THE NORTH CAROLINA STATE BAR

JOURNAL

WINTER
2012

IN THIS ISSUE

THE
NORTH CAROLINA
STATE BAR
JOURNAL

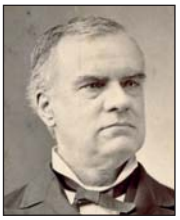
Winter 2012
Volume 17, Number 4

www.ncbar.gov

PRINTED ON RECYCLED PAPER

Contents

FEATURES



Update Membership Information: Members who need to update their membership information must do so by contacting the Membership Department via one of the four following methods: (1) log on to the Member Access section of the State Bar's website (www.ncbar.gov); (2) mail changes to: NC State Bar, Membership Dept., PO Box 26088, Raleigh, NC 27611-5908; (3) call (919) 828-4620; or (4) send an e-mail to amaner@ncbar.gov. **In deciding what address to list with the State Bar, be advised that this address will be used for all official correspondence from the State Bar and that membership information is a public record pursuant to the NC Public Records Act.**

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DEPARTMENTS

BAR UPDATES

The *North Carolina State Bar Journal* (ISSN 10928626) is published four times per year in March, June, September, and December under the direction and supervision of the council of the North Carolina State Bar, 208 Fayetteville Street, Raleigh, NC 27601. Member rate of $6.00 per year is included in dues. Nonmember rates $10.78 per year. Single copies $3.21. The *Lawyer's Handbook* $10.78. Advertising rates available upon request. Direct inquiries to Director of Communications, the North Carolina State Bar, PO Box 25908, Raleigh, North Carolina 27611, tel. (919) 828-4620.

We want your fiction!

Tenth Annual Fiction Writing Competition

The Publications Committee of the *Journal* is pleased to announce the Tenth Annual Fiction Writing Competition.

Rules for Fiction Writing Competition

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

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

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

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

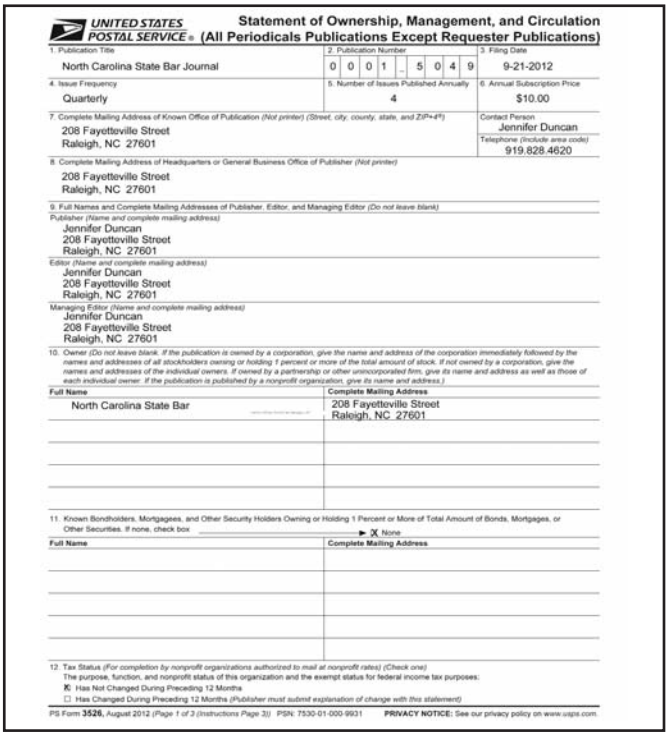
4. ***Articles should not be more than 5,000 words in length*** and should be submitted in an electronic format as either a text document or a Microsoft Word document.

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

6. **All submissions must be received in proper form prior to the close of business on May 31, 2013.** Submissions received after that date and time will not be considered. Please direct all questions and submissions to: Fiction Writing Competition, Jennifer Duncan, 6568 Towles Rd., Wilmington, NC, 28409, ncbar@bellsouth.net.

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

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



UNITED STATES POSTAL SERVICE® **Statement of Ownership, Management, and Circulation (All Periodicals Publications Except Requester Publications)**

1. Publication Title	2. Publication Number	3. Filing Date
North Carolina State Bar Journal	0 0 0 1 - 5 0 4 9	9-21-2012
4. Issue Frequency	5. Number of Issues Published Annually	6. Annual Subscription Price
Quarterly	4	$10.00

7. Complete Mailing Address of Known Office of Publication (Not printer) (Street, city, county, state, and ZIP+4®) — Contact Person: Jennifer Duncan; Telephone (Include area code): 919.828.4620
208 Fayetteville Street
Raleigh, NC 27601

8. Complete Mailing Address of Headquarters or General Business Office of Publisher (Not printer)
208 Fayetteville Street
Raleigh, NC 27601

