin American immigration during the 2000s has decreased, due principally to the economic downturn, increased immigration enforcement at the border, and hostility in a number of communities across the state. The recent decrease in the number of

new immigrants notwithstanding, a salient demographic facet of North Carolina remains: the Latino population will continue to increase.<sup>2</sup>

The presence of immigrants in North Carolina raises a number of vital concerns. North Carolina has welcomed the salutary effects of international trade in goods, services, and information, and has been receptive to the expansion of international finance. But migration of people, and especially unauthorized migration, has been a less-than-welcomed outcome of global exchanges.<sup>3</sup> The absence of legal status in the United States has served to shape decisively the perceptions of undocumented immigrants' rights, and whether and to what extent they may obtain access to the courts to protect rights they possess.

### I. The Need for Access

Undocumented immigrants lack legal status in the United States. But precisely because they lack legal status, they need legal protections. In 1982, the US Supreme Court in *Plyler v. Doe* described the heightened vulnerability experienced by undocumented immigrants who constitute a population "whose presence is tolerated, whose employment is perhaps even welcomed, but who are virtually defenseless against any abuse, exploitation, or callous neglect to which the state's natural citizens and business organizations may wish to subject them."<sup>4</sup>

Instances of such vulnerabilities are widespread in North Carolina. Undocumented immigrants are likely to be subject to wage theft and other unscrupulous labor practices that often violate employment laws.<sup>5</sup> They are frequently assigned hazardous jobs and have suffered fatal accidents in disproportionate numbers compared with non-immigrant populations due principally to dangerous—but easily preventable—workplace conditions.<sup>6</sup> They are more likely to be victims of consumer credit fraud and exploitative mortgage loan practices.<sup>7</sup> In the housing sector, they are often obliged to pay exorbitant rents and live in uninhabitable conditions as a result of discrimination by private landlords.<sup>8</sup> Law enforcement agencies often target Latino immigrants through illegal profiling.<sup>9</sup> Immigrants are subject to longer stays in jail, even for minor traffic offenses, and are often required to pay higher bail fees.<sup>10</sup>

### II. Right of Access

The judicial system is charged with the

responsibility to protect rights and remedy wrongs in a system that is fundamental to the structure of a democratic society. The court is designed to function as the arbiter of human rights, values, and ideals, thus making access to the courts indispensable. Indeed, access to full standing in the courts is considered a halloved principle, one that is affirmed in both the United States and North Carolina Constitutions.<sup>11</sup> This principle applies no less to those who have entered the United States unlawfully, who work without authorization, and who otherwise might be in violation of immigration law. Even the most egregious law-breakers have constitutionally-sanctioned access to the legal system. Convicted criminals and incarcerated individuals do not forfeit their rights to access the courts. They may bring suit challenging their conditions of confinement and seek redress for all variety of civil rights violations, file actions for torts claims, breach of contract, or for matters pertaining to family law issues.<sup>12</sup>

Issues pertaining to access to justice for unauthorized immigrants and the parameters of their legal rights are complicated by legal uncertainties and procedural ambiguities. Some question whether undocumented immigrants should obtain unfettered access to the courts, and whether such rights should be truncated by subject matter or procedure. That these issues appear at first sight to be determined by the legal status of an immigrant, it is important to consider the temporal significance of unauthorized immigrant status, often referred to as "illegal alien" status, that is, whether the condition of "illegal alien" is in fact a permanent and unchanging condition.

#### A. Understanding the Meaning of Unlawful Presence: The Complexity of Immigration Law

For most people other than immigration attorneys, the most accurate answer to the rhetorical question posed by advocates of stricter enforcement of immigration laws—"What part of 'illegal' don't you understand?"—might be: "Mostly all of it." Whether an individual is present in the United States unlawfully or not is a complex legal matter made more complicated by the fact that "illegal" immigrants may nonetheless be fully entitled to legalize their status in the United States.<sup>13</sup> Some individuals may enter the United States in violation of the law, but still succeed in a rightful claim to

asylum status and eventually gain lawful permanent residency.<sup>14</sup> Immigrants from Cuba who entered the country illegally, for example, may by-pass immigration procedures and obtain lawful permanent residency. Others may be present illegally but subsequently qualify for Temporary Protected Status as a result of a natural disaster or political upheaval in their home country. David A. Martin, legal scholar and deputy counsel general for the US Department of Homeland Security, has used the term "twilight status" to describe the circumstances of a sizeable percentage of the undocumented immigrant population.<sup>15</sup> These individuals may be "illegal," but they may be eligible to regularize their status through family relations or employment. Others may qualify for visas created for victims of certain crimes.<sup>16</sup> Immigrants who enter the country illegally but who are victims of trafficking, as well as children who enter with their parents, may constitute a group who lack agency in the matter of their unlawful presence in the United States and thus may find pathways to lawful permanent residence.<sup>17</sup> Still others, despite their illegal presence, may be granted discretionary relief and allowed to remain lawfully in the United States based on the length of residence, coupled with the hardship their removal would cause to their US citizen spouse or child. Many immigrants are "unlawful aliens" at a given moment, but yet have legal claims by which they may adjust their status to lawful presence.

These circumstances suggest the need for careful consideration when determining what rights may be afforded to "illegal aliens." Illegal presence is not a permanent condition, and may indeed be a transitory circumstance, a factor considered by the US Supreme Court in *Plyer*. The Court settled the issue that "illegal alien" children had the right to public education, in part, as a matter of contingency, that is, that "illegal alien" children might in fact remain in the United States without being subject to deportation.<sup>18</sup> The Court noted too that undocumented status is not "an absolutely immutable characteristic,"<sup>19</sup> and that many of the children were potentially "documentable,"<sup>20</sup> warning of the dire consequences of efforts to abridge their rights on the basis of their illegal presence:

The situation raises the specter of a permanent caste of undocumented resident aliens encouraged by some to remain here

as a source of cheap labor, but nevertheless denied the benefits that our society makes available to citizens and lawful residents. The existence of such an underclass presents most difficult problems for a Nation that prides itself on adherence to principles of equality under law.<sup>21</sup>

State and local law enforcement—no less than judicial officials and attorneys who do not practice immigration law—often lack familiarity with the nuances of immigration status. These circumstances suggest the need for heightened vigilance in protecting the rights of all persons, regardless of an individual's actual or perceived immigration status to access the judicial system.

## B. Sources of the Right of Unlawfully Present Immigrants to Access the Courts

For unauthorized immigrants who have not yet—or cannot—avail themselves of a particular pathway to lawful presence, the US Constitution nonetheless guarantees the right of access to the courts that cannot be denied on the basis of one's unlawful presence. The Fifth and Fourteenth Amendments bestow due process and equal protection rights upon "persons," not "citizens."<sup>22</sup>

Federal statutory provisions similarly provide rights to access to the courts by undocumented immigrants. The Civil Rights Act of 1866 established that "[a]ll persons within the jurisdiction of the United States shall have the same right ... to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings ...."<sup>23</sup> The Supreme Court has declared that these protections apply to all persons, including unlawfully present foreigners. In *Yick Wo v. Hopkins*, the Court declared that the protections offered by the Fourteenth Amendment applied to every person within the territorial jurisdiction of the United States.<sup>24</sup> The Court reaffirmed this principle in *Plyler v. Doe*, noting that "[a]liens, even aliens whose presence in this country is unlawful, have long been recognized as 'persons' guaranteed due process of law by the Fifth and Fourteenth Amendments."<sup>25</sup> Additionally, international legal norms and treaties, including the UN Declaration on Human Rights and the International Covenant on Civil and Political Rights, bind the United States to provide an effective legal remedy for claims of rights violations to everyone within its jurisdiction.<sup>26</sup> Federal courts have applied these principles of

access and have determined that an immigrant's undocumented status is irrelevant to a variety of matters including, for example, claims under the Fair Labor Standards Act, workers' compensation statutes, torts actions, and suits for employment discrimination.<sup>27</sup>

State courts across the country have uniformly recognized that unauthorized immigrants have the right of access to state judicial systems. Although it does not appear that any North Carolina court has yet directly confronted the question of whether unlawfully present immigrants have the right to access the courts generally, our courts have upheld their rights to sue with regard to the particular subject matter at hand. For example, in *Ruiz v. Belk Masonry Co., Inc.* the court of appeals upheld the right of an immigrant to seek workers' compensation.<sup>28</sup> The court of appeals also rejected an employer's claim that an injured worker's illegal status constituted a constructive refusal to perform vocational rehabilitation and refused to allow the employer to terminate benefits on such grounds.<sup>29</sup> Additionally, the court of appeals upheld a trial court's refusal to admit evidence of the purported illegal status of one of the victims, deeming it irrelevant.<sup>30</sup>

It should be noted that due process and equal protection guarantees, and the right to the "full and equal benefit of all laws and proceedings" do not mean, however, that unlawfully-present immigrants whose rights have been violated are always entitled to the same remedies available to US citizens. For example, the US Supreme Court ruled in *Hoffman Plastics Compound, Inc. v. NLRB* that unauthorized immigrants whose rights under the National Labor Relations Act have been violated are nonetheless not entitled to receive back pay.<sup>31</sup> Efforts to extend the Court's ruling in *Hoffman* to other claims by illegal immigrants, however, have largely failed.<sup>32</sup>

## III. Obstacles and Barriers

The implementation of the right of access by undocumented immigrants to federal and state courts has been hindered by factors related to fear and animosity, a lack of clarity of lawyers' ethical responsibilities under the Rules of Professional Conduct, and insufficient allocation of resources to the judicial system generally.

### A. Fear and Animosity

Immigrants without authorization of residence often face significant barriers to the

exercise of their legal rights. They typically lack sufficient knowledge about their legal protections and how to obtain access to the legal system. They are most likely to refrain from exercising their legal rights out of fear of retaliation from the persons or institutions against whom they seek legal remedy. Anti-immigrant sentiment has further contributed to the apprehensions among undocumented immigrants who fear—often correctly—that by seeking legal recourse, they risk deportation to even worse conditions of poverty, violence, and persecution. Many undocumented workers who are victims of wage theft fail to take legal action due to threats by their employers to call immigration should they seek to recover wages owed.<sup>33</sup> Immigrants who live in uninhabitable conditions forego requests for repair for fear of retaliation from landlords. Unlawful immigrants often fail to report crimes, fearful that communication with law enforcement authorities places them in jeopardy of deportation, thus compromising public safety for citizens and non-citizens alike.<sup>34</sup> Most notably, undocumented immigrant victims of domestic violence in need of police protection are disinclined to expose their immigration status by contacting law enforcement, particularly if they are dependent on the abuser for their lawful residency. Congressman David Price expressed his concern that "rumors ripple through the immigrant community that reporting a crime such as domestic violence results in the person reporting the crime or the victim 'would themselves then face deportation or some dire consequence.'"<sup>35</sup> These victims thus feel compelled to remain in dangerous relationships.

These circumstances are further complicated by a general political anti-immigrant environment. As a region, the South—including North Carolina—has exhibited stronger anti-immigration sentiment and nativist hostility than other regions in the country.<sup>36</sup> A poll conducted by the University of North Carolina at Chapel Hill School of Journalism found that approximately two-thirds of those North Carolinians interviewed indicated they would not welcome Latinos into their neighborhoods.<sup>37</sup> One study determined that many North Carolina communities have become increasingly less hospitable toward their new Latino immigrant neighbors.<sup>38</sup> This ambience also contributes to the reluc-

tance of undocumented immigrants to pursue legal protections.

## B. North Carolina Lawyers' Ethical Responsibilities to Undocumented Immigrants

Lawyers may wittingly or unwittingly contribute to the barriers that undocumented immigrants face when they need to address legal grievances in the courts. Anecdotal evidence suggests that undocumented witnesses and litigants have often faced deportation threats as a result of pursuing their claims.<sup>39</sup> Indeed, several stories have surfaced indicating that at least one victim of domestic violence was detained by Immigration Customs and Enforcement (ICE) at the conclusion of her protection order hearing in North Carolina, causing speculation that her efforts to obtain legal relief resulted in retaliatory actions by the opposing party.<sup>40</sup> These events demonstrate the need for lawyers to refrain from engaging in conduct that hinders undocumented immigrants from asserting their rights, to conform their conduct to their ethical obligations, and to insist that their clients similarly refrain from undermining the rights of others.

Two North Carolina State Bar formal ethics opinions directly address a lawyer's obligations with regard to the threat of, or actual disclosure of, a litigant's unauthorized status. The first opinion, issued in 2005, prohibits lawyers from using the threat of reporting an opposing party or a witness to immigration officials in settlement negotiations on behalf of a client in a civil matter.<sup>41</sup> The ethics committee opined that "the threat to expose a party's undocumented immigration status serves no other purpose than to gain leverage in the settlement negotiations for a civil dispute and furthers no legitimate interest of our adjudicative system." The second opinion in 2009 regulates the behavior of lawyers who discover that a litigant or witness to the proceedings is undocumented. This opinion prohibits lawyers from informing ICE of the person's unlawful status, unless federal or state law otherwise requires.<sup>42</sup> The Ethics Committee noted that the prohibition applies to individuals who are not parties to the litigation, citing Rule 8.4 (d) of the Rules of Professional Conduct, which forbids lawyers from using "means that have no substantial purpose other than to embarrass, delay, or burden a third per-

son."<sup>43</sup> The committee additionally noted that "paragraph (d) should be read broadly to proscribe a wide variety of conduct, including conduct that occurs outside the scope of judicial proceedings."<sup>44</sup>

Lawyers familiar with these opinions and the rationale upon which they are based can avoid any actions that contribute to the fear and intimidation experienced by undocumented litigants. They should counsel clients about the impropriety of using the threat of deportation to gain leverage in any type of lawsuit and should take all necessary steps to avoid complicity with such tactics which serve to undermine justice and the legal system.<sup>45</sup>

In addition to professional ethics that proscribe the reporting of undocumented immigrants, the Rules of Professional Conduct provides additional guidance about whether—and under what circumstances—the immigration status of a party or witness can be disclosed.<sup>46</sup> Compliance with these rules serves to minimize the possibility that immigrants will forgo their right to seek remedy for grievances while assuring that litigation proceeds according to the Rules of Civil Procedure. For example, lawyers who represent undocumented workers must decide whether they are obliged to disclose, upon discovery demand, a client's immigration status, a decision that is based first on whether such information is relevant to the litigation, and if so, whether privilege mandates against disclosure.<sup>47</sup> Lawyers who understand these ethical concepts should, where possible, tailor their claims on behalf of undocumented immigrants in ways that render immigration status irrelevant.<sup>48</sup> If immigration status is not relevant to the proceedings, lawyers may withhold such information where rules of confidentiality mandate against disclosure.<sup>49</sup>

Perhaps most importantly, Rule 4.4(a) of the Rules of Professional Conduct states that "[i]n representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person."<sup>50</sup> Rule 8.4(d) prohibits lawyers from "engage[ing] in conduct prejudicial to the administration of justice." The comments to this rule provide that actual prejudice is not required, rather that the act that "a reasonable likelihood of prejudicing the administration of justice."<sup>51</sup> Lawyers should limit the circumstances where they seek to

discover a litigant's immigration status to assure it is done for purposes relevant to the litigation, and to otherwise promote access to the legal system for unauthorized immigrants as they would any litigant seeking to resolve disputes.<sup>52</sup>

## C. Insufficient Allocation of Resources to the Judiciary: The Need for Certified Interpreters in All North Carolina Proceedings

The efficacy with which the legal needs of undocumented immigrants are met are often further complicated by language barriers. English is the national language and serves as the foundation of all political processes and governmental functions, including the courts. Census data indicates that 8% of North Carolinians speak a language other than English in their homes, with the most common foreign language being Spanish.<sup>53</sup> For immigrants lacking English language proficiency, access to English is a necessary prelude to access to the courts. North Carolina presently lacks a state statutory or administrative guarantee to a competent foreign-language court interpreter.<sup>54</sup> Moreover, foreign interpreters are not provided in all court proceedings. Courts often improvise and rely on whoever is available, including family members or unknown persons who happen to be present, to interpret.<sup>55</sup> As a result, limited English-proficient (LEP) litigants are often denied meaningful access to the courts.<sup>56</sup>

In criminal matters, the right to a foreign language interpreter is found in the US Constitution pursuant to the Fifth and Fourteenth Amendment Due Process Clauses, as well as the Sixth Amendment right to confront and cross-examine witnesses and to have effective assistance of counsel.<sup>57</sup> The Federal Court Interpreter Act requires the use of interpreters in criminal and civil actions filed by the United States in federal district courts when a party's ability to comprehend proceedings or otherwise communicate with counsel is inhibited.<sup>58</sup> The Act also requires the courts to use a certified interpreter unless one is not reasonably available, in which case the non-certified interpreter is required, at a minimum, to be competent.<sup>59</sup>

Title VI of the Civil Rights Act of 1964 is the most comprehensive federal statute that creates the right to an interpreter in *all* legal proceedings, both civil and criminal.<sup>60</sup> As

determined by the Civil Rights Division of the Department of Justice charged with overseeing compliance with Title VI, such proceedings include:

child custody hearings; child support hearings, civil no-contact order 50C proceedings, foreclosures, and divorce proceedings; all small claims court matters, which can include wage disputes and eviction proceedings; non-indigent defendants for criminal and traffic matters, non-indigent respondents in domestic violence 50B proceedings and involuntary commitment proceedings, and non-indigent parents in juvenile proceedings; and post-judgment services centers where a defendant's sentence is coordinated and monitored. (Footnotes omitted.)<sup>61</sup>

In March 2012, the US Department of Justice (US DOJ) found that the North Carolina Administrative Office of the Courts (AOC) failed to provide Latino and other national origin minority LEP individuals with "meaningful access to court proceedings and operations" and thus failed to comply with Title VI and implementing regulations, as well as related contractual agreements.<sup>62</sup> In addition to finding that the AOC failed to provide interpreters at no cost to litigants in all legal proceedings, the US DOJ determined that the AOC "fail[ed] to meet its own standards even in the limited circumstances where free interpreters are authorized."<sup>63</sup> The US DOJ stated that "[b]udget constraints do not excuse the AOC's failure to provide LEP individuals with meaningful access to court operations;" moreover, it noted that "the amount of funding that the AOC itself has estimated would be necessary to provide fuller interpreter coverage is relatively small."<sup>64</sup>

The US DOJ and the AOC are currently working towards a compliance agreement. Systemic problems within the North Carolina foreign language court interpretation system are readily capable of being addressed. Attorneys and judicial officers alike must become familiar with the legal, ethical, and practical issues relevant to working with interpreters. Without such efforts, whether or not newcomers to North Carolina have legal status will be a secondary consideration to the larger question of meaningful access and due process protections for all.

## Conclusion

The presence of unauthorized immi-

grants in North Carolina and the current debate about immigration policies evoke diverse and often divisive responses among members of the legal profession. However, on the matter of the need to protect the rights of undocumented immigrants entitled to access to the courts, the law is clear. Lawyers most assuredly share a commitment to fundamental civil and human rights to all persons. Justice requires acknowledgement of the risk of denying individuals of the processes and substance of the rule of law, and that without guaranteeing access to the courts for all, "an unpalatable social and legal hierarchy" will be established.<sup>65</sup> Undocumented individuals are *persons* entitled to fundamental legal protections and rights within the meaning of the US and North Carolina Constitutions. There are no disadvantages to offering affirmative protection of the rights of these individuals while refraining from practices and behaviors that serve to chill the exercise of such rights. Anything less risks creating effective impunity for those who would prey on a vulnerable population and would have pernicious implications for the judicial system at large. ■

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## Endnotes

1. Emma Lazarus, *The New Colossus* (1883), engraved on a plaque and mounted at the pedestal of the Statue of Liberty.
2. Julia Preston, *Births Outpace Immigration for Mexican-Americans Report Says*, NY Times, July 15, 2011, at 15.
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10. See Jen Góez, *Latinos Voice Bail Concerns to Prosecutor*, News & Observer (Raleigh, NC), Apr. 28, 2000, at 3B.
11. The United States Constitution provides that "[n]o state shall...deny to any person within its jurisdiction the equal protection of the laws." US Const. Amend. XIV, §1. Similarly, the North Carolina Constitution states that "[n]o person shall be denied the equal protection of the laws." NC Const. Art. I, § 19. More specifically, the North Carolina Constitution provides that "[a]ll courts shall be open; every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law; and right and justice shall be administered without favor, denial, or delay." NC Const. Art. I, §18.
12. See Christine Cimini, *Ask, Don't Tell: Ethical Issues Surrounding Undocumented Workers' Status in Employment Litigation*, 61 Stan. L. Rev. 355, 375 (2008).
13. For an overview of the fluid nature of the status of "illegal aliens" see Hiroshi Motomura, *Immigration Outside the Law*, 108 Colum. L. Rev. 2037 (2008). See also Michael R. Curran, *Flickering Lamp Beside the Golden Door: Immigration, the Constitution, & Undocumented Aliens in the 1990s*, 30 Case W. Res. J. Int'l L. 57, 101 (1998).
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# Access to Justice: The TALIAS Solution

## *Technology Assisted Legal Instruction and Services*

BY PAMELA S. GLEAN

*“It wasn’t long after I was appointed as senior counselor for Access to Justice that I realized how central a role technology would have to play in any effort to close the justice gap faced by poor and working class people—including those who reside in rural communities and on Indian reservations.”—Laurence Tribe, former senior counselor for Access to Justice, United States Department of Justice at the National Telecommunication and Information Administration Announcement of NCCU School of Law as a broadband grant recipient.<sup>1</sup>*

In March 2011, Jane Parker, a resident of Fayetteville, North Carolina, awoke with the grim prospect of losing her home in the next few weeks.<sup>2</sup> She could not convince the mortgage holder that she was up to date on her mortgage payments, and foreclosure seemed imminent. She had sought help from vari-



ous private attorneys and agencies, but all of them charged fees that had to be paid in advance. A woman of modest income, Ms. Parker had no money to pay for legal assistance. She saw a public service announcement about a foreclosure assistance workshop at Fayetteville State University and decided to attend. She knew that the workshop would be held by videoconference, but she was doubtful whether it would help her communicate effectively enough to really help her. Nevertheless, Jane was running out of options. This workshop was free. What did she have to lose?