9. Full Names and Complete Mailing Addresses of Publisher, Editor, and Managing Editor (Do not leave blank)
Publisher (Name and complete mailing address)
Jennifer Duncan
208 Fayetteville Street
Raleigh, NC 27601
Editor (Name and complete mailing address)
Jennifer Duncan
208 Fayetteville Street
Raleigh, NC 27601
Managing Editor (Name and complete mailing address)
Jennifer Duncan
208 Fayetteville Street
Raleigh, NC 27601

10. Owner (Do not leave blank. If the publication is owned by a corporation, give the name and address of the corporation immediately followed by the names and addresses of all stockholders owning or holding 1 percent or more of the total amount of stock. If not owned by a corporation, give the names and addresses of the individual owners. If owned by a partnership or other unincorporated firm, give its name and address as well as those of each individual owner. If the publication is published by a nonprofit organization, give its name and address.)

Full Name	Complete Mailing Address
North Carolina State Bar	208 Fayetteville Street Raleigh, NC 27601

11. Known Bondholders, Mortgagees, and Other Security Holders Owning or Holding 1 Percent or More of Total Amount of Bonds, Mortgages, or Other Securities. If none, check box → X None

Full Name	Complete Mailing Address

12. Tax Status (For completion by nonprofit organizations authorized to mail at nonprofit rates) (Check one)
The purpose, function, and nonprofit status of this organization and the exempt status for federal income tax purposes:
☒ Has Not Changed During Preceding 12 Months
☐ Has Changed During Preceding 12 Months (Publisher must submit explanation of change with this statement)

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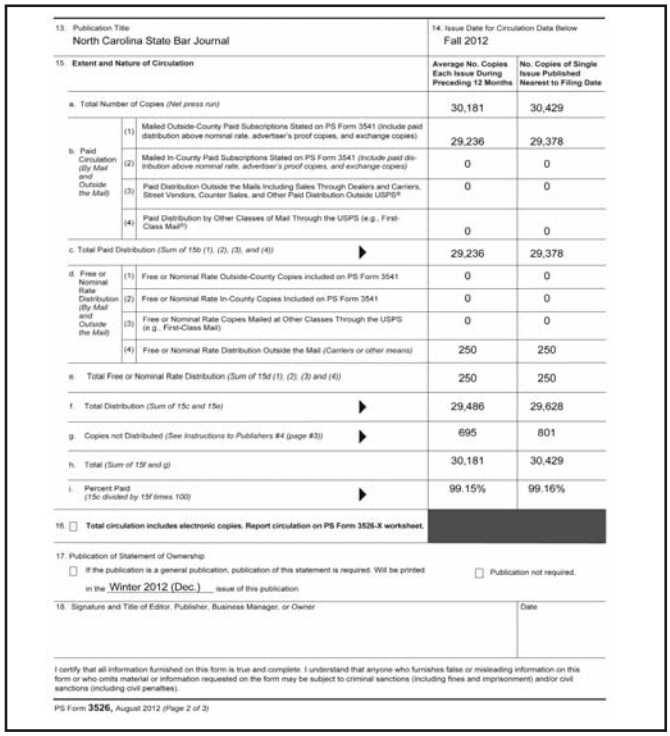

13. Publication Title: North Carolina State Bar Journal	14. Issue Date for Circulation Data Below: Fall 2012	
15. Extent and Nature of Circulation	Average No. Copies Each Issue During Preceding 12 Months	No. Copies of Single Issue Published Nearest to Filing Date
a. Total Number of Copies (Net press run)	30,181	30,429
b. Paid Circulation (By Mail and Outside the Mail) (1) Mailed Outside-County Paid Subscriptions Stated on PS Form 3541 (Include paid distribution above nominal rate, advertiser's proof copies, and exchange copies)	29,236	29,378
(2) Mailed In-County Paid Subscriptions Stated on PS Form 3541 (Include paid distribution above nominal rate, advertiser's proof copies, and exchange copies)	0	0
(3) Paid Distribution Outside the Mails Including Sales Through Dealers and Carriers, Street Vendors, Counter Sales, and Other Paid Distribution Outside USPS®	0	0
(4) Paid Distribution by Other Classes of Mail Through the USPS (e.g., First-Class Mail®)	0	0
c. Total Paid Distribution (Sum of 15b (1), (2), (3), and (4)) ▶	29,236	29,378
d. Free or Nominal Rate Distribution (By Mail and Outside the Mail) (1) Free or Nominal Rate Outside-County Copies included on PS Form 3541	0	0
(2) Free or Nominal Rate In-County Copies Included on PS Form 3541	0	0
(3) Free or Nominal Rate Copies Mailed at Other Classes Through the USPS (e.g., First-Class Mail)	0	0
(4) Free or Nominal Rate Distribution Outside the Mail (Carriers or other means)	250	250
e. Total Free or Nominal Rate Distribution (Sum of 15d (1), (2), (3) and (4))	250	250
f. Total Distribution (Sum of 15c and 15e) ▶	29,486	29,628
g. Copies not Distributed (See Instructions to Publishers #4 (page #3)) ▶	695	801
h. Total (Sum of 15f and g)	30,181	30,429
i. Percent Paid (15c divided by 15f times 100) ▶	99.15%	99.16%