Unfortunately, Ms. Parker’s problem is not unique. Throughout North Carolina there are moderate and low-income people who cannot afford private attorneys to help them navigate their legal problems, especially during economic downturns. Many live in rural communities, while others live in urban areas but lack the resources of home computers, internet, and broadband connections to access the benefits of their community. Desperate and un-informed, they often fall prey to scam agencies that purport to help them. Like Ms. Parker, they either can’t afford a private attorney or don’t realize that legal information and assistance can help them resolve many of their problems.



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The crisis in access to civil legal justice has been well documented throughout the United States. Locally, many leaders in the legal academy have used various platforms to document the growing need in North Carolina for private attorneys to assist modest and low-income individuals.

Poverty has always been the catalyst for the demand for free legal assistance, and during economic downturns more people find themselves in poverty. Of the 10 million people who reside in North Carolina, 17.25% have incomes that put them at or below the poverty level.<sup>3</sup> Forty of the 100 counties in our state are considered economically distressed, and 67 counties are considered rural.<sup>4</sup> According to *The Progressive Pulse*, poverty has disproportionately impacted certain geographic communities in the state. The poverty rate in urban counties is 19.1%, 3.7% higher than the rural poverty rate of 15.4%. Yet, the more rural counties in the state have some of the highest poverty rates.<sup>5</sup> Poverty impacts minority populations at disproportionate rates. The economic situation for minorities was far from stable even before the recession hit in

2007.<sup>6</sup> In 2010, the Center for American Progress reported that Blacks and Hispanics had higher unemployment, lower household income and wages, and higher poverty rates across America.<sup>7</sup> According to the most recent census, North Carolina's minority population is approximately 31.5%, 21.5% of whom are black.<sup>8</sup>

These demographics set the scene for many social issues including access to justice. Minority populations, those who live in poverty, and those who live in remote areas disproportionately suffer from the consequences of economic and other crises that plague our country from time to time. These communities face the continuing challenges of privation, inequality, indignity, and inadequate development and opportunity.<sup>9</sup> Access to legal information and legal services allows individuals to combat the personal and systemic consequences of their condition.

The solution to improving access to civil legal justice is more complex than expanding the pool of *pro bono* attorneys, however. Harvard Law Professor Laurence Tribe, the first senior counselor for Access to Justice in

the United States Department of Justice, defines access to justice “not in a narrow or technical sense that focuses simply on lawyers and courts, but in a broad sense that looks at how well people can achieve fair outcomes in matters that are of major importance to the way they live.”<sup>10</sup>

How do we reach the disenfranchised people in our communities? The United States Department of Commerce Broadband Technology Opportunity Program is guided by the theory that broadband provides a wide range of resources that enhance the lives of individuals like Jane Parker. “Broadband can be the great enabler that restores America's economic well-being and opens doors of opportunity for all Americans to pass through, no matter who they are, where they live, or the particular circumstances of their individual lives.”<sup>11</sup> Broadband is expensive, however, and it is not a coincidence that many of the same communities and individuals who lack access to justice also lack access to the internet, especially broadband.

With this backdrop, it made perfect sense that in 2010 the North Carolina

Central University (NCCU) School of Law—a historically black university (HBCU) and a national leader in clinical legal education and technology—applied for a grant to expand broadband technology to several HBCUs and Legal Aid of North Carolina offices across the state. The previous year, The American Recovery and Reinvestment Act allocated \$7.2 billion to the Department of Agriculture’s Rural Utilities Service (RUS) and the Department of Commerce’s National Telecommunications Information Administration (NTIA) to fund the Broadband Technology Opportunity Project (BTOP). The long-term goal of the BTOP was to begin to bridge the digital divide, thereby improving access to education and healthcare services, and to boost economic development for communities held back by limited or no access to broadband.<sup>12</sup> NCCU’s grant proposal, led by Greg Clinton, director of information technology at NCCU Law, expanded the goal. Inspired by the mission of NCCU School of Law to produce socially responsible attorneys, our vision was to utilize technology to improve the efficiency of *pro bono* legal services for the legally underserved residents of North Carolina by expanding the reach of the legal clinic. We decided to place video-conferencing technology in institutions that serve the communities and individuals who could not access broadband internet and the critical information that could improve their lives. Our broader vision was to use technology to increase the representation of ethnic and economic minorities in the legal profession by offering courses that prepare students for the study of law.

The successful grant proposal culminated on September 16, 2010, when we were among the very few grant recipients invited to Washington, DC, for the announcement of our grant by Laurence Strickling, assistant secretary for communication and information, United States Department of Commerce, and Laurence Tribe, then senior counselor for Access to Justice for the United States Department of Justice.<sup>13</sup> Both speakers acknowledged the inability of our nation to meet the demand for civil access to justice for low-income individuals, and intimated that our project would become a model for the nation as it continues to address this issue—a daunting prediction.

Upon our return, we began the TALIAS

project and built a high definition video-conference telepresence room at NCCU School of Law and smaller versions of the room at four other North Carolina HBCUs: Elizabeth City State University, Fayetteville State University, North Carolina A&T State University, and Winston-Salem State University. We also provided portable high definition video-conferencing equipment to the 16 Legal Aid of North Carolina offices across the state that survived the crippling 2010 budget cuts, three Pisgah Legal Services offices, and two mediation centers in Durham and Orange county. Geographically, the TALIAS network was designed to reach across North Carolina from far east Elizabeth City to far west Sylva, North Carolina.

### From Vision to Reality

When you walk into the telepresence room at NCCU School of Law you may think that you have entered another dimension. The room is impressive. An RPX video-conference room designed by Polycom, Inc., it is equipped with high definition cameras, four large viewing screens, and high definition microphone and speakers, all of which provide an almost real presence experience for those who use it. The partner universities have smaller versions of the room on their campuses and are equipped with document cameras that allow users to share documents in real time. The video-conferencing facilitated by this equipment is not basic Skype or FaceTime. TALIAS utilizes a secure internet connection with software that protects the confidentiality of those who utilize it. The high quality of audio and video allows users to hear the nuances in the speaker’s voice and clearly see the subtle body language made during the conversation; a critical active-listening technique that supports a clear understanding between the attorney and the client.<sup>14</sup> Nearly every user has commented that the system is user-friendly and easy to adjust to.

More impressive than the room itself is how it is being used. On the afternoon in March 2011, Jane Parker walked into the telepresence room at Fayetteville State University and took her seat. She was amazed that she could clearly see and hear attorney Timothy Peterkin, who was 88 miles and over an hour away in a similar room at North Carolina Central University

School of Law. She adjusted quickly to the technology around her and focused on the reason she was there. Attorney Peterkin spoke with Ms. Parker, answered all of her questions, and gave her the information she needed to advocate for herself at the upcoming hearing. Over one year later, Parker still owns her home as she waits for the mortgage holder to comply with her request for records that Peterkin coached her through.

Since that day in March, the TALIAS project has facilitated individual consultations and community education programs on other topics including unemployment rights and remedies, domestic violence, child custody and support, landlord and tenant, and immigration. The NCCU Eagle Empowerment Series sponsored by the Office of Student Affairs has broadcasted programs to fellow students at all the partner university sites on the criminal justice system, credit and money management, entrepreneurship, and social networking. One Eagle Empowerment Program reached 321 people. Overall, TALIAS programs and services have reached 1,032 people across the state in just 15 months. In addition to workshops, clinic attorneys have utilized the system to consult with clients who otherwise may not have been able to receive assistance.

Legal Aid-NC and Pisgah Legal Services offices hold virtual statewide office meetings and save valuable time and critical funds that would otherwise be used toward travel. In celebration of the American Bar Association’s *Pro Bono* Week in October 2011, TALIAS and Legal Aid sponsored a continuing legal education program on re-entry for 171 staff and volunteer attorneys who participated from NCCU School of Law and 15 Legal Aid locations across the state.

### The Future: Access to Legal Information, Representation, and Justice

Technology provides the infrastructure to reach the underserved population in North Carolina, but the success of TALIAS is built on the foundation of an enduring relationship between NCCU’s Legal Clinic and Legal Aid of North Carolina-Durham. This relationship expanded as we installed the video-conferencing systems across the state. A team from NCCU visited every Legal Aid office in the state and spoke with staff members about not only how to use the technol-

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ogy, but also why we use it. We spoke of our shared objective to meet the consistently growing demand from low-income people for free legal services, and the shared frustration when we fail to meet that objective. We all agreed that one of the most obvious results of this failure has been the increasing number of *pro se* litigants in our court system, especially in civil and family matters.

Before TALIAS, NCCU and Legal Aid of North Carolina developed community education programs to prepare these *pro se* litigants for court. In response to the overwhelming demand for representation in child custody matters, NCCU School of Law's Family Law Clinic began to hold File It Yourself child custody workshops to provide the information and forms required to access the court, and more importantly, the court-annexed custody mediator. These monthly workshops attracted as many as 30 people per session in Durham County alone, and the concept of community education and *pro se* support began to grow. Legal Aid offices also hold community workshops on divorce and tenant rights, often using volunteer attorneys who see this

forum as a convenient alternative to individual *pro se* representation.

Now, TALIAS is the mechanism that makes legal information and assistance more efficient. Community education programs like those described above can be conducted by one attorney at one location, and broadcast to each of the 27 partner locations simultaneously, reaching more people more often. Individual representation in legal specialty areas such as tax can be provided to individuals without geographical restriction. For example, any eligible person can go to the nearest TALIAS location and receive services from one of only three low-income taxpayer clinics in the state.

Another contributing factor to the issue of access to justice is that many low-income individuals require advocacy in areas that are not provided by Legal Aid-NC, Legal Services, or law school clinics. Consequently, one of the most exciting results achieved through TALIAS is the number of attorneys who have volunteered to consult with individuals or conduct community workshops in their area of specialty. TALIAS recently sponsored four sessions on

immigration, all conducted by volunteer attorneys from various locations in the state and broadcast to participants at TALIAS sites. TALIAS facilitates a future with more *pro bono* representation because the technology reduces the time and cost required for the attorney and client to meet in person, eliminating a common barrier to *pro bono* services. The software that bridges the video-conference call can be temporarily installed in a personal computer with high speed broadband connection and allow a private attorney in Warrenton to hold a conference with a client in Asheville!

These are just a few examples of the possibilities that TALIAS brings to the underserved residents of our state. While our grant will end this year, our advocacy will not. We are determined to continue to build a network of organizations, attorneys, and individuals who will help us realize more possibilities for an efficient and effective delivery of legal information and services; possibilities for reaching many of those who have previously been socially, economically, and

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# Full Disclosure to Investors in Legal Education

BY STUART RUSSELL

Would you invest over \$100,000 in a company that did not give you information to calculate a projected rate of return? What if you invested \$100,000 in a company that gave you misleading information? Recently, law students have been making six-figure investments in laws schools either without good information about their employment prospects or with hopes falsely inflated by misleading information. This is not fair and should not be tolerated by a profession that demands honesty and accountability from its members.

While students should be free to choose the law as a profession and the school of their choice, they should be able to make an informed decision. Thus, the bar should support efforts to require more accurate reporting by law schools, including the new accreditation standard preliminary approved by the American Bar Association's (ABA's) Council of the Section of Legal Education and Admission to the Bar ("Council").

While it is common knowledge that law school is expensive, the financial statistics which support this perception are sobering. According to *US News & World Report*, the average 2010 law school graduate had

\$98,055 in law school debt.<sup>1</sup> Assuming a blended interest rate of 7.3%, a law school graduate with this average debt load can expect to pay \$1,158.96 per month over 10 years, or \$715.14 per month over 25 years.<sup>2</sup> These figures may be especially shocking to more senior members of the bar since the average 1987 law school graduate only carried \$31,577 in law school debt, after adjusting for inflation.<sup>3</sup>

In most cases, new lawyers will not receive a comfortable six-figure income in exchange for their six-figure debt burden. Specifically, the National Association for Law Placement (NALP) reports that the national



median salary for the Class of 2010 was \$63,000 and the national mean was \$84,111.<sup>4</sup> Furthermore, NALP's survey of the Class of 2010 indicates that the median starting salary for new law school graduates dropped 13% and the mean salary fell 10%.<sup>5</sup> Within the Class of 2010, only 64% were employed in a full-time job requiring bar passage, and nearly 1 in 5 jobs (excluding clerkships) were reported as temporary.<sup>6</sup> Even those in the Class of 2010 who landed law firm jobs earned starting salaries that were 20% less than in 2009.<sup>7</sup> These problems will not quickly go away since roughly 45,000 students are expected to graduate

from law schools in the next three years.<sup>8</sup>

In addition to the problems of a bleak job market, when the total cost of a legal education is compared to the average starting salary of a new lawyer fortunate enough to be working, most law students pay too much for their education. In a thorough economic analysis, Dean Jim Chen of the University of Louisville Brandeis School of Law used mortgage eligibility standards to evaluate law school affordability.<sup>9</sup> Ultimately, Dean Chen created a table (located below), which linked first year salaries of good, adequate, and marginal viability with annual law school tuition.

Based on these figures, a 2010 law school graduate who paid \$32,000 in annual tuition and earned the median or mean starting salary for his class did not make an economically viable investment. While the top tier of law school graduates will receive a good return on their law school investment, law school remains a poor economic choice for far too many students. As the job market continues to falter, this reality may worsen.

While the invisible hand of market forces may eventually restore the financial viability of a JD, for now, law school tuition continues to increase and the number of law school applicants continues to surpass available seats. In 2011, 87,900 candidates sought only 60,000 seats at ABA-approved law schools.<sup>10</sup> Furthermore, approximately 43,000 JDs were awarded in 2009, which is 11% more than a decade earlier.<sup>11</sup>

Although there are many reasons that students continue to overpay for a legal education, it appears that law schools have contributed to this problem by not accurately disclosing the employment prospects of their graduates. In 1996, the ABA Section of Legal Education adopted interpretation 509-1 to ABA Standard 509 (“Standard 509”), which prescribed job placement rates and bar passage data to be published by every accredited law school.<sup>12</sup> Although intended

to give law students an accurate picture of the legal profession, law schools have exploited Standard 509 to focus more on their ranking than to provide accurate information to prospective students. For example, until recently, law schools could report that a graduate waiting tables within nine months of graduation was “employed.”<sup>13</sup> Additionally, the ABA’s law school surveys are not audited, which creates a conflict of interest for schools concerned about how their survey reports will affect their ranking.<sup>14</sup> Furthermore, the survey data gathered by law schools are skewed because employed graduates are far more likely to respond than unemployed ones, who are excluded from the results.<sup>15</sup> The failure of the ABA’s reporting requirements has culminated in several class actions involving at least 15 law schools alleging misrepresentation of employment outcomes.<sup>16</sup>

Recently, the ABA has recommended that law schools be required to follow more stringent reporting requirements. On March 17, 2012, the Council gave its preliminary approval to revising Section 509 as proposed by a special standards review committee.<sup>17</sup> The Council approved changes to Section 509, which would require law schools to disclose on their websites: admissions data, tuition rates and fees, enrollment data, faculty size, curricular offerings, library resources and facilities, employment data, and bar passage rates.<sup>18</sup> Under the changes, any school salary figures must disclose the number of graduates who were included in their calculation.<sup>19</sup> Also, schools will be required to report the number of graduates employed in jobs that require bar passage, jobs in which a JD is preferred, professional and nonprofessional jobs, *and the number of graduates pursuing further education unemployed.*<sup>20</sup>

However, the Council did not follow the recommendation of the standards review committee to require that schools report the 25th, 50th, and 75th percentile salaries their

graduates earn.<sup>21</sup> Advocates for law schools support this outcome because they maintain that it is difficult to get their graduates to respond to salary surveys.<sup>22</sup> But if law schools could only report salary figures based on a minimum number of responses, this would reduce the chance of statistically inaccurate results.<sup>23</sup> Also, if schools were required to report the percentage of graduates who responded to their salary surveys, students could use the difference in response rates to determine which law schools had graduates that were most enthusiastic about their employment after law school.<sup>24</sup> Since many students have naively entered law school with false expectations about their future earning potential, the Council’s rejection of more detailed salary reporting requirements overlooks a huge part of the law school reporting problem.

The Council will be holding a public comment period in the near future and again vote on the revised standard for Section 509.<sup>25</sup> Although the Council’s preliminary approval of the new accreditation standard is a step in the right direction, students deserve to have more disclosure on the salary statistics of the law schools they are considering. Indeed, if law schools are expected to teach legal ethics, this profession cannot ignore their flawed marketing practices of the past. While the bar should not discourage young students from pursuing a legal education, it is essential that it take a more active role in ensuring that those students have access to accurate and consistent employment information about law schools. There will always be those who pursue a legal career to fulfill a lifelong dream or passion regardless of the financial outcome. But too many students have chosen to pursue law school after formulating unrealistic expectations of financial success from misleading marketing material. Furthermore, despite the idealistic motivations of some students, law school is an investment for most. Contributing to the public comments on the proposed revision to Section 509 is the most immediate step attorneys can take to make sure that our future generation of lawyers makes an informed decision about investing in their futures. ■

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Dean Chen Table			
Annual Tuition	Salary needed for good viability	Salary needed for adequate viability	Salary needed for marginal viability
\$16,000	\$96,000	\$48,000	\$32,000
\$32,000	\$192,000	\$96,000	\$64,000
\$48,000	\$288,000	\$144,000	\$96,000

## Endnotes

1. US News Spreadsheet (Class of 2009). See [lawschooltransparency.com/wp-content/uploads/2011/04/Class-of-2009-US-News.xls](http://lawschooltransparency.com/wp-content/uploads/2011/04/Class-of-2009-US-News.xls).
2. [direct.ed.gov/RepayCalc/dlentry1.html](http://direct.ed.gov/RepayCalc/dlentry1.html).
3. *Law School Debt*, [abcny.org/pdf/report/lawSchoolDebt.pdf](http://abcny.org/pdf/report/lawSchoolDebt.pdf). The \$31,577 figure is adjusted for 3% annual inflation.
4. NALP, *Class of 2010 Graduates Saddled with Falling Average Starting Salaries as Private Practice Jobs Erode*.
5. *Id.*
6. *Id.*
7. *Id.*

8. David Seagal, *For 2nd Year, a Sharp Drop in Law School Entrance Tests*, New York Times, March 19, 2012.
9. Jim Chen, *A Degree of Practical Wisdom: The Ratio of Educational Debt to Income as Basic Measurement of Law School Graduates' Economic Viability*, [ssrn.com/abstract=1967266](http://ssrn.com/abstract=1967266).
10. Law School Admissions Council.
11. *Is Law School a Losing Game*, David Seagal.
12. *A Way Forward*, pp. 6-7.
13. *Is Law School a Losing Game*, David Seagal.
14. *Id.*
15. *Id.*
14. *Breaking: 12 More Law Schools Facing Class Actions*, [lawschooltransparency.com/category/deceptive-prac-](http://lawschooltransparency.com/category/deceptive-prac-tices)

tices. As of the date of this article, one of those class actions was dismissed at the trial level but the plaintiffs' attorney plans on appealing the decision.

17. [law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202546229913&slreturn=1](http://law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202546229913&slreturn=1).
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.*

## Undocumented Immigrants (cont.)

19. *Id.* at 220.
20. *Id.* at 236 (Blackmun, J. concurring).
21. *Id.* at 202, 226.
22. "Nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." US Const. Amend. XIV § 1.
23. 42 USCA §1981.
24. 118 US 356, 369 (1886). See also *Wong Wing v. United States*, 163 US 228, 238, (1896); *Shaughnessy v. Mezei*, 345 US 206, 212 (1953).
25. 457 US 202, 210 (1982).
26. UN Declaration....Articles 2(3), 14(1) of the International Covenant on Civil and Political Rights. See also Article 5 of the Convention on the Elimination of Race Discrimination.
27. See generally Christine N. Cimini, *Undocumented Workers and Concepts of Fault*, 65 Vand. L. Rev. 389 (2012).
28. 148 NC App. 675, 559 S.E. 2d 249 NC App., 2002.
29. *Gayton v. Gage Carolina Metals, Inc.* 149 NC App. 346, 560 S.E.2d 870 NC App., 2002.
30. *State v. Little*, 182 NC App. 176, 641 S.E.2d 417 NC App., 2007.
31. 535 US 137 (2002).
32. See Christopher David Ruiz Cameron, *The Borders of Collective Representation: Comparing the Rights of Undocumented Workers to Organize under United States and International Labor Standards*, 44 U.S.F. L. Rev. 431, 449-450 n.90 (2009) (noting that state and federal courts were not following *Hoffman Plastics*). Keith Cunningham-Parmeter, *Fear of Discovery: Immigrant Workers and the Fifth Amendment*, 41 Cornell J. Int'l L. J. 27, 39, 40, nn. 80, 88(2008) (reviewing the types of claims that have been held not to be affected by the ruling in *Hoffman* including tort claims, medical malpractice, negligence, workers' compensation claims, unpaid wage claims, and labor complaints in general).
33. See *Picking Empty Pockets*, *supra* note 4. See *A Failure of Discretion*, NY Times, June 8, 2012 at A26 (referencing the "Southern 32," and the impending deportation of "dozens of people who spoke out against abuses like dangerous working conditions, unlawful arrests, unpaid wages, racial profiling, and retaliation against those trying to organize").

34. See *The Policies and Politics of Local Immigration Enforcement Law*, 287(g) Program in North Carolina, 34 (Feb. 2009).
35. Stuart Powell, *ICE Chief Welcomes Undocumented Immigrants Who Report Domestic Violence*, Mar. 8, 2012, [blog.chron.com/txpotomac/2012/03/ice-chief-welcomes-undocumented-immigrants-who-report-domestic-violence/](http://blog.chron.com/txpotomac/2012/03/ice-chief-welcomes-undocumented-immigrants-who-report-domestic-violence/).
36. Krista M. Perreira, *Mexican Families in North Carolina*, 51 Southeastern Geographer 260, 276 (2011).
37. See James H. Johnson Jr. et al., *A Profile of Hispanic Newcomers to North Carolina*, 9 Popular Gov't, Fall 1999.
38. Jeff Popke, *Latino Migration and Neoliberalism in the US South*, 51 Southeastern Geographer 242, 245 (2011).
39. On several occasions, victims of domestic violence have been apprehended after seeking police protection and/or pursuing a domestic violence protection order. See Southern Poverty Law Center, *Sexual Abuse, Discrimination*, April 2009, [splcenter.org/publications/under-siege-life-low-income-latinos-south/4-sexual-abuse-discrimination](http://splcenter.org/publications/under-siege-life-low-income-latinos-south/4-sexual-abuse-discrimination).
40. Information on file with the author.
41. NC State Bar, 2005 Formal Ethics Opinion 3, July 14, 2005, *Immigration Prosecution to Gain an Advantage in a Civil Matter*.
42. NC State Bar, 2009 Formal Ethics Opinion 5, January 22, 2009, *Reporting Opposing Party's Citizenship Status to ICE*.
43. *Id.*
44. *Id.*
45. Cimini notes that lawyers who represent employers must also exercise caution when considering whether to seek or provide information about the immigration status of the client's employees. *Cimini, supra* note 12, at 364.
46. For a comprehensive overview of the ethical issues involved in representing undocumented workers, see *Cimini, supra* note 12.
47. The privilege against self-incrimination pursuant to the 5th Amendment to the US Constitution may be invoked, although there are possible consequences including negative inferences, or even the possibility of dismissal of the action. Under certain circumstances, the attorney-client privilege can be invoked. See *Cimini, supra* note 12, at 388-390.
48. *Cimini, supra* note 12, at 392 (observing that in claims under the National Labor Relations Act, lawyers can forego requests for back-pay and reinstatement as a

way of eliminating immigration status from the realm of relevancy to the suit.

49. NC Rules of Professional Conduct, Rule 1.6. See *Cimini, supra* note 12, at 398-404 for a full analysis of the Model Rules on this point.
50. NC Rules of Professional Conduct, Rule 4.4(a).
51. NC Rules of Professional Conduct, Rule 8.4(d). *State Bar v. DuMont* 52 NC App. 1, 277 S.E.2d 827 (1981), mod. on other grounds, 304 NC 627, 286 S.E.2d 89 (1982).
52. Preamble: A Lawyer's Professional Responsibilities, NC Rules of Professional Conduct (2011).
53. See US Department of Justice, *Findings: Investigation of the North Carolina Administrative Office of the Courts*, Complaint No. 171-54M-8, Mar. 8, 2012, Cover letter, p.1 (hereinafter DOJ Findings: NCAOC), [justice.gov/crt/about/cor/TitleVI/030812\\_DOJ\\_Letter\\_to\\_NC\\_AOC.pdf](http://justice.gov/crt/about/cor/TitleVI/030812_DOJ_Letter_to_NC_AOC.pdf).
54. The Administrative Office of the Courts of North Carolina has promulgated "best practices," which include guidelines for payment of interpreters on those occasions where they are provided by the court. See *AOC Policies and Best Practices for the Use of Foreign Language Interpreting and Translating Services in the North Carolina Court System*, Feb. 2007, [nccourts.org/Citizens/CPrograms/Foreign/Documents/guidelines.pdf](http://nccourts.org/Citizens/CPrograms/Foreign/Documents/guidelines.pdf).
55. See Emily Kirby, Sarah Long, & Sonal Raja, *An Analysis of the Systemic Problems Regarding Foreign Language Interpretation in the North Carolina Court System and Potential Solutions*, May 2010, [law.unc.edu/documents/clinicalprograms/foreignlanguageinterpretationproblemsnc.pdf](http://law.unc.edu/documents/clinicalprograms/foreignlanguageinterpretationproblemsnc.pdf).
56. *Id.* See also Deborah M. Weissman, *Between Principles and Practice: The Need for Certified Court Interpreters in North Carolina*, 78 N.C. L. Rev. 1899 (2000).
57. See *United States v. Carrion*, 488 F.2d 12, 14 (1st Cir. 973) (per curiam); *United States ex rel. Negrón*, 434, F.2d 389 (2nd Cir. 1970).
58. See 28 USC § § 1827(d)(1), 1828(a).
59. See 28 USC § 1827(b)(2), (d)(1).
60. 42 USC §§ 2000d to 2000d-7 (1994).
61. *DOJ Report of Findings: NCAOC, supra* note 53, at p.2.
62. *DOJ Report of Findings: NCAOC*.
63. *Id.* at p. 6.
64. *Id.* 15-17.
65. D. Carolina Nuñez, *Inside the Border, Outside the Law: Undocumented Immigrants and the Fourth Amendment*, 85 S. Cal. L. Rev. 85, 118 (2011).



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# Change in the Legal Profession: Danger or Opportunity?

BY ANDREW CIOFFI

When it comes to how revenue gets generated, or our expectations for the future, the buzzword in the legal profession seems to be

“change.” Every week another legal publication crosses our desk with a story about how the recession is affecting the legal profession and how we need to prepare for a different economic reality in the future.<sup>1</sup> Alex Long, a University of Texas law professor who has researched the penetration of political songwriting into the legal system, combed legal databases to identify lyrics in court filings and scholarly publications, and found that the most quoted artist was Bob Dylan. Not surprisingly, the songs most quoted often involve change.

Most lawyers in North Carolina can probably identify some way in which their practice has been affected by these changes regardless of the size of their practice, the type of work they do, or their length of time in the profession. It is too early to know whether the legal world is undergoing a permanent sea change economically, as some predict, or merely shifting with the latest financial tides, as others suggest. Only time will tell. What is clear is that, in the short

term, lawyers are getting buffeted by a variety of economic, cultural, and technological changes that affect the way they do business. What will matter in the long run is the way each lawyer is able to adapt or embrace such change.

The effects of the recession on our profession are real. Young lawyers are having problems finding jobs, salaries are flat or decreasing—even for lawyers with experience, and many mature practices or specialties are fast

becoming obsolete or drying up completely. At the same time, client expectations are high and many consumers are attempting to handle matters on their own or with the assistance of online forms. Increasingly, jobs are being sent off-shore in an ever-expanding global economy, and even long-time corporate clients are increasing their demands, imposing new restrictions, and fostering competition to drive down fees. The effect of these changes is surprisingly broad and deep, and ranges from the loss of opportunities for new associates, to firings and cutbacks in private firms and among government agencies, and increases stress among practitioners who are in a panic about how to keep their practices afloat. While a lucky few may be more insulated, the impact on most is real and differs only in degree. To quote the old adage, most recently made popular by Ronald Reagan, it is a recession when your neighbor loses his job, but it is a depression when you lose your job.

The qualitative changes in our profession are real, too. The balance of power in most transactional and corporate law practices is shifting from traditional law firms toward clients and tech-savvy legal service vendors. Consumers, especially corporate clients, are becoming more sophisticated and are becoming increasingly well-armed with more information and greater market power to rein in costs. Increased competition—domestically and internationally—in conjunction with powerful information technologies, is reducing the number of opportunities for law firms to bill for services that have historically been performed by lawyers. Advertising, internet marketing, and social networking also increase competition and change traditional marketing.

In the long term, lawyers will have to

adapt to change just to survive. Common these days are war stories from lawyers about how good things used to be and how different they are now. We cannot simply hope things will return to the way they were a few years ago, much less expect they will ever return to the way they were back in “the good old days.” In his seminal business book *Who Moved My Cheese*, Spencer Johnson provides a parable about mice as a model for how to work through, and eventually embrace, change. For a long time, the mice could count on there being cheese in one particular spot, but one day it disappears. In response, one mouse stubbornly returns to the same spot, day after day, even though cheese never again appears. Other mice, often unsuccessfully, sniff out new opportunities and scurry all over looking for cheese. The wisest mouse of all watches the other mice, and sees them sniff and scurry about, and takes advantage of their efforts. Like the mice in Johnson’s book, some lawyers will not change and may go hungry. Others will spend time and treasure chasing the next new thing and some of them will succeed. The wisest perhaps will be alert to new ideas and jump on the ones that hold the most promise. If we are to survive, we cannot hem ourselves in by doing things the same old way, but must be vigilant so we can be on the front edge of new opportunities. As Johnson says in his book, when you see how change can make things better, you get more interested in making change happen.<sup>2</sup>

Some of us will be able to not just survive by adapting to change, but actually improve our lives. For those of us who are not happy with our current jobs—and research indicates there a quite a few lawyers who meet this description—a forced career change may allow us to make lemonade out of lemons by finding a job that better meets our needs. The sudden loss of a job or drop in earnings may be the type of catalyst we need to develop a better understanding of our own intrinsic motivations and seek out career opportunities that will allow us to not just survive, but actually thrive personally and professionally. This is not easy and requires considerable soul searching. Nonetheless, if we understand that for which we are really thirsting, we can rummage through the cluttered pantry of change and find the things that truly sweeten our life. This is great news because several studies show many of us, even in good economic times, are pretty sour.

As a group, lawyers seem to be quite miserable and unhappy. One law review article states that North Carolina lawyers are happy only 59% of the time.<sup>3</sup> Another law review article, written by Ruth McKinney, the director of the Writing and Learning Resources Center at UNC (who is educated as both a counselor and a lawyer), suggests that law schools are a breeding ground for depression, anxiety, and stress-related illnesses.<sup>4</sup> According to the same author, things get no better after graduation.<sup>5</sup> This is consistent with other articles on the subject. According to Patrick Shiltz, who reviewed medical and psychological literature on the subject, lawyers are depressed, more prodigious drinkers, and think about suicide more than others.<sup>6</sup> Social scientists offer various explanations for this discontent. For example, some believe that pessimism is rewarded in the legal profession, and thus tends to reward persons with that propensity, a propensity that tends not to lead to happiness.<sup>7</sup> Others believe it is variously the adversarial nature of the profession, the fact that lawyers often deal with situations in which there is a zero-sum game in which one side must win and the other must lose, the lack of autonomy, and especially the billable hour.<sup>8</sup> Undoubtedly, there are other reasons as well.

Loss of a job or career is scary, but so is the thought of being miserable for the rest of your life. For those of us who are not happy, a job or career change—even if forced upon us—provides a rare opportunity to reshape our lives. Frequently cited by motivational speakers and in self-help books is the old saw that the Chinese ideogram for “crisis” is made up of two characters signifying “opportunity” and “danger.” Despite some debate about whether this is true, the idea has real appeal to Westerners in general, and especially to Americans, who have an indomitable spirit and optimism and a confidence in our ability to cleverly turn any bad situation to our advantage. As a group, lawyers are adept at seeing and arguing both sides of any situation—a sort of intellectual Jiu Jitsu in which we are all well trained. When confronted with the danger of a sudden career change, we should strive to flip it into an opportunity.

Especially for lawyers well into their careers, the current economic climate might offer an opportunity to restore some balance between work and home life, or pursue other higher-level needs. This is an opportunity

that is now open to some new lawyers as well. In response to both the economy and to demands by associates, some big name law firms are now offering two tracks for associates—the traditional partnership track and a new lifestyle-focused track. These “career associate” or “permanent associate” positions allow lawyers to enjoy a better “lifestyle” in terms of more reasonable hours and greater control over their schedule, and still have the benefits that come with working for large law firms, even though they are not eligible for partnership consideration and earn considerably less than traditional associates (around \$60,000 instead of the \$160,000) and work out of offices in smaller cities (Wheeling, West Virginia and Dayton, Ohio instead of New York, Chicago, or LA).<sup>9</sup>

For lawyers who are bored by routine work and tired of billable hours, market forces and technology may lead to legal jobs that are focused more on creativity, autonomy, and purpose. Many law firms have lost work due to the outsourcing of legal services or by new information technologies. This is because the legal services that are most often outsourced or replaced by information technology systems are jobs that are routine, and well suited for strict oversight and being billed by the hour. The growth area for legal jobs—and the ones less able to be outsourced or replaced by technology—are more creative and can be done with flexibility of management and pay.

Author Daniel Pink in his book *Drive* describes these routine tasks as being algorithmic—that is they could be done by applying the same script, formula, and series of steps to produce the right answer. Lower-paid workers in other places can run the same algorithm, get the same answer, and deliver it instantly from their computer thousands of miles away. By contrast, more creative work, which cannot be outsourced or replaced by technology, is described as being heuristic. Heuristic work must be mastered, allows workers to be autonomous, and provides purpose.<sup>10</sup> These are jobs that intrinsically motivate people. Workers want to do the jobs because they are interesting and fulfilling, not because they are being watched over or monitored. These jobs can be done in flexible work environments, both in terms of hours and locations, and they are growing. In the United States only 30% of

CONTINUED ON PAGE 41

# The Piddling Shed

BY TONYA LANIER

It had been rumored that he did not have a thought that she had not supplied. But he knew that wasn't true. He grew up in an era when men respected their wives. It was no big deal. Just the way things were. After 40 plus years of marriage some things had just become commonplace. He had thoughts. He had dreams. He just kept them to himself.

Men were expected to provide for their family by any means necessary. The wife raised the children and looked after the home. Most of the things inside were there because she said they could be. His Linwood Road residence was no exception. He allowed her to choose the curtain colors, the furniture style, the room arrangement, and even the flooring. She had sole rights to the wall hangings and knickknacks. However, there was one exception...his prize 12-point buck mounted white tail. It was a beauty. It had taken many hunting seasons to capture this bad boy, and he liked the constant reminder of his accomplishment. Although the furry creature failed to fit the décor of any room, he had insisted that it be hung in the den.

"How long are you going to leave that ugly thing hanging there?" she would ask almost monthly. "I don't like the way those eyes keep looking at me. I believe they follow me around." He snickered under his breath every time she made this remark.

The discussion was always the same. There were questions, followed by her calling him names like trifling, unreasonable, and even selfish. He stood his ground. He refused to give in. The buck head hung proudly in the family room. He always felt a twinge of confidence whenever he admired this trophy from across the room.

The only other extensive dialogue that gave cause for alarm centered around the

outbuilding in the side yard. It had not been a matter that he entered into lightly. He had given it months of thought. After careful planning, he figured the best place for it would be adjacent to the well pump but slightly above the barn in a spot that was out of the way of everything. It would not interfere with the garden or the backyard or the clothes line or the peach tree or the muscadine vine. That particular spot in the yard wasn't being used for anything. Of course she could not fathom the need for another shack, but it was just something that he felt that he needed. It was hard to explain, but the idea was almost consuming. After three weeks of her grumbling, and three weeks of his inner struggle, he finally informed her that he had listened with an open mind (like the pastor said) but had decided to move forward. He was going to build another shed.

"Why in heavens name do you need another outbuilding?" she shouted as he made his way out the door one Saturday morning.

"Oh it will give me a place to piddle," he muffled while easing down the steps. "It will be my piddling shed," he whispered as he made his way slowly across the yard.

"Oh my stars, if that don't beat all!" she shouted seconds before slamming the door.

Within two weeks lumber and Sheetrock appeared. The saw horses stood waiting for their orders. Two black trash bags rested near newly purchased items. Slowly, the frame was constructed. The floor was laid and the room began to take shape. His son, a cousin, and men from the church would come over occasionally to help. There were many weekends that no work could be done.

Months later he found himself putting on the final touch—a Master lock on the door. He stepped back and marveled at his

## The Results Are In!

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

handiwork. It was all done. It wasn't anything big—about a 12' x 16' building with electricity, lights, plywood floor, and basic Sheetrock walls. Inside was a long work table, cubbyholes with a variety of tools, an old bookcase that provided more shelving, and basic stuff that he felt might come in handy. Small windows had been installed on two of the four walls and the bottom panes were lifted less than an inch. The screens kept the bugs at bay. With no dressing, the window provided just enough light to scare away darkness once it arrived. His piddling shed was complete.

A simple routine quickly developed. When he reached the shed door, he pulled the Master lock close to his face and inserted the shiny key that dangled from an Industrial Federal S&L key ring. He made the appropriate turns until the clasp clicked and the hook released. He would look to his left, then his right, and quietly step inside. He might close the door or leave it cracked slightly if it was a humid day and the air inside was stifling. After he made his way inside, he would stand with hands resting on the work table. Next he would close his eyes and listen to the nothingness. The aroma of sawdust mixed with the odor of paint and a hint of shellac danced around his nostrils. He would mouth a silent "thank

you.” Once his mind was cleared he would open his eyes to see what project was vying for his attention. If nothing was left on the table from the previous visit, he picked up a piece of wood and worked it into whatever he felt it wanted to become.

For some reason, he felt something divine in this place. It was hard to explain. He discovered a sense of serenity like never before. He felt closer to his Almighty here than if he was sitting patiently in the pews at Wilson Grove Baptist church. He was sure that there was a spirit that visited. These four walls provided him the comfort that he needed to get through his stressful days. In his piddling shed he did not have to pretend to be able to read beyond the third-grade level. There was no need to play like he could hear. He did not have to make fancy conversation or stumble over difficult words. In the confines of these walls he could have a heart-to-heart conversation with his God, and every word was understood, broken grammar and all. His overalls and well-worn boots were welcome since there was no need to put on fancy Sunday stuff or even sport pieces that matched. Out in this little shed he could be himself. What joy.

Over time he made stools, bookends, decorative bread boxes, potato bins, and trash bag holders. He was surprised to discover that he could do things just by thinking it through. He mended broken tables legs, cut tomato stakes, built rabbit traps, and constructed cabinets. New woodworking techniques were attempted and eventually mastered. Everyone at church marveled at his handy work. Most of the things were made of wood that was scrapped at his day job. It seemed strange that somewhere out there was a \$5,000 bedroom suite that matched his cute little candle holders. Or that the living room tables with a sticker price of over \$3,000 were made out of the same oak as a set of picture frames. This often brought a smile to his lips as he thought about that old adage of “one man’s trash... .”

Every time he put the lock on the door, he immediately began to wonder when he would be able to return. This was where he wanted to be. There were many days and weeks when he was not able to venture out there because of overtime at the furniture factory or a church revival. But if he could carve out 30 minutes in his day not prom-

ised to something else, he dashed out the door with delight. You could almost hear him shout, “I’m going to the piddling shed!” and out the door he went before she yelled out something for him to do. Once she caught a glimpse of him making his way across the rear yard and she swore she saw a little pep in his step. He seemed to be moving with a swift sway, not that slow shuffle. It must have been her imagination, but he seemed to walk with a purposeful stride, like he had somewhere to go.

To keep things peaceful she had developed a means of communicating while he was out *there*. If time had gotten away from him, he would see the porch light flicker through the window. This meant that she needed him. It might be the telephone or that his plate had been set at the table or maybe someone had stopped by. If this need arose during the day, she stood on the back porch and blew into a whistle that gave a deafening shrill. It was an unusual device that had been given to her at a self defense training class. Even though he was slightly deaf he could hear that darn thing and so could the neighbors three miles away. It certainly served its purpose. These tactics may have seemed strange, but it worked for them. For some reason she had never stepped foot inside his new shack. He could not recall her even darkening the door. This thought always produced a soft, silent smile from him.

On this particular day, the rain had not let up. The weekend seemed ruined for outdoor activities. He really needed to piddle. It had been a rough week and his fingers longed to work at some of his special wood. Instead, he flipped the pages on his John Deere magazine and glanced at the pictures in the local newspaper. While lulling around the house he had overheard her on the phone drumming up items for an upcoming auction. She had called many of her lady friends for baked goods, handmade crafts, and small wood pieces. He saw the bright yellow flyer with “Help Urban Ministry” written across the top. It seems they were seeking donations to raise funds at an auction.

He kept this project in the back of his mind for several days. A couple of times when he entered the piddling shed he included the homeless shelter in his prayers and asked for help in deciding what to make. One day it came to him to create a

keepsake trunk. It would be a small box that held little things of remembrance.

The day the construction began he stood at the door and asked for guidance in making this thing special. He prayed that the piece he donated would bring a nice penny. He also prayed that the little trunk found a home where it would be treasured. He wanted the love that he put into it to find a way to escape into the heart of the new owner.

For the next three weeks he worked exclusively on this project. It had to be perfect. It was going to be a very special piece. Not only was love and compassion being driven inside, so was his soul. When he worked on it he handled it with care. The details were etched with great precision. Several edges were done and redone. In the end, lovely gold-plated hinges were secured. A claw hook was placed on the front. The inside was covered with deep red velvet, not only on the bottom, but on the lid as well. The finishing touch was a sandpaper scuff that gave it an aged look. He had seen this done on television and tried it out for the first time. He marveled at his work. It was a lovely piece if he must say so himself. At the bottom left hand corner, slightly out of view, he etched “HAW 8/7/69, with luv.”

On Friday he placed the box in the floorboard of his Chevrolet pickup. It was wrapped securely in a silken table cloth that he bought at the Goodwill. He planned to take his donation to the Urban Ministry after work.

The following months delivered the same old routine. He was enjoying piddling around outside as much as he could.

“Everyone wanted it,” he heard her state to someone on the other end of the telephone receiver. “I still cannot believe that I was the highest bidder. Mable and Rose went over their limit, but I held strong. Since it was for a good cause, I decided to splurge a little.”

She went on to talk about some beautiful piece. He called it a day and went to bed.

The next morning he woke to humming. The aroma of coffee and pork sausage filled the air. He pulled on his favorite weekend jeans and flannel shirt. He pushed his feet inside Timberland boots that were waiting patiently by the bed. He made his way down the hallway into the empty family room. The television was on low. He heard the humming of *Amazing Grace*. Making

his way into the dining room, his glance was immediately drawn to the center of the table where the keepsake box he had made and donated to the auction rested proudly. It glistened.