16. ☐ **Total circulation includes electronic copies. Report circulation on PS Form 3526-X worksheet.**

17. Publication of Statement of Ownership
☐ If the publication is a general publication, publication of this statement is required. Will be printed in the Winter 2012 (Dec.) issue of this publication. ☐ Publication not required.

18. Signature and Title of Editor, Publisher, Business Manager, or Owner — Date

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Say it Ain't So, Bruno!

By L. Thomas Lunsford II

Bruno DeMolli has given his notice. He will be retiring at the end of the year. If you're not practicing in District 2 or 6B—the districts which have been selected for random audit this quarter—you are likely to miss seeing him again in his official capacity as the State Bar's auditor. Back in 2000, when Bruno was still in his 70s, we suspected that he might soon be calling it quits. I referenced that possibility in an essay about the regulation of trust accounting I wrote for the Journal *in the fall of that year entitled, "If You Knew Bruno Like I Know Bruno." Perhaps some of you will remember it. In any event, the report of his imminent retirement was wildly premature. He has in fact soldiered on at maximum efficiency and effectiveness for more than a decade since I foreshadowed his separation from our staff. However, since much of the information and virtually all of the sentiment contained in my essay have continuing validity and relevance, I thought it might be appropriate to dust it off and publish it again. So I have, and here it is, with just a bit of refurbishing.*

Not long after Bobby White accepted a position on our staff as director of the Client Assistance Program, he attended a meeting of the bar in the district where he resided. Because he had worked in academia prior to joining the State Bar staff and had not been engaged in the actual practice of law, he was relatively unknown in the local legal community. On the evening in question he was introduced to the group as a member of the State Bar's legal staff and then largely ignored. But as the gathering was breaking up, one of the local lawyers noticed him at a table by himself and fired a conversational shot in the dark. He asked the simple question, "Do you know Bruno?" Instantly the entire room fell silent as the remaining lawyers strained to hear the answer. "Why yes, I do," Bobby responded. "I had lunch with him just yesterday." Immensely gratified by that answer, the lawyer roughly embraced Bobby. "Hey everybody," he shouted, "he knows Bruno!" and ordered a round for the house.

Bruno DeMolli is a celebrity—the only celebrity in the history of the State Bar. Like Sting, Madonna, and the members of the Brazilian National Soccer team, he is known universally by a single, wonderfully evocative name: "Bruno." The usages are familiar to virtually everyone with a law license. "Bruno's coming!" "Bruno was here." "Bruno's in town." "I think we can do it, but we'd better ask Bruno." In his role as the State Bar's auditor, Bruno DeMolli has become a modern-day Kilroy. He is everywhere, monitoring compliance with the trust account rules in, it seems, a thousand places at once, covering the state like a spectral Italian blanket. Indeed, lawyers have, on occasion, reported seeing his towering figure and great white hair in law offices 400 miles apart on the same afternoon. But for all this ubiquity, his presence is abiding and beneficent wherever he happens to be. Simply by showing up, he personifies and dignifies the State Bar, and raises the standard of fiduciary practice. We suppose that the very idea of Bruno has dissuaded some lawyers from stealing from their clients.

For the past 27 years Bruno has been in the forefront of the State Bar's effort to ensure that North Carolina's lawyers are handling funds entrusted to them in a professionally responsible manner. He has performed heroically and has succeeded, we suppose, to a very large extent. But we know there is still much work to be done. For that reason, the council has chosen to continue the random audit program post-DeMolli in much the same vein as heretofore. Tim Batchelor, a financial investigator with the Office of Counsel for the past ten years, has been persuaded—somewhat reluctantly—to step into Bruno's expensive Italian loafers. We simply made him an offer that he couldn't refuse. He will hit the road in January. Although the name "Tim" by itself is rather ominous and has evoked mild distress among some lawyers in our focus groups, we have decided that, for the time being, Mr. Batchelor should continue using both of his names professionally.