Before he could ask any questions, she sat at a plate of eggs, sausage, applesauce, and toast in front of him. A coffee mug came next. She turned the light out in the kitchen and dashed around the corner and down the hall.

"I have errands this morning," she shouted midway out of the room. "Don't forget we will be in church most of the day tomorrow."

He realized that he had not taken his eye off the box. It faced him head on. He knew it was the one he created. He could tell without a doubt. He ate his food in what seemed like slow motion. After finishing his breakfast he took his used dishes and placed them in the sink. He glanced again at the piece resting on his dining room table and left the room confused.

The day had gone by so fast. By the time he came in from a full day, he had mowed the lawn, mended the back fence, burned a pile of limbs, changed the oil in his truck, grabbed a plumbing piece from the hardware store, hauled away two bags of trash, and picked up a load of wood scraps from the plant. He was too pooped to ask her about the keepsake box.

He heard her say into the avocado colored receiver, "It is so stunning. I just love it. I have never seen one like it. It reminds me of that Thomas Day work. You know Thomas Day, that famous wood working man from way long ago. But it could not be a piece from his collection. There is no way to afford that. No, they won't tell me who donated it. They promised to keep all donors confidential. He has to be someone famous. Girl, no way will I sell it. How much?...Not only did I get the prize piece, I also helped a great cause. Yeah, I know everyone is talking about the auction. Did you see the article in the paper? They say it was the most they have ever raised."

"Sure, come over when you can. I told the other ladies to come over before I put it away. I think I am going to keep the grandchildren's things in there like report cards, medals, and photos. You know, things that are precious to me. Things that I love," she concluded. That was enough for him. He decided not to bring up the keepsake sub-

ject. It didn't really matter anyway.

"I hope you are going to do something constructive today if you go back out there to that shed," she stated as he passed the door.

It had been six years since the piddling shed debuted on Linwood Road, and not once had she stepped foot inside. There had never been a need. She told their daughter that she thought he was probably sleeping or dipping snuff out there. When she was really angry she even insinuated that he was looking at girly magazines. It was not a big deal.

The keepsake treasure chest had remained the talk of the town. A new one would show up each year at the auction, almost as lovely as the very first, but different in its own right. The velvet inside changed from burgundy to red to black and one year it was a deep purple. The crowd seemed to grow each year in anticipation of the last item. The keepsake chest donor was still a mystery. It had been agreed that he would donate a handmade keepsake item each year as long as the Urban Ministry did not reveal his identity. They graciously agreed.

As morning glided in with an uncanny fog, she arose to an empty left side. That's odd, she thought, I don't remember Henry getting up. Nothing seemed out of place. In the kitchen she put on the coffee and began to make a little something to take away the morning hunger. When things were ready, she flickered the light once, twice, then a third time assuming he was out in that shed. I can't believe he is out there already, she pronounced in her head. Three hours had passed before she realized that he had not come in for his breakfast. Making the beds and dusting the living room had occupied her mind and she had lost track of time.

She glanced out the kitchen window to see the tail of the white Buick. She shuffled around to the family room blinds and saw that the truck was where he had parked it the day before. Maybe he is fixing the fence or mending the barn, tasks that would have taken him out of her eye shot, she thought. It wasn't until noon had arrived that she began to worry—this is not like Henry. He usually told her when he was going out and he always acknowledged the light flicker in 20 minutes or less. It was unusual for him to leave without asking her if she needed anything. She took her whistle and blew hard.

I am sure he could not miss that, no matter where he is, she thought. Cora and the kids probably heard that searing sound way down the road. When there was no sighting for over 30 minutes, she decided to go out there. Maybe he had fallen.

She grabbed her yard shoes and out the door she went. Her pace was not hurried or casual. She just wanted to lay eyes on him to make sure he was ok. When she reached the door she felt a need to knock, so she did. There was no answer. The lock had been removed, but the door stood shut. She knocked again. To silence she placed her hand on the knob and twisted. Her nostrils were immediately filled with the odor of paint and dust intertwined with the scent of wood. Stepping in she noticed a cluttered neatness.

Stepping in further she glanced to her left and saw him sitting in a rocker. He looked as though he was sleeping. His hands set relaxed in his lap and his chin rested on his chest. Her eyes were drawn to little boxes on a shelf behind him. Lined in a neat row were at least a dozen keepsake treasury boxes in various stages of completion. Her heart pounded. She reached out to grab hold of the edge of the work table.

She realized that he had not yet moved. She reached out and touched his shoulder. He was cold. She bent over close to his ear and whispered, "Henry." Nothing. She moved closer. It was then that she noticed the most serene look on his face. There were no tension lines or wrinkled forehead. His complexion held a shiny hue that almost made her gasp. He looked so peaceful. She even detected the making of a smile at the corners of his lips. "My Henry," she whispered to herself while flopping down to sit on a stool that was beside the rocker. It was then that she saw the sign right in front of her. It hung over the back of the door only visible to those inside. It had been etched with scrawny elementary letters: Peace and piddling found here!

She placed her hand on top of his hand. "I love you Henry Anst Wilson. I always have. I always will and I *thought* you should know." ■

*Tonya Lanier enjoys digging for details. She has a passion for local history and genealogy, and finds the study of family and friends in its purest sense an extremely fascinating exercise. She enjoys writing, reading, and researching.*

# Pro Bono— *How Working Toward the Greater Good Can Make a Positive Impact on Your Practice*

BY ROSE G. PROTO

The successful incorporation of *pro bono* projects into one's legal practice is the cornerstone of a complete and well-balanced career. The Model Rules of Professional Responsibility require every lawyer to provide legal services for those who are "unable to pay," and both the Model Rules (Rule 6.1) and the NC State Bar Rules of Professional Conduct (Rule 6.1) encourage lawyers to complete "at least" 50 hours of *pro bono* legal services yearly. While this commitment may seem daunting, the spirit behind this rule is clear: as attorneys, we owe a responsibility to the public, and to serve those in need of our specialized knowledge and skills. Lawyers are bestowed the privilege of fulfilling a unique role in society as guardians of justice from the moment they are sworn in, and performing *pro bono* services is a crucial step toward accepting this role.

*Pro bono* work is typically easy to find, and is commonly advertised on the websites of state and local bar associations, legal aid, and defenders' organizations. Opportunities are also posted on the ABA website under the "Center for Pro Bono," and are commonly offered on law school clinic websites. Before accepting a *pro bono* case, an attorney must first evaluate the time commitment he is willing to make. Short projects, including will-drafting clinics (i.e. Wills for Heroes) and Ask-A-Lawyer Day telethons, usually only require a few hours on a weekend, while some landlord-tenant and guardian ad litem matters may require months of litigation. If you are undertaking your inaugural *pro bono* case, it may be prudent to start out with a smaller project to "test the waters" before

taking a case that requires deeper lawyer involvement.

The next factor to consider when taking a *pro bono* case is the skill level required. It is important that an attorney take only the cases in which he may ethically provide competent representation. To broaden the ranks of those who are eligible to participate, many *pro bono* centers host training sessions for attorneys who wish to volunteer in cases outside of their practice area. Many of the training sessions require a full day's commitment, but some offer the bonus of continuing legal education credit. Attorneys who seek to assist in a *pro bono* matter not within their field of law should consider taking on co-counsel specializing in that practice area to ensure that the case is handled in an idoneous manner. This cross-disciplinary component of *pro bono* work is appealing for many attorneys, as it allows for variation in their practice. In today's age of specialization, branching out of one's legal niche can be a welcome change of pace. Learning a new set of skills or field of law can lend diversification to your practice and enhance your legal awareness.

For new lawyers, participating in a *pro bono* project affords the rare opportunity of taking the lead in a case—a perquisite typically afforded to more experienced attorneys. Taking a file from start to finish hones crucial case management skills that can only be acquired from practice. Through *pro bono* work, new lawyers gain experiential training in dealing with 1) time budgeting concerns, 2) developing legal strategy, 3) ethical issues, 4) setting and meeting client expectations, and 5) working with opposing counsel and judges, to name a few. *Pro bono* cases also offer new attorneys greater exposure in working with

clients, placing them in a favorable position for developing essential interviewing and communication skills. *Pro bono* projects sharpen talent and help build the confidence that comes with experience.

The business advantages to *pro bono* work are just as significant as its practical benefits. An attorney who regularly incorporates *pro bono* work into his practice builds a positive reputation for himself in the community by demonstrating a commitment to promoting the welfare of others. An attorney also develops an entirely new set of contacts through *pro bono* projects, working closely with *pro bono* center employees, clients and their families, other attorneys, and judges, to name a few. An attorney's *pro bono* network can be an excellent source of referrals, potential business projects, and career opportunities.

It is all too often in the legal profession that attorneys lose sight of the rewards of *pro bono* work, their vision clouded by the pressing reality of billable hours and demanding case loads. Yet those who shy away from *pro bono* opportunities never realize the multitude of benefits they confer. *Pro bono* work can enliven a law practice by sprinkling variety into an attorney's typical caseload. Workload diversification lends novelty and intrigue to lawyers' professional lives, reminding them of what they love about their career in the law. A commitment to *pro bono* service allows attorneys to take pleasure in their work, while providing vital assistance to their communities. Attorneys who dedicate their efforts to serving society by taking *pro bono* cases enjoy a fulfilling career and professional satisfaction. ■

*Rose Proto is a practitioner in Charlotte with the Law Offices of Jason E. Taylor, PC.*

# Profiles in Specialization—Heather Ziemba

BY DENISE MULLEN, ASSISTANT DIRECTOR OF LEGAL SPECIALIZATION

I recently had an opportunity to talk with Heather Ziemba, a board certified immigration law specialist practicing in Charlotte. Heather attended Duke University, earning her undergraduate degree in political science in 1993, and subsequently received her law degree from Vanderbilt University in 1996. Following graduation, she worked in the Department of Social Services in Gaston County for a year before a mission trip to Mexico inspired a shift in her career path. She joined Legal Services of the Southern Piedmont to establish an Immigrant Justice Project and worked in that role for ten years. Heather then went into private practice, working with the Aziz Law Firm before joining Garfinkel Immigration Law in 2009. She became a board certified specialist in immigration law in 2011. Following are some of her comments about the specialization program and the impact she anticipates on her career.

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

There were a number of things that led me to pursue board certification. One of the main reasons was that I saw a surprising amount of unauthorized practice of law. I really believe that it's important for the community, and particularly the immigrant community, to know who to trust with their legal issues. Immigration law is very complicated and clients need to find a lawyer who has real expertise. I was also drawn to the personal satisfaction aspect of the program.

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

I relied heavily on my American Immigration Lawyer's Association (AILA) course materials from previous years. I paid particular attention to those areas that I

don't see in my daily practice, like employment issues. I reviewed and studied in a similar fashion to the way I prepared for the bar exam, including going over scenarios with other immigration lawyers. I studied with a couple of other lawyers who were also taking the exam, and relied on the expertise of my colleagues as well.

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

It was helpful and gratifying to see that my peers are supportive of the certification program in general, as well as being willing to serve as personal references. I reached out to others who were already certified and I value that opportunity to strengthen those relationships. Studying for the exam

was the most helpful part of the process. I really enjoyed taking a more in-depth look at areas like removal and family immigration issues. Learning more about these types of issues will benefit my practice and my clients.

**Q: How do you envision certification being helpful to your practice?**

I think that the board certification is an important way to attract clients and to give them a sense of confidence to know that they are receiving the best representation available. Now that I'm in private practice, providing a quality product to my clients is something that's deeply important to me in a new way. I want to understand the issues that they face, to really know the process for handling them, and to provide the best assistance possible.

**Q: What have your clients, staff, and colleagues said about your certification?**

I received quite a few "congratulations" from colleagues, and a number of lawyers asked me about studying for the exam and if it was worth it! I have already had clients seek me out because of the certification,

knowing that they wanted a specialist.

**Q: How do you think your certification will benefit your clients?**

For my clients, it ensures quality representation. I've seen many situations where immigrants have been taken advantage of and I think certification lends credibility to the work that we do. As certified specialists, we assure our clients that we are up to date on current topics. In immigration law, changes take place very quickly. When I took the exam, I remember that one question presented a scenario in which the law had just changed the previous week! I knew that the exams must have been printed earlier and thought the graders would have to change the answer key to accommodate the change.

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

Probably the biggest topic in immigration law currently is the Dream Act. If passed, this would enable young people who are in the country illegally, but graduate from a US high school, to receive some benefits, including employment and college opportunities. The proposed act did not pass Congress, but President Obama and the Department of Homeland Security have established new policies that can defer action in some of those situations. We will all be watching this issue closely.

**Q: How do you stay current in your field?**

As a member of AILA I attend their annual conferences and participate in their list-serve. I am also a member of the National Immigration Project list-serve. Since immigration law is a federal practice area, it is very helpful to see how laws are implemented in different parts of the country. I also read new case law and follow closely how the Board of Immigration Appeals interprets issues. These are all critical for staying up to date in our field.

**Q: Is certification important in your practice area or region?**

Board certification is very important for





immigration lawyers in North Carolina. Though the State Bar has become more aggressive about pursuing unauthorized “notarios” and putting them out of business, I still see clients who find me because they have received bad advice from a notario. I also occasionally see lawyers, who typically focus on other practice areas, accept an immigration case, assuming that it will be easy. They soon find out that without experience and learning, these cases are very difficult to handle. Further, because immigration law is a federal practice, I sometimes see lawyers who are not licensed in North Carolina attempting to practice here. I recently watched as a judge told a non-North Carolina lawyer to “get out of my jurisdiction and stop preying on the people of North Carolina!” I think board certification raises awareness among lawyers and clients of how challenging it is to practice immigration law, and also assures clients and judges that those who are board certified made the extra effort to really understand

this practice area. It shows others that we are not dabbling.

In the Charlotte area, we have a very large and growing immigrant population. We have many companies that need assistance with immigration issues. Some are foreign owned and bringing in employees from other locations, and some are local companies that have difficulty finding qualified employees and want to bring in someone from another country. The smaller companies tend to ask the questions early to plan out their time and financial commitments. It’s gratifying to help them navigate the process, as it would be nearly impossible to figure the issues out on their own.

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

I think that the program will continue to help people. As the immigrant community continues to grow, it will become even more important for them to distinguish qualified attorneys.

**Q: What would you say to encourage other**

**lawyers to pursue certification?**

Becoming a board certified specialist has helped me in many ways. Learning about other issues has allowed me to become a better lawyer as I integrate that knowledge into my practice. I really like learning and enjoyed studying for the exam. The exam itself wasn’t nearly as bad as the bar exam! I thought it was a fair test.

I have also really enjoyed the opportunity to get to know the other specialists, including those in other practice areas. I use the directory that’s published each year to make referrals to specialists in other practice areas. That’s a huge benefit, as I get referrals from other specialists as well. Even if I don’t know the lawyer personally, I do know that they are committed to their practice area and that they stay current in their field. That gives me comfort in making a referral. ■

*For more information on the State Bar’s specialization programs please visit us on the web at [nclauspecialists.gov](http://nclauspecialists.gov).*

## Change (cont.)

job growth comes from algorithmic work, while 70% comes from heuristic work.<sup>11</sup>

Best of all for many lawyers, these jobs are not well suited to older methods of compensation such as the billable hour, which not only are inefficient for such work, but actually stifle creativity.<sup>12</sup> Indeed, studies of artists show a diminishment in the quality of their commissioned work compared to their non-commissioned work.<sup>13</sup> This is because we are most creative and productive when we are self-motivated, in a state of flow, working on tasks that are neither too hard nor too easy, using skills we have mastered, and when we are working with purpose. Trying to compensate workers doing heuristic work with hourly wages, and managing them with extrinsic criteria, is outdated and ill-suited for the work we will be doing in the years ahead, and only undermines motivation and creativity. Imagine requiring Einstein or Meryl Streep to bill by the hour.

Some lawyers, forced out of bigger firms, will go off on their own. Others may need to pool resources to survive. A few may need to change specialties or focus to adapt. Regardless of such changes, many will adapt

and survive. For a few, they will not only get by, but will be able to thrive by taking advantage of an opportunity to mold their practice into one that will meet their economic, personal, psychological, and emotional needs. As tough as this will be, we may be at a stage in the history of our profession where doing this will never be easier or more compelling. ■

*Andrew Cioffi has practiced law in North Carolina for 27 years and is a partner at Smyth and Cioffi, LLP, in Raleigh where he focuses on the arbitration, mediation, and trial of disputes involving insurance and injury matters.*

### Endnotes

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## Thank You to Our Meeting Sponsor

Thank you to North Carolina Lawyers Weekly and Lawyers Mutual for sponsoring the State Bar quarterly meeting in July.

# A Year in the Life of a Lawyer Wife

BY ANONYMOUS

I am a wife. I am a lawyer. I am the wife of a lawyer. My father is a lawyer. My husband's father is a lawyer. My first cousin on my mother's side is a lawyer. If you have ever seen the movie *My Cousin Vinny*, you know where I am going here. Despite all of the legal subject matter expertise running around my family tree, I was in no way prepared to be the wife of an alcoholic lawyer in need of in-patient treatment.

Yet, that is exactly where I found myself on a Tuesday night in February last year. After putting my kids to bed, my husband cracked open a beer (his 11th of the evening—yes, I was keeping a tally at that point in time), and proceeded to tell me that he had decided that he needed to go to rehab. My first reaction was one of relief. I had known for a long time that my husband was an alcoholic and that he needed treatment, and I was glad that he finally agreed. I also knew that the NC Lawyer Assistance Program (LAP) could help us initiate treatment (as the LAP had assisted when my husband attended outpatient treatment a few years earlier—a treatment attempt which obviously did not stick), and I knew that my health insurance included coverage for inpatient substance abuse treatment. That night I slept like a baby, content with all of the things I thought that I knew. Then came Wednesday and reality hit me squarely between the eyes.

**Reality Check #1: My Husband.** He was in the midst of a complete mental breakdown. He was drinking 18-24 beers each and every night. His law practice was in the toilet. He had not answered any mail, email, or voicemail since before the holidays. He wasn't paying his bills at work or his half of our household bills. He was drinking in the office. He was drinking in the car, while driving our kids home from school. He was angry, ashamed, and completely overwhelmed. Once he made the decision to enter treatment, he became completely

unable to function. He stopped going to work and alternated between being passed out and watching TV until he went into treatment. In the 12 days between his decision to get treatment and actually entering treatment, my husband consumed 252 beers at our house (trash day was on Tuesday, so I had a good baseline when I counted the empty bottles in the recycle bin).

**Reality Check #2: Treatment.** Based upon my husband's lengthy history with alcohol abuse and unsuccessful attempts at outpatient treatment, we were advised that my husband's best chance at recovery was to attend a 90 day inpatient, residential program geared towards professionals. The LAP recommended two treatment facilities, and both required up-front payment for at least the initial six weeks. Both facilities recommended immediate admission into medically supervised detox followed by residential treatment. Neither program accepted insurance.

**Reality Check #3: Money.** In short, we didn't have enough of it. I needed to pay for treatment in full, in less than two weeks. I needed to pay our household bills while my husband was in treatment and pay the bills that he had let lapse over the past few months. There would be no income coming in from my husband for at least 90 days (he was a solo practitioner), and he had barely enough money in his operating account to pay his receptionist and paralegal for the next month. We had less than \$5,000 in savings between the two of us and really had nothing of value (other than our children), so making a quick sale to raise funds was out.

The sense of relief that I had felt the night before fled quickly, and I was in an absolute panic as to how I was going to make this work. My husband was completely checked out, so it was all up to me. During the next few days I turned off all emotions and went into hyper-focused problem-solving mode. I methodically



worked through all of the possibilities for paying for treatment and somehow found a way to borrow the money. I wrote out a daily schedule, including when I would work remotely from my husband's office, and when I would enlist my parents to pick the kids up from school so I could work in his office in the evenings. I went through our expenses and cut all non-essential expenditures. I dictated a letter to my husband's clients about his unexpected medical leave and advised his staff of the same. I had a very frank discussion with my three young children about "daddy going to treatment." I finalized the details of my son's sixth birthday party, which was scheduled for the following Sunday, and I also completed my remaining six hours of CLE (it was the last week in February, after all). When the following weekend rolled around and we were traveling to the treatment facility, I was on autopilot. My kids were upset, my husband was terrified, and I knew it was up to me to hold it together.

I spent the next week balancing my job, working through my husband's files, and fielding calls from his irate clients. I had a vague notion that the LAP could assign a volunteer lawyer to assist with my husband's cases during his absence, but I didn't really want another lawyer digging into his files. I was concerned any competent lawyer would quickly uncover (as I had) numerous instances of neglect. Worse, I feared they might find actual malpractice or trust account violations. Even though I had not practiced law in five years, I took it upon myself to manage my husband's practice in

his absence. I honestly believed that it was my responsibility to keep his practice afloat and to remedy as many problems as I could, because I believed that my husband's law license depended on it. I was already pushed to the limit with my own full-time job, parenting my three small children, and maintaining our household/bills by myself, but somebody had to keep the wheels on the bus. The madness went on for about a month, during which time I didn't sleep for more than three hours a night; I completely lost my appetite and dropped 15 pounds in as many days; and I began to develop an ulcer. Finally, I was overcome with sheer physical and mental exhaustion and knew that something had to give or I was going to end up in the hospital.

**Reality Check #4: Help Needed.** I could no longer do the professional and personal work of two people. Something had to give. I needed to ask for and accept help from other people.

First came the tactical help—such as accepting an offer from a friend to drop off dinner, enlisting the assistance of the LAP to get a few of my husband's litigation cases continued, and asking my retired father to pick up mail and phone messages from my husband's office so that I didn't have to drive across town. (By this time I had let my husband's staff go because there wasn't any money left.) These acts of generosity definitely lightened the load to some degree, but I still kept most of the burden of my husband's practice for myself, fearing for his license. I was "stressed," but I thought I was coping pretty well under the circumstances.

People around me suggested that I go "talk to somebody" or go to an Al-Anon meeting. First it was my mother, then a friend who made these suggestions. I insisted that I was "fine," I just needed help with the "to-dos." After all, I wasn't the one in rehab. I was the responsible one. I was paying the bills on time. I was effective and successful at work. The kids were getting fed and bathed. I certainly wasn't the one with the problem. Around the same time, I attended a family program at my husband's treatment center. A number of participants in the program mentioned that I seemed angry and very hurt. I just assumed that they were projecting their own feelings on to me, because I wasn't angry at all. Sure, I was tired, but I was happy that my husband was finally getting the treatment he needed. I also met with my husband's

therapist that weekend, and her first comment to me was, "Wow, you seem really pissed. Are you talking to someone about that?" I was confounded. Why didn't these people understand? I was stressed about our finances and I was exhausted from doing the work and parenting of two people, but I wasn't mad at my husband. I was fine.

Then, a week later, it happened—I snapped. A bank teller wouldn't allow me to transfer money between my husband's accounts, despite the fact that I had a Power of Attorney, so I shouted that she was a moron and stormed out of the bank branch. Later that afternoon I hung up the phone on one of my co-workers mid-sentence for disagreeing with me. I left my office, and before I could drive out of the parking deck, I was sobbing uncontrollably.

**Reality Check # 5: I Needed Help.** Me. Not my husband's caseload. Not my budget. Not my to-do list. Me. I was emotionally overwhelmed and I didn't know how to cope. I did not know that one of the effects of the disease of alcoholism is that the non-alcoholic begins to assume all responsibility, taking on far more than is reasonable.

I found a counselor who specialized in addiction and joined a therapy group specifically for family members of alcoholics. I did not know at that time that the LAP could have directed me to resources like this for myself. I knew that the LAP could help my husband, but I did not realize I might receive help as well for being affected (overwhelmed) by someone else's alcoholism or addiction. I quickly learned that years of living with an active alcoholic had impacted me. I learned that I was indeed angry, not only that I had been left with all of the responsibility and burden of my husband's abrupt departure for treatment, but also that alcohol had been the most important thing in my husband's life for so long. I also learned that underneath the anger were a lot of fear and sadness. Through regular group therapy sessions and with the support of other spouses of alcoholics, I learned a lot about myself and learned how to work through the anger and other emotions that are so common with those affected by the disease of alcoholism.

This has not been an easy journey for me, and there have been some fairly large bumps in the road, including substantial financial challenges and my husband's relapse (which thankfully was not prolonged and he is back

working on his own recovery). I am still a work in progress, but for the first time in my life I truly understand the meaning of serenity and the joy has returned to my life. I am now able to take ownership of what is mine and to let go of the things that are outside of my control (like my husband's recovery or the status of his law license). I have a sense of gratitude for the small, everyday things in life, and I am able to live in the present. Gone are the constant "what if" worries that so often plague those impacted by alcoholism.

In addition to the personal growth and insights that have come from my getting help, I have learned a lot about the LAP and the resources and support that it can provide. For example, I learned that had I enlisted the assistance of volunteer lawyers through the LAP, our communication would have been confidential pursuant to Rule 1.6 and the LAP staff and volunteers are duty bound to preserve the confidentiality of anything I needed to discuss with them. I did not have to take on the added burden of my husband's law practice. Most importantly, I have learned that I am not alone. There are a lot of us out there. We are lawyers, but we are also wives, husbands, siblings, parents, partners, and friends of alcoholics. Some of us are in crisis due to the consequences of active addiction or the sudden upheaval caused when a lawyer or family member seeks treatment. There are others who are adjusting to life with a recovering alcoholic or addict who don't know where to turn to get help for themselves or a loved one. There is help available to us through the Lawyer Assistance Program, Al-Anon, mental health professionals, and through the support and friendship of other lawyers with similar experiences. All we need to do is ask. ■

*The North Carolina Lawyer Assistance Program is a confidential program of assistance for all North Carolina lawyers which helps lawyers address problems of stress, depression, addiction, or other problems that may lead to impairing a lawyer's ability to practice. If you are a North Carolina lawyer, judge, or law student and would like more information, go to [www.nclap.org](http://www.nclap.org) or call toll free: Robynn Moraites (for Charlotte and areas west) at 1-800-720-7257, Towanda Garner (in the Piedmont area) at 1-877-570-0991, or Ed Ward (for Raleigh and down east) at 1-877-627-3743.*

# North Carolina State Bar Amends Procedures for Exemption from Random Audit of Trust Accounts

*BE IT RESOLVED: Henceforth, it will be the policy of the North Carolina State Bar Council that a lawyer may seek exemption from the random audit of trust accounts authorized by 27 NCAC 1B, Rule .0128(b), by having a CPA or CPA firm perform an examination of his/her trust account pursuant to procedures approved by the council and by having the CPA or CPA firm send a report showing compliance to the North Carolina State Bar. The required period covered by the CPA examination is 12 months. Exemptions are good for 15 months from the date the CPA examination was concluded. A lawyer is prohibited from seeking exemption from the random audit of his/her trust accounts during the quarter in which the lawyer's judicial district bar has been selected for review.*

Since the creation of the State Bar's Random Audit Program in 1985, lawyers have, as a matter of policy, been permitted to obtain exemption from selection for random audit by preemptively submitting their trust accounts for examination by certified public accountants. The impetus behind this policy was to allow lawyers to subject their trust accounts to an examination similar to a random audit and thus preclude selection by the Random Audit Program. In theory, this policy would be a win-win for both the State Bar and the lawyer, as it would allow the State Bar auditor to examine other lawyers and let the lawyer have his account examined on his own schedule and by a CPA of his choice. This policy remains in effect; however, the method for seeking and being granted an exemption has been revised.

Previously, a certified public accountant examined the lawyer's trust account and certified that the trust account was in compliance with Rule 1.15 of the Rules of Professional Conduct. The CPA was not required to provide any specific findings,

explain the process by which the examination was conducted, or show that any remedial measures were taken to bring the trust account into compliance. When the State Bar received a completed form that showed compliance with Rule 1.15, the lawyer or law firm was exempted from random audit for 15 months. The State Bar received, on average, 35-40 exemption forms a year from law firms of all sizes, including solo practitioners.

Not surprisingly, the reports the State Bar received from the accountants almost always certified that the lawyer's trust account was spotless and had no deficiencies. From our experience with the Random Audit Program and the high percentage of non-compliant trust accounts, we were suspicious that the examinations were either not thorough enough or not conducted at all.

Additionally, the Board of CPA Examiners expressed reservations with the format and language of our exemption form, and asked us to revise the form to provide more specific requirements for the CPA examination. Given our concerns with the effectiveness of the exemption process and the request from the Board of CPA Examiners, we undertook to revise our forms and procedures for seeking and obtaining an exemption from the Random Audit Program. Descriptions of the new forms are below.

■ The Lawyer's Representation Form will require the lawyer to certify to the State Bar that he/she is in compliance with certain trust accounting rules. The form requires the lawyer or law firm to list all of their trust accounts and all of the lawyers covered by the requested exemption. The representation form must be provided to the CPA/CPA firm prior to commencement of the examination and must be attached to the

CPA report sent to the North Carolina State Bar.

■ The Agreed Upon Procedures Form specifies what records the CPA must examine for the State Bar, how they are to examine the records, and what we want CPAs to report to us. It will make the CPA trust account examination more equivalent to the random audit procedure, and will give the State Bar a more detailed look into the lawyer's compliance with trust accounting rules.

■ The Agreed Upon Procedures Engagement Letter is the contract between the lawyer and the CPA that clearly states what the CPA will be examining and how information will be reported to the State Bar.

Finally, the CPA will provide the lawyer and the State Bar with a report detailing the results of the examination pursuant to the agreed upon procedures.

These documents are available in the "Forms" section of the State Bar website, under "Trust Accounting." They are also available in the *Lawyer's Trust Account Handbook*, available online at [ncbar.gov/PDFs/TrustAccountHandbook.pdf](http://ncbar.gov/PDFs/TrustAccountHandbook.pdf).

Please note that a lawyer is *prohibited* from seeking exemption from the random audit of his/her trust account(s) during the quarter in which the lawyer's judicial district bar has been selected for review.

The revisions to the procedures regarding exemption from random audit balance the need to advance the State Bar's mission of protecting the public with the desire to allow lawyers to have their accounts audited in a more convenient and less stressful environment. If you have any questions about the new procedure and forms, please contact Peter Bolac, trust account compliance counsel, at (919) 828-4620 or [PBolac@ncbar.gov](mailto:PBolac@ncbar.gov). ■

# Lawyers Receive Professional Discipline

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## Disbarments

**Alexander L. Lapinski** of Durham pled guilty in federal court to one felony count of unlawful procurement of citizenship or naturalization under 18 U.S.C. §1425 by aiding and abetting his client in seeking US citizenship under a false name. Lapinski surrendered his license and was disbarred by the Wake County Superior Court.

**Robert L. Mebane** of Rutherfordton embezzled client funds and funds withheld, for the benefit of the IRS, from employees' paychecks. He was disbarred by the DHC.

**Sean Nelson Rogers Wells** of Swansboro surrendered his law license and was disbarred by the Wake County Superior Court. Wells admitted that he misappropriated entrusted funds.

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## Suspensions & Stayed Suspensions

**Cameron Ferguson** of Boone neglected personal injury cases, did not supervise his non-lawyer assistant, did not safeguard entrusted funds, did not promptly deliver entrusted funds, allowed entrusted funds to be used for an unauthorized purpose, did not communicate with clients, did not appear for trials and for a hearing on an order to show cause why he should not be held in contempt, and was found guilty of criminal contempt. He was suspended for five years and must satisfy numerous conditions before he can be reinstated.

**Roydera Hackworth** of Greensboro commingled, did not maintain proper trust account records, and did not reconcile her trust account. She was suspended for four years. After one year she may apply for a stay of the balance upon compliance with numerous conditions, including that she identify the owners of funds in her trust account, disburse its contents to the owners, and obtain a practice monitor.

**Gary Lawrence** of Southport made sexual comments to and inappropriately touched two clients. He was suspended for three years. After one year he may apply for a stay of the balance upon compliance with numerous conditions, including that he must provide certifi-

cation from a psychiatrist who specializes in treating sexual offenders in the professions that he does not suffer from any condition creating a predisposition to engage in inappropriate sexual behavior.

**Michael D. Lea** of Thomasville neglected his client's case, forged his client's signature on an affidavit, notarized the forged signature, and filed the affidavit with the court. He was suspended for six months. The DHC found many mitigating circumstances and indicated that, but for those circumstances, much more substantial discipline would have been imposed.

**Mark Mangiarelli** of Huntersville neglected real estate transactions, failed to conduct quarterly trust account reconciliations, and disbursed entrusted funds improperly. He was suspended for three years. The suspension is stayed for three years upon compliance with numerous conditions.

**Charles M. Oldham III** of Charlotte allowed a mortgage loan "modification" business to operate under the auspices of his law firm. He was suspended for two years. The suspension is stayed for two years.

**Steven E. Philo** of Franklin omitted relevant information on HUD-1 Settlement Statements, neglected his clients, and did not adequately communicate in real estate transactions. Because there was no evidence of intent to deceive, the DHC imposed a three-year suspension stayed for three years.

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## Censures

The Grievance Committee censured Elizabeth City lawyer **Van H. Johnson**. Johnson did not cooperate with opposing counsel in scheduling Johnson's client's deposition and did not tell his client that the deposition had been noticed several times. Johnson's client was ordered to pay sanctions.

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## Reprimands

Raleigh lawyer **Robert J. Lane III** was reprimanded by the Grievance Committee for assisting a disbarred lawyer in the unauthorized practice of law.

**James E. Hairston** of Raleigh was reprimanded by the Grievance Committee for

assisting a disbarred lawyer in the unauthorized practice of law.

**Matthew R. Plyer** of Fayetteville was reprimanded by the Grievance Committee for failing to supervise his paralegal. Plyer allowed his paralegal to substitute her professional judgment for those of associate lawyers in his office and allowed her to modify those lawyers' work product.

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## Transfers to Disability Inactive Status

The chair of the Grievance Committee transferred **Robert H. Gourley, Sr.** of Statesville and **Andrew Jason Brauer** of Raleigh to disability inactive status.

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## Reinstatements

The secretary reinstated Wilmington lawyer **Leeanne Quattrucci** to active status. The remaining two and a half years of her suspension are stayed upon compliance with conditions contained in the original order of discipline.

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## Notices of Intent to Seek Reinstatement

Individuals who wish to note their concurrence with or opposition to these petitions should file written notice with the secretary of the State Bar, PO Box 25908, Raleigh, NC 27611, before November 1, 2012 (60 days from publication).

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## In the Matter of James T. Ferguson III

Notice is hereby given that James T. Ferguson III intends to file a petition for reinstatement before the Disciplinary Hearing Commission of the North Carolina State Bar. On July 28, 2005, Ferguson entered a plea of guilty in US Federal Court to one count of conspiracy to commit securities fraud, mail fraud, and wire fraud. This conviction provided the substance of a grievance filed against Ferguson by the Grievance Committee of the North Carolina State Bar. On or about August 23, 2005, Ferguson tendered an Affidavit of Surrender of his license. On October 21, 2005, the tender of the surrender was accepted by the State Bar and Ferguson was disbarred.

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# Class Action Residuals Boost IOLTA Income for 2012

## Income

Income from IOLTA accounts remains depressed. Total income from IOLTA accounts for 2011 was flat at \$2.2 million, though it declined by 16% during the last two quarters as the boost from implementing comparability ended. The first quarter of 2012 showed a decline of 17%. We expect this situation to continue as banks are now re-certifying their comparability compliance at even lower interest rates. Also, the Federal Reserve is now predicting that it will keep interest rates at the current unprecedented low level through 2014.

We were, however, pleasantly surprised to receive a check for over \$1.2 million in June. These funds are from residuals directed to IOLTA programs across the country in a Washington State class action case. Residual funds are those funds remaining after exhaustive efforts are made to locate and distribute funds to class members following the collection of a class action judgment. The original lawsuit was brought against a Washington company that hired a fax blaster to send unsolicited advertisements by facsimile to individuals and businesses advertising life insurance rates. Blast faxes violate Washington State and federal statutes. A large amount of residual funds resulted from the inability to locate class members because of the absence of good records, the passage of time since the case was initiated, and the recovery ceiling of \$500 for each received fax established by statute and court ruling.

A Washington court rule directs a minimum of 25% of class action residual funds to their IOLTA program and 75% by court order to other appropriate organizations.

In this case, the remaining 75% of residual funds are being distributed to IOLTA programs in all states and the District of Columbia on a *pro rata* basis using an estimate of the statutorily prohibited activity that occurred in each state. The court found that these entities promote access to the civil legal justice system, something that members of the

certified class, who have claims under consumer protection and other laws, desire and need.

North Carolina has a statute that sets out a procedure for distributing class action residuals equally to the Indigent Person's Attorney Fund and the North Carolina State Bar. The State Bar has asked IOLTA to administer the funds it receives (\$50,000 to date), which are for the provision of civil legal services for indigents. The Equal Access to Justice Commission (EAJC) has published a manual on *Cy Pres and Other Court Awards* to educate judges and attorneys as to the importance of such awards to legal aid organizations. The manual includes information on different types of court awards, tips for structuring award agreements, examples of awards, and a primer on how to structure a cy pres settlement. The manual is available on the NC Equal Access to Justice website ([ncequalaccesstojustice.com](http://ncequalaccesstojustice.com)) and the NC IOLTA website ([nciolta.org](http://nciolta.org)).

## Settlement Agent Accounts Added to NC IOLTA

An amendment to the Good Funds Settlement Act (N.C. Gen. Stat. 45A-9) requires that interest bearing trust and escrow accounts of settlement agents handling closing and loan funds be set up as IOLTA accounts as of January 1, 2012. Though many of these accounts are not interest bearing and are not being set up as IOLTA accounts, we have identified 45 new accounts as settlement agent only accounts (those not associated with an attorney licensed in North Carolina), and have received over \$11,000 from interest earned on those accounts through May of this year.

The State Bar Council has approved and transmitted to the NC Supreme Court for final approval a rule revision to allow an exception for out-of-state banks with no NC branches to hold NC IOLTA accounts for settlement agents. Several large title companies will be affected.

## Grants

Beginning with the 2010 grants, we have limited our grant-making to a core group of (mainly) legal aid providers. Even with that restriction and using \$1 million in reserve funds in two consecutive years, grants have dramatically decreased (by approximately 20% in 2010 and 11% in 2011). Faced with a smaller reserve fund (~\$800,000) and projections that interest rates will remain low for some time, the NC IOLTA trustees decided to decrease grants by 15% and use between one third and one half of the remaining reserve fund (45%) in order to make just over \$2.3 million in grants for 2012.

Those decisions left us with approximately \$450,000 remaining in reserve for future use.

## State Funds

In addition to its own funds, NC IOLTA administers the state funding for legal aid on behalf of the NC State Bar. For the 2011 year, we administered just over \$4.4 million. This amount is less than the previous year's \$5.1 million and has decreased from a high of \$5.5 million in 2009. The legal aid programs and the Equal Access to Justice Commission are working with the NC Bar Association in an effort to maintain state funding for legal aid and increase it if possible.

## NC IOLTA Trustees and Leadership Appointed

At their July meeting, the NC State Bar Council appointed IOLTA trustees to begin a three-year term on September 1, 2012, and IOLTA leadership for 2012-13. The council re-appointed former NC Bar Association President Michael C. Colombo and former NC Bankers Association Chair F. Edward Broadwell Jr. to a second three-year term as IOLTA trustees, and appointed former State Bar President E. Fitzgerald (Jerry) Parnell as a new trustee. Michael C. Colombo was appointed chair, and F. Edward Broadwell Jr. was appointed vice-chair of the NC IOLTA Board of Trustees for 2012-2013. ■

# Featured Artist—Timothy Postell

*My philosophy on life is the same as the reason I paint: I want to soak up the atmosphere with all my senses, and then capture the essence of what I see with my brush. Like Monet, I want to paint the air around the subjects before me. I want to capture those moments between breaths, the sound after a water drop rejoins a puddle, and the instant after a leaf breaks free and begins its journey.*

*I approach each landscape with the intent to allow the viewer to take time to exhale and to rediscover those moments in time that represent tranquility and harmony in their life. My intent is to find beauty in the simplicities of life. My paintings are passageways for one's journey to discovering common ground.*

Timothy Postell grew up in rural Gastonia, where most of his memories are of days spent playing sports and working on the family farm. At the age of 18 he joined the military and soon after married Teresa, who remains his inspiration. After leaving the military, he was recalled to active duty for the Persian Gulf Conflict where he served for the duration. Upon his



*Through the Meadow*

return, Tim attended night school at the local community college while working full time during the day. At age 28 he left his job and transferred to East Carolina University to pursue his dream of becoming an artist.

After obtaining his undergraduate degree, Tim attended graduate school at the prestigious Hoffberger School of Painting at the Maryland Institute College of Art (MICA) in Baltimore, Maryland. While at the Institute, Tim grew as an artist under the guidance of the late internationally known artist Grace Hartigan, the founder of the Hoffberger School; Raoul Middleman, the artist-in-residence at the school; and many more visiting artists. During his two years at the Institute, he also learned from the many international artists enrolled in the program.

Tim lives in Raleigh, where he pursues his lifetime ambitions as a full-time artist and teacher. On most days, he can be found in his studio at Artspace in downtown Raleigh or on location in the countryside

Each quarter the works of a different contemporary North Carolina artist are displayed in the storefront windows of the State Bar building. The State Bar is grateful to The Mahler Fine Art, the artists' representative, for arranging this loan program. The Mahler is a full-service fine art gallery in Raleigh representing national, regional, and North Carolina artists, and provides residential and commercial consulting. Readers who want to know more about an artist may contact owners Rory Parnell and Megg Rader at (919) 896-7503 or [info@themahlerfineart.com](mailto:info@themahlerfineart.com).



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painting landscapes. Tim paints in a diversity of styles including portraiture, abstraction, narrative, and symbolism, with a strong focus on the rural landscape through plein air and studio painting. Tim's paintings are in many private and corporate collections in the United States and abroad. ■

# Email and the Internet Continue to Present Issues of Professional Responsibility to the Ethics Committee

## Council Actions

At its meeting on July 20, 2012, the State Bar Council adopted the ethics opinions summarized below:

### 2012 Formal Ethics Opinion 1

#### *Use of Client Testimonials in Advertising*

Opinion rules that testimonials that discuss characteristics of a lawyer's client service may be used in lawyer advertising without the use of a disclaimer. Testimonials that refer generally to results may be used so long as the testimonial is accompanied by an appropriate disclaimer. The reference to specific dollar amounts in client testimonials is prohibited.

### 2012 Formal Ethics Opinion 3

#### *Imposition of Finance Charges on Delinquent Client Account in Absence of Advance Agreement*

Opinion rules that a lawyer may charge interest on a delinquent client account, without an advance agreement with the client, to the extent and in the manner permitted by law.

## Ethics Committee Actions

At its meeting on July 19, 2012, the Ethics Committee voted to send the following proposed opinions to subcommittees for further (or continued) study: Proposed 2011 FEO 11, *Communication with Represented Party by Lawyer Who is the Opposing Party*; Proposed 2012 FEO 2, *Lawyer-Mediator's Preparation of Contract for Parties to Mediation*; and Proposed 2012 FEO 4, *Screening Lateral Hire Who Formerly Represented Adverse Organization*. The Ethics Committee also voted to publish the following four proposed opinions. The comments of readers are welcomed.

### Proposed 2012 Formal Ethics Opinion 5

#### *Reviewing Employee's Email Communications with Counsel Using*

## Employer's Business Email System July 19, 2012

*Proposed opinion rules that a lawyer representing an employer must evaluate whether email messages an employee sent to and received from the employee's lawyer using the employer's business email system are protected by the attorney-client privilege and, if so, decline to review or use the messages unless a court determines that the messages are not privileged.*

### Inquiry #1:

Attorney A represents Employer on various matters including legal disputes with its employees. Employer has a business email system that is available to all employees and that is used for transacting Employer's business. Employer's personnel policy states that Employer may monitor emails sent or received using Employer's email system, specifically including email sent or received on any employee's business email account.

Employee is in a legal dispute with Employer. Employee has used his business email account on Employer's email system to send emails to his lawyer and he has received emails from his lawyer on his business email account on Employer's email system.

Does a lawyer have a duty to avoid communicating with a client over the email system of the client's employer?

### Opinion #1:

A lawyer must avoid communications with a client over an employer's email system if there is a risk that the employer will find and read the emails. The duty of confidentiality, set forth in Rule 1.6 of the Rules of Professional Conduct, requires a lawyer "to act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer...." Rule 1.6, cmt. [17].

## Public Information

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

## Citation

To foster consistency in citation to the North Carolina Rules of Professional Conduct and the formal ethics opinions adopted by the North Carolina State Bar Council, the following formats are recommended:

- To cite a North Carolina Rule of Professional Conduct: N.C. Rules of Prof'l Conduct Rule 1.1 (2003)
- To cite a North Carolina formal ethics opinion: N.C. State Bar Formal Op. 1 (2011)

Note that the current, informal method of citation used within the formal ethics opinions themselves and in this *Journal* article will continue for a transitional period.

Comment [18] to the rule adds that, when transmitting confidential client information, a lawyer must take "reasonable precautions to prevent the information from coming into the hands of unintended recipients."

Where a lawyer knows or reasonably



should know that a client is using an employer's email system to communicate with the lawyer, the lawyer should seek to avoid the use of the employer's system regardless of whether the legal matter is unrelated to the client's employment and regardless of whether there is a legal argument that use of the system does not waive the attorney-client privilege. The duty of confidentiality is more expansive than the attorney-client privilege. It requires a lawyer to protect confidential information from disclosure to "any unintended recipient." The lawyer should explore with the client alternative methods of communicating including use of the employee's personal email system, telephone, and texting.

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

May Attorney A tell Employer to review the records for its email system to retrieve any personal email messages sent or received by Employee on Employee's business email account?

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

Attorney A should research the law relating to the recovery, identification and production of employee email, including the law on attorney-client privilege, and advise Employer as to its rights and responsibilities under the law. *See* Rule 4.4(a) ("In representing a client, a lawyer shall not...use methods of obtaining evidence that violate the legal rights of...a person.")

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

Employer reviews the records of its email system and discovers email messages between Employee and his lawyer. The emails from the lawyer contain the statement "Attorney-Client Confidential Communication." Employer informs Attorney A that it has copies of these messages.

May Attorney A review the email messages?

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

In the absence of a Rule of Professional Conduct or prior ethics opinion on point, the Ethics Committee was guided by the case law on the application of the attorney-client privilege to communications between a client and his lawyer over an employer's email system. The attorney-client privilege is fundamental to the client-lawyer relationship and the trust that underpins that relation-

ship. As such, the bar must protect the privilege and seek to limit incursions upon the privilege that are not warranted by law.

Case law from many jurisdictions,<sup>1</sup> including North Carolina,<sup>2</sup> indicates that whether the privilege applies to email exchanges between an employee and his lawyer that occurred over an employer's email system depends upon whether the employee had a reasonable expectation of privacy in the email communications. This in turn requires an investigation into a myriad of factors, including whether the employer has a clear, unambiguous policy regarding email usage and monitoring; whether that policy is effectively communicated to employees; whether the policy is adhered to by the employer; whether third parties have access to the employee's email account on the employer's system; when/where the communication occurred (at home or the office; during work or leisure hours); and whether the employee took affirmative steps to preserve the privacy of the communication. *See, e.g., In re Asia Global Crossing, Ltd.*, 322 B.R. 247, 258 (S.D.N.Y. 2005) (in considering whether employee has objectively reasonable expectation of privacy in emails sent to the employee's attorney over the employer's computer systems, court should consider (1) does the corporation maintain a policy banning personal or other objectionable use, (2) does the company monitor the use of the employee's computer or email, (3) do third parties have a right of access to the computer or emails, and (4) did the corporation notify the employee, or was the employee aware, of the use and monitoring policies).

Therefore, whether Attorney A may read the email messages recovered by Employer will depend upon an analysis of the case law and the factors set forth therein to determine whether Employee had a reasonable expectation of privacy or, lacking that, waived the privilege when communicating with his lawyer using Employer's email system. If Attorney A is able to conclude, confidently and in good faith, that the privilege was waived, he may read the emails and use them to represent his client. However, in deference to the bar's interest in protecting the attorney-client privilege, Attorney A should err on the side of recognizing the privilege whenever an analysis of the facts and case law is inconclusive. If a matter is in litigation, Attorney A may seek the court's determination of the waiver issue.

#### **Inquiry #4:**

Does Attorney A have to notify Employee's lawyer that Employer has copies of the email messages?

#### **Opinion #4:**

No. Rule 4.4(b) is not applicable in this situation. The rule states that "[a] lawyer who receives a writing relating to the representation of the lawyer's client and knows or reasonably should know that the writing was inadvertently sent shall promptly notify the sender." Employee and his lawyer sent the email messages knowingly using Employer's email system. Therefore, the email was not "inadvertently sent" and no duty to notify arises under this rule. *See* ABA Formal Opinion 11-460 (2011).

2009 FEO 1 (2010) can be distinguished. The opinion rules that a lawyer must notify the sender upon finding confidential information embedded in metadata transmitted in an electronic communication. The transmission of metadata, which is not disclosed on the face of an electronic document, is held to be inadvertent on the part of the sending lawyer, thus triggering a duty to notify for the receiving lawyer under Rule 4.4(b). However, in the instant situation, the substance of the communications between the employee and his lawyer are disclosed on the face of the emails and use of the employer's system was intentional. Therefore, the emails were not "inadvertently sent."

In the absence of a duty to notify, the fact that Employer has copies of the email messages is confidential client information that Attorney A may not disclose unless one of the exceptions to the duty of confidentiality applies or the client gives informed consent to disclosure. Rule 1.6(a). In the current situation, Rule 1.6(b)(1) only allows the lawyer to disclose confidential client information to comply with the law, a court order, or the discovery requirements under the Rules of Civil Procedure.

The ABA Standing Committee on Ethics and Professional Responsibility (the Standing Committee) addressed a similar inquiry in ABA Formal Opinion 11-460 (2011), and found that notification is only allowed with client consent in the absence of a law authorizing disclosure. As observed by the Standing Committee,

[I]f no law can reasonably be read as establishing a reporting obligation, then the decision whether to give notice must be

made by the employer-client. Even when there is no clear notification obligation, it often will be in the employer-client's best interest to give notice and obtain a judicial ruling as to the admissibility of the employee's attorney-client communications before attempting to use them and, if possible, before the employer's lawyer reviews them. This course minimizes the risk of disqualification or other sanction if the court ultimately concludes that the opposing party's communications with counsel are privileged and inadmissible. The employer's lawyer must explain these and other implications of disclosure, and the available alternatives, as necessary to enable the employer to make an informed decision.

#### **Inquiry #5:**

Employee has a personal email account with a commercial email service (such as Gmail, Hotmail, or Road Runner) that is not a part of Employer's business email system. However, the personal email account can be accessed via Employee's office computer. The personal email account is password protected. Employer can access the email messages on this personal email account by changing the password to the account.

May Attorney A advise Employer to change the password to access Employee's email messages on his personal email account?

#### **Opinion #5:**

No. To advise a client to change the password to a personal email account violates Rule 1.2(d), which prohibits a lawyer from counseling a client to engage in criminal or fraudulent conduct, and Rule 8.4(c), which prohibits a lawyer from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation. Again, obtaining a judicial ruling allowing Employer to access the email messages would authorize the Employer to proceed and avoid any professional misconduct by Attorney A.

#### **Inquiry #6:**

On its own initiative, Employer changes the password on Employee's personal email account and gains access to emails on the account including email messages between Employee and his lawyer.

May Attorney A review the email messages? Should Attorney A notify Employee's lawyer that Employer has

copies of the email messages?

#### **Opinion #6:**

No. Attorney A may not review the email messages unless allowed to do so by court order. To hold otherwise would be to permit a lawyer to assist a client in fraudulent conduct in violation of Rule 1.2(d) and Rule 8.4(c).

Attorney A may not notify Employee's lawyer that Employer has copies of the email messages unless he has the informed consent of Employer or if Attorney A believes that notification is reasonably necessary to comply with law or a court order. Rule 1.6(a) and (b)(1). As noted above, it may be in Employer's best interest to obtain a judicial ruling on the admissibility of the email messages and this should be explained to Employer to obtain consent to disclose.

#### **Inquiry #7:**

Lawyers who are employed by government agencies that are subject to public records laws frequently are required to review emails of government employees to ascertain whether the emails are public records and must be produced pursuant to a public records request. Because all emails are subject to review to comply with the public records law, emails between a government employee and his lawyer would be subject to the same review. May a government lawyer participate in such a review?

#### **Opinion #7:**

Yes. The review is required by law and it is in the best interests of the government and the public that the review be performed by lawyers. However, if emails between a government employee and his lawyer are evaluated and held not to be public records, the government lawyer must further determine whether the attorney-client privilege for the communications was waived by the employee by the use of the government's email system. See Opinion #2 above. If the lawyer determines that the privilege was not waived or the lawyer cannot confidently and in good faith make that determination, the lawyer should recognize the privilege and take steps to protect the communications from further disclosure or distribution unless authorized by court order.

#### **Endnotes**

1. The Ethics Committee is grateful to the North

## *Rules, Procedure, Comments*

All opinions of the Ethics Committee are predicated upon the Rules of Professional Conduct as revised effective March 1, 2003, and thereafter amended, and referred to herein as the Rules of Professional Conduct (2003). The proposed opinions are issued pursuant to the "Procedures for Ruling on Questions of Legal Ethics." 27 N.C.A.C. ID, Sect. .0100. Any interested person or group may submit a written comment or request to be heard concerning a proposed opinion. Any comment or request should be directed to the Ethics Committee at PO Box 25908, Raleigh, NC 27611, by September 30, 2012.

## *Captions and Headnotes*

A caption and a short description of each of the proposed opinions precedes the statement of the inquiry. The captions and descriptions are provided as research aids and are not official statements of the Ethics Committee or the council.

Carolina Bar Association Labor and Employment Law Section Council for the following list of relevant cases: *Convertino v. US DOJ*, 674 F. Supp. 2d 97 (D.D.C. 2009); *Curto v. Medical World Comms. Inc.*, 2006 US Dist. LEXIS 29387 (EDNY 2006); *Curto v. Medical World Comms. Inc.*, 2006 US Dist. LEXIS 29387 (EDNY 2006); *Garrity v. John Hancock Mut. Life Ins. Co.*, No. 00-12143-RWZ, 2002 US Dist. LEXIS 8343 (D. Mass. May 7, 2002); *Haynes v. Office of the Attorney General*, 298 F.Supp.2d 1154 (D. Kan. 2003); *Holmes v. Petrovich Dev. Co., LLC*, 191 Cal. App.4th 1047, 119 Cal.Rptr.3d 878 (2011); *Kaufman v. Sungard Inv. Sys.*, No. 05-CV-1236, 2006 US Dist. LEXIS 28149 (DNJ 2006) (unpub.); *Leor Exploration & Prod'n LLC v. Aguilar*, No. 09-60136-CIV, 2009 US Dist. LEXIS 87323 (SD Fla. Sept. 23, 2009); *Leventhal v. Knappek*, 266 F.3d 64 (2d Cir. 2001); *Muick v. Glenayre Elecs.*, 280 F.3d 741 (7th Cir. 2002); *Restuccia v. Burk Tech.*, 5 Mass.L.Rep. 712, 1996 Mass. Super. LEXIS 367 (Mass. Super. Ct. 1996); *Scott v. Beth Israel Medical Center, Inc.*, 17 Misc.3d 934, 847 N.Y.S.2d 436 (NY Sup. Ct. 2007); *Sims v. Lakeside School*, No. CO6-

1412RSM, 2007 US Dist. LEXIS 69568 (Sept. 20, 2007); *Hygeson v. US Bancorp Equip. Fin'g. Inc.*, No. CV-03-467-ST, 2004 US Dist. LEXIS 18863 (D.Or. Sept. 15, 2004); *United States v. Simons*, 205 F.3d 392 (4th Cir. 2000).

2. *Mason v. ILS Techs., LLC*, No. 3:04-CV-139, 2008 US Dist. LEXIS 28905 (W.D.N.C. 2008) (attorney-client privilege was not waived where the employee testified that he did not know of the employer's policy on monitoring of personal emails transmitted on the employer's email system and employer failed to prove otherwise).

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## Proposed 2012 Formal Ethics Opinion 6 Use of Leased Time-Shared Office Address or Post Office Address on Letterhead and Advertising July 19, 2012

*Proposed opinion rules that a law firm may use a leased time-shared office address or a post office address to satisfy the address disclosure requirement for advertising communications in Rule 7.2(c) so long as certain requirements are met.*

### Inquiry #1:

ABC Company offers to lease office space to law firms. The office lease is a time-sharing arrangement in which lawyers use meeting rooms by appointment. Depending upon the lease, ABC Company may also provide mail forwarding and personalized call answering. ABC Company advertises that it provides businesses with "prestigious addresses" that can be utilized on business cards and stationary.

May a law firm enter into a lease with ABC Company and use the leased office address as the law firm's address on letterhead and advertising?

### Opinion #1:

Yes, subject to certain requirements.

Rule 7.2(c) provides that a lawyer's advertisements must include the name and office address of at least one lawyer or law firm responsible for its content. Rule 7.1(a) provides that a lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. "It is a misleading communication for a law firm to infer that it has an office or a lawyer located in a community when, in fact, there is no law office or lawyer for the firm present in the community." RPC 217. In RPC 217, the Ethics Committee concluded that listing what appears to be a local telephone number in an advertisement in a particular community,

without including an explanation that the number is not a local telephone number and that there is no law office in that community, is misleading as to the actual location of the law firm.

Similarly, it would be misleading for a law firm to use a leased time-shared office address on letterhead or in advertising to infer that the law firm has an office or a lawyer located in a community when the law firm's only connection with the community is the lease arrangement that allows a lawyer to use meeting rooms in that community on an "as needed" basis.

However, the use of a leased time-shared office address in communications may not be misleading depending upon the law firm's connection to the community or the disclosures included in the communication. Whether such a communication is misleading must be determined on a case-by-case basis.

A lawyer who does not wish to meet clients at his home, or to list his home address on letterhead and advertisements, does not mislead the public by using a time-shared leased office address on letterhead and advertisements when the lawyer actually lives in the community associated with the leased address and uses the leased office to meet with clients on a regular basis.

In addition, it is not misleading for a law firm to list a time-shared leased office address on letterhead or in advertising so long as the communication contains an explanation that accurately reflects the law firm's presence at the address (i.e., "by appointment only").

### Inquiry #2:

Lawyer operates a "virtual law firm" from an office located in her home. She communicates with her clients online and by the telephone. She does not meet with clients in person except on rare occasions at locations outside of her home. Rule 7.2(c) of the Rules of Professional Conduct requires a lawyer to include "the name and office address of at least one lawyer or law firm" on every advertisement. Lawyer would like to advertise her virtual law firm, but she does not want to include her home address in the advertisements because she is concerned about her safety and privacy. She is considering using a leased office address in her community, as described in Inquiry #1, to circumvent this problem, but would prefer not to incur this expense.

May Lawyer list her post office address,

which is the address listed for her on the membership records of the North Carolina State Bar, on advertising to comply with Rule 7.2(c)?

### Opinion #2:

Previously, the Ethics Committee interpreted the "office address" requirement in Rule 7.2(c) to mean a street address. However, requiring a street address in all legal advertising has proved problematic, particularly as the number of lawyers working from home offices or operating virtual law practices has increased. The requirement is no longer practical or necessary to avoid misleading the public or to insure that a lawyer responsible for the advertisement can be located by the State Bar. Moreover, the membership department of the North Carolina State Bar accepts post office addresses as a lawyer's address.

Therefore, a post office address qualifies as an "office address" for purposes of Rule 7.2(c) provided the post office address is on file as the lawyer's current mailing address in the lawyer's membership record with the North Carolina State Bar.

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## Proposed 2012 Formal Ethics Opinion 7 Copying Represented Persons on Email Communications July 19, 2012

*Proposed opinion rules that Rule 4.2 requires a lawyer to have the express consent of a represented person's lawyer prior to sending the represented person a copy of an email communication.*

### Inquiry #1:

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

### Opinion #1:

No, unless Lawyer B has consented to the communication. Rule 4.2(a), often called the "no contact rule," provides that, during the representation of a client, "a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order." Copying the opposing party on a

communication—whether email or conventional mail—with opposing counsel is a communication under Rule 4.2(a) and prohibited unless there is consent.

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

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

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

No. Rule 4.2 requires the express consent of opposing counsel.

This issue was recently addressed by the Association of the Bar of the City of New York Committee on Professional and Judicial Ethics (“New York Committee”) and the California Standing Committee on Professional Responsibility & Conduct (“California Committee”).

Both the New York Committee and the California Committee concluded that consent to “reply to all” communications may sometimes be inferred from the facts and circumstances presented. Ass’n of the Bar of the City of N.Y. Comm. on Prof’l and Judicial Ethics, Formal Op. 2009-1; Ca. Standing Comm. on Prof’l Responsibility & Conduct, Formal Op. 2011-181.

Although concluding that consent under Rule 4.2 may be implied, both opinions caution lawyers against relying on implied consent. The New York Committee’s opinion states that a lawyer who relies on implied consent “runs the risk that the represented person’s lawyer has not consented to the direct communication” and that “[t]o avoid any possibility of running afoul of the no-contact rule, the prudent course is to secure express consent.” The California opinion states that the consent requirement of Rule 4.2 should not be taken lightly and that it is not appropriate for lawyers to “stretch improperly to find implied consent.” The California Committee further states that “even where consent may be implied, it is good practice to expressly confirm the existence of the other attorney’s consent, and to do so in writing.”

The Ethics Committee accepts the cautionary words offered by the New York and California Committees. Because of the risks associated with inferring implied consent, we

conclude that 4.2 requires the express consent of opposing counsel.

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### **Proposed 2012 Formal Ethics Opinion 8 Lawyer’s Acceptance of Recommendations on Professional Networking Website July 19, 2012**

*Proposed opinion rules that a lawyer may ask a former client for a recommendation to be posted on the lawyer’s profile on a professional networking website and may accept a recommendation if certain conditions are met.*

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

Lawyer has a profile listing on a professional social networking website, such as LinkedIn. The networking website has a feature that allows members to write recommendations for each other. A member of the networking website may request a recommendation from another member, or a member may send a recommendation to another member without being asked. In either event, the member receiving the recommendation has the opportunity to review the recommendation and decide whether to “accept” the recommendation. For a recommendation to be published on the member’s online profile, it has to “accepted.”

May a lawyer with a professional profile on the networking website accept a recommendation from a current or former client?

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

Yes. When a lawyer has control over the content of postings on his or her profile on the networking website, the lawyer may accept a recommendation from a current or former client subject to certain conditions. The lawyer may only “accept” recommendations that comply with the Rules of Professional Conduct that pertain to advertising. Rule 7.1 provides that a lawyer shall not make a false or misleading communication about the lawyer or the lawyer’s services. A communication that is likely to create an unjustified expectation about results the lawyer can achieve is misleading. Rule 7.1(a)(2).

A recommendation posted on the networking website is essentially a client testimonial. Depending upon content, a client testimonial has the potential to create unjustified expectations. The Ethics Committee recently established guidelines under which a lawyer may use certain client testimonials in

advertising. *See* 2012 FEO 1. A lawyer may only accept a recommendation from a current or former client if the recommendation complies with 2012 FEO 1.

Pursuant to 2012 FEO 1, a lawyer may accept a client recommendation that is limited to a discussion of the characteristics of a lawyer’s client service. If the recommendation includes general references to the results the lawyer obtained for the client, the lawyer may accept the recommendation if it can be accompanied by an appropriate disclaimer. The lawyer may not accept a recommendation that refers to a settlement or verdict of a specific dollar amount. In addition, the lawyer must review the recommendation for any confidential information that the lawyer believes should not be published online. Therefore, it may be necessary for the lawyer to ask the client to add disclaiming language or to delete certain content.

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

May a lawyer with a professional profile on the networking website send a recommendation request to a current or former client?

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

Yes, subject to certain conditions. A lawyer may ask a current or former client for a recommendation that consists of comments indicating the client’s level of satisfaction with certain aspects of the lawyer-client relationship. *See* 2007 FEO 4.

The lawyer’s duty of confidentiality to the client requires that the lawyer advise the client, at the time of the request, that the recommendation may be published on the member’s online profile, and the lawyer must obtain the client’s consent to publication.

The lawyer’s duties as to a recommendation received pursuant to the request are set out in Opinion #1 above. ■

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## **Disciplinary Actions (cont.)**

### **In the Matter of Edwin A. Peters**

Notice is hereby given that Edwin A. Peters of Corning, New York, intends to file a petition for reinstatement before the Disciplinary Hearing Commission of the North Carolina State Bar. Peters surrendered his law license and was disbarred April 20, 2007, for misappropriating client funds for his personal benefit. ■

# Amendments Pending Approval of the Supreme Court

At its meetings on April 27, 2012, and July 20, 2012, the council of the North Carolina State Bar voted to adopt the following rule amendments for transmission to the North Carolina Supreme Court for approval (for the complete text see the Spring 2012 and Summer 2012 editions of the *Journal* or visit the State Bar website):

## Proposed Amendments to the Procedures for Election of State Bar Councilors

27 N.C.A.C. 1A, Section .0800, Election and Appointment of State Bar Councilors

The proposed amendments permit judicial district bars to adopt procedures for online voting for State Bar councilors as long as the procedures provide for appropriate notice, ensure secure voting, and offer access to ballots to all active members in the judicial district.

## Proposed Amendments to the Discipline and Disability Rules

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

The proposed amendments make the Grievance Committee's procedure for referring cases to the Trust Account Supervisory Program consistent with the procedures for referrals to approved law office management programs and the Lawyer Assistance Program.

## Proposed Amendments to the Procedures for Fee Dispute Resolution

27 N.C.A.C. 1D, Section .0700, Procedures for Fee Dispute Resolution

The proposed amendments clarify that the Fee Dispute Resolution Program does not have jurisdiction over fees or expenses established by private arbitrators.

## Proposed Amendments to the Administrative and CLE Suspension Rules

27 N.C.A.C. 1D, Section .0900, Procedures for Administrative Committee, and Section .1500, Rules Governing the Administration of the Continuing Legal Education Program

The proposed amendments will facilitate the service of notices to show cause (NSC) for failure to fulfill a membership or CLE requirement by allowing for service of a NSC by designated delivery service and for acknowledgment of service of a NSC by email. They also allow for a suspension order for the same conduct to be served by mailing the order to the last address on file with the State Bar if, after due diligence, the member cannot be served by registered/certified mail, designated delivery service, or personal service. The proposed amendments clarify that a written response to a NSC must "show cause" for not suspending the member, rather than merely provide an explanation for the failure to fulfill an obligation of membership.

## Proposed Amendments to the IOLTA Rules

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

The accounts of lay "settlement agents" are required by law to be IOLTA accounts. The proposed rule amendments clarify that a settlement agent account may be established at a bank outside of North Carolina provided the account is not maintained by a North Carolina lawyer, the bank is FDIC insured, and the bank has a certificate of authority to transact business from the North Carolina Secretary of State.

## Proposed Amendments to the CLE Rules

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

The proposed amendments provide CLE credit to lawyers who teach classes at accredited law and paralegal schools and who teach classes or courses on topics of substantive law at accredited graduate schools.

## Proposed Amendments to the Legal Specialization Rules

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

## *The Process*

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

## *Comments*

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

The proposed amendments specify that the substantial involvement and CLE requirements for certification apply to the calendar years prior to application, and clarify the standard for peer review.

## Proposed Amendments to the Rules for Paralegal Certification

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

The proposed new rule creates an inactive status for certified paralegals who are suffering financial hardship, illness or disability, on active military duty, or following a military spouse to another state or country. To be reinstated to active status after two years or more of inactivity, an inactive certified paralegal must take 12 hours of CPE. After five years of inactive status, certification lapses and, to be

certified again, the paralegal must apply and pass the certification exam.

## Proposed Amendments to the Rules of Professional Conduct

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

Conduct, Rule 1.15, Safekeeping Property

Rule 1.15-2 requires a lawyer maintaining a trust or fiduciary account to file a written directive that requires the depository bank or other financial institution to report to the State Bar when an instrument

drawn on the account is presented for payment against insufficient funds. The proposed amendments clarify that the bank directive requirement is limited to trust and fiduciary accounts with demand deposit.

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# Proposed Amendments

At its meeting on July 20, 2012, the Council voted to publish the following proposed rule amendments for comment from the members of the bar:

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## Proposed Amendments to the Lawyer Assistance Program Rules

27 N.C.A.C. 1D, Section .0600, Rules Governing the Lawyer Assistance Program

The proposed amendments eliminate consensual suspension by court order in favor of consensual transfer to inactive status by court order. This process provides a lawyer with a mental health or substance abuse problem an opportunity to voluntarily take a respite from practice. The lawyer may only return to active status pursuant to a court order.

### .0617 Consensual Suspension Inactive Status

Notwithstanding the provisions of Rule .0616 of this subchapter, the court may enter an order ~~suspending a lawyer's license~~ **transferring the lawyer to inactive status** if the lawyer consents ~~to such suspension~~. The order may contain such other terms and provisions as the parties agree to and which are necessary for the protection of the public. **A lawyer transferred to inactive status pursuant to this rule may not petition for reinstatement pursuant to Rule .0902 of this subchapter. The lawyer may apply to the court at any time for an order reinstating the lawyer to active status.**

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## Proposed Amendments to the Procedures for Reinstatement from Inactive or Suspended Administrative Status

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

The rules on reinstatement from inactive status and from suspension require a lawyer who has been inactive or suspended for seven years or more to pass the bar examination to

be reinstated. However, the rule allows the seven years to be offset if the lawyer was licensed and practiced in another state during the period of inactivity or suspension, or if the lawyer was on active military duty during this time. Nevertheless, the lawyer must satisfy the CLE requirements for reinstatement (12 CLE credit hours for every year of inactivity or suspension), which become substantial in the case of a lawyer who has been inactive or suspended for seven or more years. Capping the CLE requirement for reinstatement of lawyers who have been inactive or suspended for seven or more years and who have been practicing in another state or serving in the military will preserve the purpose of the requirement (to assure minimal competence upon reinstatement) and moderate an unnecessarily burdensome obligation. The proposed rule amendments also clarify that CLE taken in another state may be used to offset the CLE requirement for reinstatement even if the CLE was taken more than two years prior to the petition.

### **.0902 Reinstatement from Inactive Status**

(a) Eligibility to Apply for Reinstatement

....

(c) Requirements for Reinstatement

(1) Completion of Petition.

....

(5) CLE Requirements If Inactive Less Than 7 Years.

[Effective for all members who are transferred to inactive status on or after March 10, 2011.] If more than 1 but less than 7 years have elapsed between the date of the entry of the order transferring the member to inactive status and the date that the petition is filed, the member must complete 12 hours of approved CLE for each year that the member was inactive. The CLE hours must be completed within 2 years prior to filing the petition. For each 12-hour increment, 4 hours may be taken

online; 2 hours must be earned by attending courses in the areas of professional responsibility and/or professionalism; and 5 hours must be earned by attending courses determined to be practical skills courses by the Board of Continuing Legal Education or its designee. If during the period of inactivity the member complied with mandatory CLE requirements of another state where the member is licensed, those CLE credit hours may be applied to the requirements under this provision **without regard to whether they were taken during the 2 years prior to filing the petition.**

(6) Bar Exam Requirement If Inactive 7 or More Years.

[Effective for all members who are transferred to inactive status on or after March 10, 2011.] If 7 years or more have elapsed between the date of the entry of the order transferring the member to inactive status and the date that the petition is filed, the member must obtain a passing grade on a regularly scheduled North Carolina bar examination.

(A) Active Licensure in Another State. Each year of active licensure in another state during the period of inactive status shall offset one year of inactive status for the purpose of calculating the 7 years necessary to actuate this provision. If the member is not required to pass the bar examination as a consequence of offsetting, the member shall satisfy the CLE requirements set forth in paragraph (c)(5) for each year that the member was inactive **up to a maximum of 7 years.**

(B) Military Service. Each calendar year in which an inactive member served on full-time, active military duty, whether for the entire calendar year or some portion thereof, shall offset one year of inactive status for the purpose of calculating the 7 years necessary to actuate the

requirement of this paragraph. If the member is not required to pass the bar examination as a consequence of offsetting, the member shall satisfy the CLE requirements set forth in paragraph (c)(5) **for each year that the member was inactive up to a maximum of 7 years.**

(7) Payment of Fees, Assessments, and Costs.

#### .0904 Reinstatement from Suspension

(a) Compliance Within 30 Days of Service of Suspension Order.

....

(d) Requirements for Reinstatement

(1) Completion of Petition

....

(3) CLE Requirement If Suspended Less Than 7 Years

If more than 1 but less than 7 years have elapsed between the effective date of the suspension order and the date upon which the reinstatement petition is filed, the member must complete 12 hours of approved CLE for each year that the member was suspended. The CLE must be completed within 2 years prior to filing the petition. For each 12-hour increment, 4 hours may be taken online; 2 hours must be earned by attending courses in the areas of professional responsibility and/or professionalism; and 5 hours must be earned by attending courses determined to be practical skills courses by the Board of Continuing Legal Education or its designee. If during the period of suspension the member complied with mandatory CLE requirements of another state where the member is licensed, those CLE credit hours may be applied to the requirements under this provision **without regard to whether they were taken during the 2 years prior to filing the petition.**

(4) Bar Exam Requirement If Suspended 7 or More Years

If 7 years or more have elapsed between the effective date of the suspension order and the date that the petition is filed, the member must obtain a passing grade on a regularly scheduled North Carolina bar examination.

(A) Active Licensure in Another State. Each year of active licensure in another state during the period of suspension shall offset one year of suspension for the purpose of calculating the 7 years necessary to actuate this provision. If the

member is not required to pass the bar examination as a consequence of offsetting, the member shall satisfy the CLE requirements set forth in paragraph (d)(3) for each year that the member was suspended **up to a maximum of 7 years.**

(B) Military Service. Each calendar year in which a suspended member served on full-time, active military duty, whether for the entire calendar year or some portion thereof, shall offset one year of suspension for the purpose of calculating the 7 years necessary to actuate the requirement of this paragraph. If the member is not required to pass the bar examination as a consequence of offsetting, the member shall satisfy the CLE requirements set forth in paragraph (d)(3) **for each year that the member was suspended up to a maximum of 7 years.**

(5) Character and Fitness to Practice

....

#### Proposed Amendments to The Plan for Legal Specialization

27 N.C.A.C. 1D, Section .3100, Certification Standards for the Trademark Law Specialty

This proposed new section of the Plan for Legal Specialization will create a new specialty in trademark law. Representation of clients with respect to trademark matters requires knowledge of the laws, procedures, and forums unique to trademark practice. By identifying lawyers with knowledge and experience in this area of practice, clients will be better able to obtain qualified counsel. The proposed standards for certification are comparable to the standards for the other areas of specialty certification.

NOTE: The entire section is new. Therefore, bold, underlined print is not used to indicate proposed additions.

#### .3101 Establishment of Specialty Field

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

#### .3102 Definition of Specialty

The specialty of trademark law is the practice of law devoted to commercial symbols, and typically includes the following: advising clients regarding creating and selecting trade-

marks; conducting and/or analyzing trademark searches; prosecuting trademark applications; enforcing and protecting trademark rights; and counseling clients on matters involving trademarks. Practitioners regularly practice before the United States Patent and Trademark Office (USPTO), the Trademark Trial and Appeal Board (TTAB), the Trademark Division of the NC Secretary of State's Office, and the North Carolina and/or federal courts.

#### .3103 Recognition as a Specialist in Trademark Law

If a lawyer qualifies as a specialist in trademark law by meeting the standards set for the specialty, the lawyer shall be entitled to represent that he or she is a "Board Certified Specialist in Trademark Law."

#### .3104 Applicability of Provisions of the North Carolina Plan of Legal Specialization

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

#### .3105 Standards for Certification as a Specialist in Trademark Law

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

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

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

(1) Substantial involvement shall mean that during the five years immediately preceding the application, the applicant devoted an average of at least 500 hours a year to the practice of trademark law, but not less than 400 hours in any one year.

(2) Practice shall mean substantive legal work in trademark law done primarily for the purpose of legal advice or representa-

tion or a practice equivalent.

(3) "Practice equivalent" shall mean:

(A) Service as a law professor concentrating in the teaching of trademark law which may be substituted for up to two years of experience to meet the five-year requirement set forth in Rule .3105(b)(1).

(B) Service as a trademark examiner at the USPTO or a functionally equivalent trademark office for any state or foreign government which may be substituted for up to two years of experience to meet the five-year requirement set forth in Rule .3105(b)(1).

(C) Service as an administrative law judge for the TTAB which may be substituted for up to three years of experience to meet the five-year requirement set forth in Rule .3105(b)(1).

(4) The board may, in its discretion, require an applicant to provide additional information as evidence of substantial involvement in trademark law, including information regarding the applicant's participation, during his or her legal career, in the following: portfolio management, prosecution of trademark applications, search and clearance of trademarks, licensing, due diligence, domain name selection and dispute resolution, TTAB litigation, state court trademark litigation, federal court trademark litigation, trademark dispute resolution, and international trademark law.

(c) Continuing Legal Education - To be certified as a specialist in trademark law, an applicant must have earned no less than 36 hours of accredited continuing legal education credits in trademark law during the three years preceding application. The 36 hours must include at least 20 hours in trademark law and the remaining 16 hours in related courses including: business transactions, copyright, franchise law, internet law, sports and entertainment law, trade secrets, and unfair competition.

(d) Peer Review - An applicant must make a satisfactory showing of qualification through peer review. An applicant must provide the names of ten lawyers or judges who are familiar with the competence and qualification of the applicant in the specialty field. Written peer reference forms will be sent by the board or the specialty committee to each of the references. Completed peer reference forms must be received from at least five of the references.

All references must be licensed and in good standing to practice law and must have significant legal or judicial experience in trademark law. An applicant consents to confidential inquiry by the board or the specialty committee to the submitted references and other persons concerning the applicant's competence and qualification.

(1) A reference may not be related by blood or marriage to the applicant nor may the reference be a colleague at the applicant's place of employment at the time of the application.

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

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

(1) Terms - The examination shall be given annually in written form and shall be administered and graded uniformly by the specialty committee.

(2) Subject Matter - The examination shall cover the applicant's knowledge and application of trademark law and rules of practice, and may include the following statutes and related case law:

(A) The Lanham Act (15 USC §1501 et seq.)

(B) Trademark Regulations (37 CFR Part 2)

(C) Trademark Manual of Examining Procedure (TMEP)

(D) Trademark Trial and Appeal Board Manual of Procedure (TBMP)

(E) The Trademark Counterfeiting Act of 1984 (18 USC §2320 et seq.)

(F) North Carolina Trademark Act (N.C. Gen. Stat. Chap. 80).

### **.3106 Standards for Continued Certification as a Specialist**

The period of certification is five years. Prior to the expiration of the certification period, a certified specialist who desires continued certification must apply for continued certification within the time limit described in Rule .3106(d). No examination will be required for continued certification. However, each applicant for continued certification as a specialist shall comply with the specific requirements set

forth below in addition to any general standards required by the board of all applicants for continued certification.

(a) Substantial Involvement - The specialist must demonstrate that, for each of the five years preceding application for continuing certification, he or she has had substantial involvement in the specialty as defined in Rule .3105(b) of this subchapter.

(b) Continuing Legal Education - The specialist must earn no less than 60 hours of accredited CLE credits in trademark law and related fields during the five years preceding application for continuing certification. No less than six of the credits may be earned in any one year. Of the 60 hours of CLE, at least 34 hours shall be in trademark law, and the balance of 26 hours may be in the related fields set forth in Rule .3105(c) of this subchapter.

(c) Peer Review - The specialist must comply with the requirements of Rule .3105(d) of this subchapter.

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

(e) Lapse of Certification - Failure of a specialist to apply for continued certification in a timely fashion will result in a lapse of certification. Following such a lapse, recertification will require compliance with all requirements of Rule .3105 of this subchapter, including the examination.

(f) Suspension or Revocation of Certification - If an applicant's certification has been suspended or revoked during the period of certification, the application shall be treated as if it were for initial certification under Rule .3105 of this subchapter.

### **.3107 Applicability of Other Requirements**

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

### **Proposed Amendments to the Rules for Certifying Paralegals**

27 NCAC 1G, Section .0100, The Plan for Certification of Paralegals

The proposed rule amendment will limit

CONTINUED ON PAGE 61



## John B. McMillan Distinguished Service Award

Rhoda B. Billings, former chief justice of the North Carolina Supreme Court, is a recipient of the John B. McMillan Distinguished Service Award. A native of Wilkesboro, Ms. Billings earned her undergraduate degree from Berea College, and was the only woman in the Class of 1966 at Wake Forest Law School.

She started her legal career practicing with her husband, Don, from 1966-68.

Billings was elected to serve as district court judge in 1968, and served in that capacity for five years. She joined the faculty of Wake Forest Law School in 1973, where she was a professor until 2003. While on leave from the faculty, Billings chaired the NC Parole Commission, was the second woman to serve on the NC Supreme Court, and also the second woman to serve as chief justice.

Throughout her legal career, Billings was a devoted educator and tireless advocate for equal access to our justice system. She is a life member of the Uniform Laws Commission, and most recently served the bar as the chair of the North Carolina judicial evaluation process. Billings is revered by her past students, her peers in the 21st Judicial District, and by all of the members of the North Carolina legal community. ■

## Seeking Distinguished Service Award Nominations

The John B. McMillan Distinguished Service Award program honors current and retired members of the North Carolina State Bar throughout the state who have demonstrated exemplary service to the legal profession. Such service may be evidenced by a commitment to the principles and goals stated in the Preamble to the Rules of Professional Conduct, for example: furthering the public's understanding of and confidence in the rule of law and the justice system; working to strengthen legal education; providing civic leadership to ensure equal access to our system of justice for all those

who, because of economic or social barriers, cannot afford or secure adequate legal counsel; seeking to improve the administration of justice and the quality of services rendered by the legal profession; promoting diversity and diverse participation within the legal profession; providing professional services at no fee or a reduced fee to persons of limited means or to public service or charitable groups or organizations; encouraging and counseling peers by providing advice and mentoring; and fostering civility among members of the bar.

Awards will be presented in recipients' dis-

tricts, usually at a meeting of the district bar. The State Bar Councilor from the recipient's district will participate in introducing the recipient and presenting the certificate. Recipients of the Distinguished Service Award will also be recognized in the State Bar *Journal* and honored at the State Bar's annual meeting in Raleigh. Members of the bar are encouraged to nominate colleagues who have demonstrated outstanding service to the profession. The nomination form is available on the State Bar's website, [www.ncbar.gov](http://www.ncbar.gov). Please direct questions to Peter Bolac at the State Bar office in Raleigh, (919) 828-4620. ■

## Gibson Nominated as Vice-President



Charlotte attorney Ronald L. Gibson was selected by the State Bar's Nominating Committee to stand for election to the office of vice-president of the North

Carolina State Bar. The election will take place in October at the State Bar's annual meeting.

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

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

Gibson currently is a partner with the law firm of Ruff, Bond, Cobb, Wade & Bethune, LLP.

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

## Law School Briefs

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

### Campbell University School of Law

***Juris Doctor/Master of Science in Public Health Dual Degree Program Announced***—Campbell Law School and Campbell University's College of Pharmacy & Health Sciences have announced the establishment of a new dual degree program. The four-year program, which will begin with the fall 2012 semester, allows students to pursue and obtain a Juris Doctor at Campbell Law, as well as a Master of Science in Public Health from the College of Pharmacy & Health Sciences. The JD/MSPH program provides students with a unique interdisciplinary perspective of law and public policy. Graduates will enter the workplace prepared to represent clients and health organizations or systems, and serve in leadership roles in health policy at the national, state, county, and local levels. Prospective students are required to gain admission to both programs in order to pursue the dual degree. Campbell Law offers five dual degree programs—three with Campbell University and two with NC State University—in an effort to provide students with maximum exposure and preparedness for a wide assortment of career opportunities in the fields that continue to shape the economy.

***Campbell Law Hosts US Patent & Trademark Office Discussion***—Campbell Law School hosted the White House Business Council, Business Forward, and Coats & Bennett, PLLC for a discussion on patents and the economy and America Invents Act (AIA) implementation with officials from the US Patent and Trademark Office (USPTO) on Thursday, June 21. Area business leaders, intellectual property (IP) attorneys, and other invited distinguished guests listened to Dr. Stuart Graham, chief economist, USPTO, who offered an in-depth discussion of the signif-

icant impact the patent system and economy have on one another, and highlighted the relationship between innovation through new patents and improvements in the economy. Dr. Graham was followed by Janet Gongola, AIA implementation coordinator, USPTO, who addressed details of the AIA, a major reform to the Patent Act signed by President Obama in 2011.

### Charlotte School of Law

CharlotteLaw's Moot Court has been successful. Lauren Nanning and Chris Campbell took top honors as well as the championship team title at the 36th annual New York Law School Robert F. Wagner Labor and Employment Law Moot Court Competition. Chris Campbell took top honors as the Best Final Round Oral Advocate, and the team received a 2nd Best Respondent Brief Award.

At the Elon National Constitutional Law Competition CharlotteLaw students received recognition as top oralists. Students also competed in the John J. Gobbons Criminal Procedure Moot Court Competition, winning 2nd Best Brief. At the ABA National Moot Court Competition, Charlotte students won 2nd Best Brief and 10th place oralist, advancing to the final round of the competition.

This spring, the Pro Bono Program unveiled its newest group pro bono project—the CSL-Legal Aid Expunction Project. The students learn more about the expunction legal process of removal of certain criminal arrest records, charges, or convictions. Students are trained by Legal Aid attorneys and staff on how to review criminal records to determine eligibility of a candidate to pursue an expungement petition.

Student Mallory Willink was presented by the ABA Law Student Division Chair with the Gold Key Award for her outstanding service to the national ABA organization. The Gold Key is the highest honor given to an individual leader. Malloy had served the ABA as a circuit governor representing her law school peers in West

Virginia, Virginia, North Carolina, and South Carolina. CharlotteLaw received the Bronze Key Award for overall membership improvement, and student Elizabeth Baker received the Silver Key Award for outstanding service at a circuit meeting.

On May 13, 180 graduates crossed the stage when CharlotteLaw conferred Juris Doctor degrees as part of its May recognition ceremony. The keynote speaker for the ceremony was mayor of Charlotte, Anthony Fox.

### Elon University School of Law

***New Washington, DC, Externship Program***—Elon Law and The Washington Center for Internships and Academic Seminars announced a partnership in March 2 to provide law students with legal externship opportunities in Washington, D.C. Elon Law students will serve in executive and legislative branches of the federal government through the program, and in nonprofit, non-governmental sectors. Elon Law's in-state externship program offers law students placement opportunities in dozens of state executive, legislative, and judicial branch offices, as well as in a number of nonprofit organizations in North Carolina.

***New Elder Law Clinic***—Beginning in the fall 2012 semester, the clinic will serve low-income residents of Guilford County, ages 60 and above, through free legal counsel and services provided by Elon Law students under the supervision of law faculty. It will focus on the civil legal issues of older adults, such as abuse and neglect, contract and consumer issues, guardianships, health care, housing, public benefits, unemployment compensation, and wills. Elon also provides students with practice-based experiences through the Humanitarian Immigration Law Clinic, serving refugees and asylum seekers, and the In-House Wills Drafting Clinic, serving clients referred by Habitat for Humanity.

***New Center for Professional Development***—Elon Law's Professional Development Center opened in August

2012 in a 5,700 square foot facility at 101 West Friendly Avenue in downtown Greensboro, across the street from the law school's H. Michael Weaver Building. The center provides a resource-rich business environment for students to explore career opportunities, to engage the office's employer relations program, and to build networking and professional development plans. The center will focus on strengthening Elon's employer relations program, equipping students with professional skills necessary for success in job search and career advancement processes, and connecting students to professional networking and placement opportunities. Contact: Chris Smith, Assistant Dean for Career Services, (336) 279-9238, csmith25@elon.edu.

### University of North Carolina School of Law

*Six New Faculty Members Join UNC*—The school welcomes Laura Britton, Suzanne Chester, Alexa Z. Chew, Amanda S. Hitchcock, Robert J. Smith, and Erica K. Wilson to its faculty ranks.

*Flatt Presents at UN Conference on Sustainable Development*—The Center for Law, Environment, Adaptation, and Resources (CLEAR) participated in the United Nations Conference on Sustainable Development in Rio, Brazil, this June. Thousands of participants, including world leaders, policy makers, non-governmental organizations, and other stakeholders, attended. CLEAR director and Thomas F.

and Elizabeth Taft Distinguished Professor in Environmental Law Victor B. Flatt spoke at a forum for the discussion and examination of critical issues surrounding the conference.

*School Receives Transformational Gift for Scholarships*—Greg Everett, a trustee of the Kathrine R. Everett Charitable Trust, delivered two checks totaling \$2.7 million to the law school on June 21. The first gift of \$2.4 million will create an endowment to fund at least six full-tuition Everett Chancellors' Scholarships for highly promising law students from North Carolina. A second gift of \$300,000 will establish the Everett Enrichment Fund, which will provide programmatic support of all recipients of Chancellors' Scholarships.

*Center for Civil Rights*—On May 7, the Fourth Circuit Court of Appeals issued an opinion in *Everett et al. v. Pitt County Board of Education*, affirming the efforts of African American parents and community members—represented by the UNC Center for Civil Rights—to stop Pitt County Schools, NC, from implementing its 2011-2012 student reassignment plan.

*CLE Programs*—Upcoming CLE programs include the Dan K. Moore Program in Ethics, October 26. Visit [law.unc.edu/cle](http://law.unc.edu/cle).

### Wake Forest University School of Law

*US Supreme Court Justice Ruth Bader Ginsburg Returns to Law School's Study Abroad Programs*—Justice Ginsburg visited

the law school's Venice program the week of July 9 and guest lectured in several classes. She gave a public lecture entitled, "A Decent Respect to the Opinion of [Human]kind: the Value of a Comparative Perspective in Constitutional Adjudication."

Following her visit to Venice, Justice Ginsburg then headed to the law school's Vienna Study Abroad Program, where she lectured in several classes and gave another public lecture on the same topic as the one she gave in Venice.

The associate justice has a long history with Wake Forest Law School.

In May, Ginsburg gave the keynote address at a luncheon celebrating the kick off of the law school's program in Washington, DC, which was held at the offices of Morgan, Lewis & Bockius, LLP.

In 2008, Suzanne Reynolds, executive associate dean for academic affairs, co-taught a comparative constitutional law class in Venice with Ginsburg, who served as a guest teacher as part of the law school's study abroad program. Her late husband, Georgetown University Professor of Law Martin Ginsburg, also taught in the 2008 Venice Summer Abroad Program with Professor Joel Newman.

In 2005, Ginsburg visited Wake Forest as part of the law school's "A Conversation With..." series, which brings speakers to campus to tell their stories. Reynolds interviewed Ginsburg about her life and career. ■

## TALIAS (cont.)

physically unreachable; and the possibilities for lawyers who are committed to providing access to justice to do so in a manner that is convenient, reliable, and relevant to the needs of the citizens of North Carolina.

As predicted, TALIAS is a model for the nation. ■

*Pamela Stanback Glean is the assistant dean for clinical programs at NCCU School of Law. The program is committed to producing excellent attorneys who are sensitive to addressing the needs of people and communities that are traditionally underserved and under represented by the legal profession. Through a diverse body of clinical*

*courses, it offers students an opportunity to pursue justice in a variety of legal disciplines, and teaches students to respect the legal process and the dignity of all clients regardless of their station in life. The program believes that sensitizing future lawyers to the importance of serving these under-represented clients advances fairness and equity in the justice system.*

### Endnotes

1. [justice.gov/atj/opa/pr/speeches/2010/atj-speech-100916.html](http://justice.gov/atj/opa/pr/speeches/2010/atj-speech-100916.html). Accessed June 3, 2012.
2. Jane Parker is a pseudonym used to insure the confidentiality of the real person who is the subject of this narrative.
3. [quickfacts.census.gov/qfd/states/37000.html](http://quickfacts.census.gov/qfd/states/37000.html). Last visited May 6, 2012.
4. *Id.*

5. [pulse.ncpolicywatch.org/2011/09/26/poverty-extends-its-reach-across-nc/](http://pulse.ncpolicywatch.org/2011/09/26/poverty-extends-its-reach-across-nc/). Last visited May 6, 2012.
6. [americanprogress.org/issues/2010/01/state\\_of\\_minorities.html](http://americanprogress.org/issues/2010/01/state_of_minorities.html). Last visited June 11, 2012.
7. *Id.*
8. *Id.* [Quickfacts.census.gov](http://Quickfacts.census.gov).
9. UNC Center for Poverty, Work, and Opportunity, *Documenting Poverty, Economic Distress, and Challenge in North Carolina, A Report for the Z. Smith Reynolds Foundation*, January 15, 2010.
10. [justice.gov/atj/opa/pr/speeches/2010/atj-speech-100916.html](http://justice.gov/atj/opa/pr/speeches/2010/atj-speech-100916.html).
11. FCC Commissioner Michael Copps, April 8, 2009, [fcc.gov](http://fcc.gov).
12. [ntia.doc.gov/about](http://ntia.doc.gov/about). Last visited May 6, 2012.
13. [law.talias.nccu.edu](http://law.talias.nccu.edu); select Videos. Last accessed June 3, 2012.
14. The connection between locations requires a high-speed or business class broadband connection.

# Client Security Fund Reimburses Victims

At its July 19, 2012, meeting, the North Carolina State Bar Client Security Fund Board of Trustees approved payments of \$292,606.55 to 15 applicants who suffered financial losses due to the misconduct of North Carolina lawyers.

The new payments authorized were:

1. An award of \$574.60 to a former client of Jennifer Green-Lee of Clayton. The board found that Green-Lee was retained to handle a client's real estate closing. From the closing proceeds, Green-Lee failed to pay the client's title insurance premium. Due to misappropriation, Green-Lee's trust account balance is insufficient to pay all of her clients' obligations. Green-Lee was disbarred on August 19, 2011. The board previously reimbursed six other Green-Lee clients \$217,648.83.

2. An award of \$70,000 to a former client of Michelle Shepherd of West Jefferson. The board found that Shepherd handled a real estate closing for her clients. Due to Shepherd's misappropriation of funds from her trust account, the closing proceeds were not avail-

able to pay the sellers. Shepherd replaced the sellers' proceeds with funds from her personal account. After Shepherd was involuntarily placed in bankruptcy, the trustee sued the sellers to recover the amount of their replacement check claiming that they received preferential payment within 90 days of the bankruptcy. The sellers countersued and included the buyers as third-party defendants. The trustee and the buyers recovered a total of \$55,000 from the sellers whose losses were caused by Shepherd's dishonest conduct. The board also approved reimbursement of the sellers' attorney fees in resisting the trustee's attempt to collect the entire debt since resisting the trustee's efforts benefited the Fund. Shepherd was disbarred on July 25, 2008. The board previously reimbursed 108 claims against Shepherd totaling \$698,138.71.

3. An award of \$10,000 to a former client of Robert Morgan Smith of Goldsboro. The board found that Smith was retained to represent a client on criminal charges. Smith failed to provide any valuable legal services for the fee

paid. Smith was disbarred on October 14, 2011. The board previously reimbursed one other Smith client \$400.

4. An award of \$3,000 to a former client of Smith. The board found that Smith was retained to represent the client on criminal charges. Smith failed to provide any valuable legal services for the fee paid.

5. An award of \$20,000 to a former client of Theophilus Stokes III of Greensboro. The board found that Stokes was retained to obtain a sentence reduction or other post-conviction relief for the client. Stokes neglected the matter and failed to provide any valuable legal services for the fee paid. Stokes was disbarred on January 12, 2011.

6. An award of \$5,500 to a former client of Nicholas Stratas Jr. of Raleigh. The board found that Stratas was retained to handle a client's personal injury matter. Stratas settled the client's matter and retained funds from the settlement until resolution of a Blue Cross/Blue Shield (BCBS) lien. Stratas abandoned his practice and never paid the funds to BCBS or the client. Stratas' trust account balance was insufficient to cover all of his clients' obligations due to misappropriation. The board previously reimbursed two other Stratas clients \$41,849.12.

7. An award of \$26,682.76 to a former client of Nicholas Stratas Jr. The board found that Stratas was retained to handle a client's personal injury matter. Stratas received med pay for the client that should have been held in his trust account until resolution of the liability claim. Stratas settled the client's liability claim without the client's authorization or consent, and failed to deposit the settlement funds into his trust account. Stratas abandoned his practice and failed to pay the funds to the client or anyone else on her behalf. Stratas' trust account balance was insufficient to cover all of his clients' obligations due to misappropriation. Counsel was directed to resolve a Medicare lien and pay the remainder to the client.

8. An award of \$12,295.71 to a former client of Nicholas Stratas Jr. The board found that Stratas was retained to handle a client's personal injury matter. Stratas settled the matter.

## In Memoriam

**Charles Crawford Caison**  
Durham

**Arthur Elliott Cockrell**  
Plymouth

**Johnnie L. Gallemore Jr.**  
Knoxville, TN

**Nancy C. Green**  
Charlotte

**Walter Lewis Hannah**  
Greensboro

**Sean Hugh O'Donnell**  
Wilmington

**Mark Anthony Pataky**  
Apex

**Richard Mack Pearman Jr.**  
Greensboro

**Ralph M. Potter**  
Fayetteville

**Archibald Henderson Scales III**  
Clemmons

**Ronald G. Seeber**  
Winston-Salem

**Jack Everett Senter**  
Fuquay Varina

**Robin Kelly Whitlock Smith**  
Cary

**Russell Charles Smith**  
Raeford

**Joseph N. Tenhet Jr.**  
Raleigh

**William Isler Wooten Jr.**  
Greenville

From the settlement proceeds, Stratas retained funds to satisfy a Medicare lien. Stratas also retained the funds from a med pay check. Stratas appropriated the funds to his own use and abandoned his practice. Stratas' trust account balance was insufficient to cover all of his clients' obligations due to misappropriation. Counsel was directed to resolve the Medicare lien and pay the remainder to the client.

9. An award of \$3,915.15 to a former client of Nicholas Stratas Jr. The board found that Stratas was retained to handle a client's personal injury matter. Stratas settled the matter and retained funds to satisfy a BCBS lien. Stratas abandoned his practice and failed to pay the medical provider or disburse the funds to the client. Stratas' trust account balance was insufficient to cover all of his clients' obligations due to misappropriation.

10. An award of \$36,973.04 to a former client of Nicholas Stratas Jr. The board found that Stratas was retained to handle a client's personal injury matter. Stratas settled the matter and retained funds to pay the client's child support obligation and any remaining medical provider liens. Due to misappropriation, Stratas' trust account balance is insufficient to pay all of his clients' obligations. Counsel was directed to resolve the client's child support lien

and pay the remainder to the client.

11. An award of \$65,396.50 to a former client of W. Darrell Whitley of Lexington. The board found that Whitley was retained to handle a client's personal injury matter. Whitley received a med pay check and settled the liability claim. Whitley retained funds from the settlement proceeds to satisfy a Medicare and other liens. Whitley never paid the medical liens and misrepresented to the client the settlement amount. Due to misappropriation, Whitley's trust account balance is insufficient to pay all of his clients' obligations. Whitley's client died and the attorney representing the personal representative agreed to satisfy any liens. Whitley died on December 6, 2011.

12. An award of \$6,500 to a former client of W. Darrell Whitley. The board found that Whitley was retained to handle a client's personal injury matter. Whitley settled the matter without the client's authorization or consent. Whitley forged the client's name on the release and misrepresented to the client the amount of the settlement. Due to misappropriation, Whitley's trust account balance is insufficient to pay all of his clients' obligations.

13. An award of \$20,000 to a former client of W. Darrell Whitley. The board found that Whitley was retained to handle a client's per-

sonal injury matter. Whitley settled the matter and retained funds to satisfy Medicare and Medicaid liens. Due to misappropriation, Whitley's trust account balance is insufficient to pay all of Whitley's clients' obligations. Counsel was directed to resolve any liens prior to disbursement to the client.

14. An award of \$11,500 to a former client of W. Darrell Whitley. The board found that Whitley was retained to handle a client's personal injury matter. Unbeknownst to the client, Whitley settled the matter and negotiated down the client's worker's comp lien. Whitley failed to disburse the funds to the client or pay the lien amount prior to his death. Due to misappropriation, Whitley's trust account balance is insufficient to pay all of his clients' obligations. Counsel was directed to attempt to resolve the worker's comp lien before paying the client the balance.

15. An award of \$268.79 to a former client of W. Darrell Whitley. The board found that Whitley was retained to handle a client's personal injury matter. Whitley settled the matter, but died prior to making some of the disbursements from the settlement proceeds. Due to misappropriation, Whitley's trust account balance is insufficient to pay all of his clients' obligations. ■

## Proposed Amendments (cont.)

to 30 days the time for appeal to the State Bar Council from an unfavorable decision on certification or continued certification of a hearing panel of the Board of Paralegal Certification.

### .0122 Right to Review and Appeal to Council

(a) An individual who is denied certification or continued certification as a paralegal or whose certification is suspended or revoked shall have the right to a review before the board pursuant to the procedures set forth below and, thereafter, the right to appeal the board's ruling thereon to the council under such rules and regulations as the council may prescribe.

(b) Notification of the Decision of the Board.

....

(d) Review by the Board.

A three-member panel of the board shall be appointed by the chair of the board to reconsider the board's decision and take action by a majority of the panel. ...

(1) Review on the Record.

....

(3) Decision of the Panel. The individual shall be notified in writing of the decision of the panel and, if unfavorable, the right to appeal the decision to the council under such rules and regulations as the council may prescribe. **To exercise this right, the individual must file an appeal to the council in writing within 30 days of the mailing of the notice of the decision of the panel.**

(e) Failure of Written Examination.

....

### Proposed Amendments to the Continuing Paralegal Education Rules

27 NCAC 1G, Section .0200, Rules Governing Continuing Paralegal Education

The rules do not currently allow a certified paralegal who is not a licensed lawyer to use

law school coursework to satisfy the annual continuing paralegal education (CPE) requirements. The proposed rule amendment will clarify that law school courses are always approved activities for the purpose of satisfying the CPE requirements.

#### .0202 Accreditation Standards

The Board of Paralegal Certification shall approve continuing education activities in compliance with the following standards and provisions.

(a) ...

**(i) A certified paralegal may receive credit for completion of a course offered by an ABA accredited law school with respect to which academic credit may be earned. No more than 6 CPE hours in any year may be earned by attending such courses. Credit shall be awarded as follows: 3.5 hours of CPE credit for every quarter hour of credit assigned to the course by the educational institution, or 5.0 hours of CPE credit for every semester hour of credit assigned to the course by the educational institution.** ■

# The North Carolina State Bar and Affiliated Entities

## Selected Financial Data

The North Carolina State Bar		2011	2010
<b>Assets</b>			
Cash and cash equivalents		\$7,536,631	\$6,549,628
Property and equipment, net		3,101,798	2,435,514
Other assets		<u>296,108</u>	<u>190,303</u>
		\$10,934,537	\$9,175,445
<b>Liabilities and Fund Equity</b>			
Current liabilities		\$4,721,125	\$4,118,464
Long-term debt		<u>157,227</u>	<u>188,927</u>
		4,878,352	4,307,391
Fund equity-retained earnings		<u>6,056,185</u>	<u>4,868,054</u>
		\$10,934,537	\$9,175,445
<b>Revenues and Expenses</b>			
Dues		\$7,192,845	\$7,019,115
Other operating revenues		<u>797,606</u>	<u>715,662</u>
Total operating revenues		7,990,451	7,734,777
Operating expenses		(6,812,250)	(6,269,203)
Non-operating revenues		<u>9,930</u>	<u>24,673</u>
Net income		\$1,188,131	\$1,490,247

The NC State Bar Plan for Interest on Lawyers' Trust Accounts (IOLTA)		2011	2010
<b>Assets</b>			
Cash and cash equivalents		\$2,613,654	\$3,196,878
Interest receivable		247,122	311,228
Other assets		<u>232,041</u>	<u>323,350</u>
		\$3,092,817	\$3,831,456
<b>Liabilities and Fund Equity</b>			
Grants approved but unpaid		\$2,353,755	\$2,700,300
Other liabilities		<u>261,180</u>	<u>325,493</u>
		2,614,935	3,025,793
Fund equity-retained earnings		<u>477,882</u>	<u>805,663</u>
		\$3,092,817	\$3,831,456
<b>Revenues and Expenses</b>			
Interest from IOLTA participants, net		\$2,299,475	\$2,203,003
Other operating revenues		-	-
Total operating revenues		2,299,475	2,203,003

Board of Client Security Fund		2011	2010
<b>Assets</b>			
Cash and cash equivalents		\$1,700,526	\$1,755,261
Other assets		<u>3,114</u>	<u>4,699</u>
		\$1,703,640	\$1,759,960
<b>Liabilities and Fund Equity</b>			
Current liabilities		\$14,151	\$14,691
Fund equity-retained earnings		<u>1,689,489</u>	<u>1,745,269</u>
		\$1,703,640	\$1,759,960
<b>Revenues and Expenses</b>			
Operating revenues		\$662,609	\$752,073
Operating expenses		(726,742)	(441,822)
Non-operating revenues		<u>8,353</u>	<u>18,465</u>
Net income		\$(55,780)	\$328,716

Board of Continuing Legal Education		2011	2010
<b>Assets</b>			
Cash and cash equivalents		\$181,533	\$249,915
Other assets		<u>216,329</u>	<u>239,950</u>
		\$397,862	\$489,865
<b>Liabilities and Fund Equity</b>			
Current liabilities		24,617	26,635
Fund equity-retained earnings		<u>373,245</u>	<u>463,230</u>
		\$397,862	\$489,865
<b>Revenues and Expenses</b>			
Operating revenues		\$640,320	\$665,757
Operating expenses		(731,271)	(697,353)
Non-operating revenues		<u>966</u>	<u>3,065</u>
Net loss		\$(89,985)	\$(28,531)

Board of Legal Specialization		2011	2010
<b>Assets</b>			
Cash and cash equivalents		\$167,522	\$140,386
Other assets		<u>3,832</u>	<u>7,091</u>
		\$171,354	\$147,477
<b>Liabilities and Fund Equity</b>			
Current liabilities		3,257	1,792

Fund equity-retained earnings		2011	2010
		<u>168,097</u>	<u>145,685</u>
		\$171,354	\$147,477

Revenues and Expenses		2011	2010
Operating revenues-specialization fees		\$124,752	\$116,450
Operating expenses		(102,925)	(99,215)
Non-operating revenues		<u>585</u>	<u>1,200</u>
Net income		\$22,412	\$18,435

The Chief Justice's Commission on Professionalism		2011	2010
<b>Assets</b>			
Cash and cash equivalents		\$259,193	\$146,332
Other assets		<u>1,627</u>	<u>88,174</u>
		\$260,820	\$234,506
<b>Liabilities and Fund Equity</b>			
Current liabilities		448	446
Fund equity-retained earnings		<u>260,372</u>	<u>234,060</u>
		\$260,820	\$234,506
<b>Revenues and Expenses</b>			
Operating revenues-fees		\$319,750	\$332,474
Operating expenses		(294,002)	(284,519)
Non-operating revenues		<u>564</u>	<u>1,244</u>
Net income		\$26,312	\$49,199

Board of Paralegal Certification		2011	2010
<b>Assets</b>			
Cash and cash equivalents		\$297,776	\$323,027
Other assets		<u>1,733</u>	<u>6,733</u>
		\$299,509	\$329,760
<b>Liabilities and Fund Equity</b>			
Current liabilities - accounts payable		10,200	8,850
Fund equity-retained earnings		<u>289,309</u>	<u>320,910</u>
		\$299,509	\$329,760
<b>Revenues and Expenses</b>			
Operating revenues-fees		\$260,760	\$260,785
Operating expenses		(193,632)	(154,514)
Non-operating revenues		<u>(98,729)</u>	<u>2,411</u>
Net income (loss)		\$(31,601)	\$108,682

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