Of course, the random audit program—though highly visible and important—is only one component of the State Bar's regulatory scheme regarding the handling of trust funds. There are several others. Most significant are the trust account rules themselves, as set forth in Rule 1.15 of the Rules of Professional Conduct. These provisions govern how trust funds are to be held, where they are to be deposited, how they are to be handled, and what records are to be maintained. The specificity of these rules, along with the considerable emphasis they have received in CLE programs over the last quarter century, has just about eliminated ignorance as a credible excuse. There are also provisions that are designed to alert the State Bar to possible irregularities. Chief among these is Rule 1.15-2(k), which requires lawyers to direct their banks to notify the State Bar whenever an instrument is presented against insufficient funds. Since it is a rare case of embezzlement that does not at some point involve the issuance of a bad check, the provision has quite frequently led to the discovery of misappropriation. There is also a very specific provision requiring lawyers to report situations in which trust funds have been withdrawn without authority. This provision—Rule 1.15-2(o)—makes it clear that a lawyer, having discovered the defalcation of a partner, associate, nonlawyer employee, or fellow member of the bar, has an absolute

duty to bring that matter to the attention of the State Bar, even if the information is arguably confidential. Unfortunately, there is no good way of finding out to what extent such discoveries are, in the context of law firms, being disclosed in accordance with the rule. The State Bar also receives on a fairly regular basis copies of orders requiring lawyer fiduciaries to show cause why they have failed to file timely accountings. Such reports have occasionally led to discoveries of defalcation.

The State Bar's rules also provide for the issuance of investigative subpoenas in those cases where the chairperson of the Grievance Committee finds reasonable cause to believe that trust funds have been or are being mishandled. "Cause audits" performed pursuant to such authority occupy most of the time of five of the State Bar's 11 investigators. Although these audits are vital to the proof or disproof of suspected irregularities, including misappropriation, they can occur only after some specific circumstance constituting "reasonable cause" comes to the attention of the Bar. They are not available on any other basis. The State Bar cannot employ this powerful tool to verify hunches or to monitor the trust accounting practices of lawyers who are merely suspected of being dishonest.

By far the most visible of the State Bar's efforts to improve trust accounting practice and deter malfeasance is the random audit program. It was to implement this program, which became operational in 1985, that Bruno DeMolli was employed. During the 27 years since he was hired, little about the program has changed. Each quarter two judicial districts are randomly selected from among the total of 44. Sixty lawyers are then selected randomly from the two districts, the number selected from each being roughly proportional to the size of the lawyer populations of the respective districts. After culling those lawyers who are not in private practice or who do not maintain, use, or have access to trust accounts, appointments are made by telephone several days in advance and subpoenas are issued. Since the auditor is obliged to inspect every trust account to which the chosen lawyer has access, and most firms maintain common trust accounts, he is often, in actuality, reviewing the trust accounting practices of all members of the firm. This effectively multiplies the number of lawyers being "audited" many fold.

When the auditor arrives he reviews the trust account records and performs what is known as a "limited procedural audit" to verify compliance with the trust account rules. He is particularly interested in determining whether the minimum recordkeeping requirements set forth in Rule 1.15-3 have been satisfied. The entire onsite procedure usually takes less than half a day. The results of the audit are subsequently reported to Peter Bolac, the State Bar's trust account compliance counsel (the counsel). If no deficiencies were noted, or if observed deficiencies are *de minimis*, there is no follow-up and the subject attorney is then exempt from random audit for the next three years. If minor deficiencies were noted, the counsel will generally communicate with the subject attorney and attempt to confirm informally that the necessary remediation has occurred or is occurring. If so, that will generally conclude the matter. If substantial deficiencies were noted, the matter is referred to the Grievance Committee and a disciplinary file is opened. If observed deficiencies are serious but not patently indicative of dishonesty, client harm, chronic inattention, or reckless indifference, the Grievance Committee may offer the subject attorney the opportunity to participate in the relatively new Trust Account Compliance Program (TACP) as a possible alternative to the imposition of professional discipline. This entails a consensual contractual undertaking by means of which the participating attorney, on a confidential basis, must agree for a period not to exceed two years to cure all deficiencies and to allow the counsel to monitor his or her trust account and to review all pertinent records and transactions involving entrusted funds. Successful completion of the contract will be considered a significant mitigating factor in the Grievance Committee's determination as to whether discipline should be imposed regarding the deficiencies that were originally observed. If the subject attorney chooses not to participate, or fails to fulfill the contract, the matter will be referred back to the Grievance Committee for investigation, processing, and possible imposition of discipline. In cases where the apparent deficiencies are significant and diversion into the TACP is not deemed appropriate, the matter will be referred directly to the Grievance Committee for investigation, processing, and possible imposition of discipline.

It should be noted that the random audit program was designed to serve several purposes. First and foremost, it is an educational initiative. It was intended to raise the standard of trust accounting practice in North Carolina by inducing self-study, motivating voluntary compliance, and providing authoritative feedback. I believe that the program has been quite successful in this regard. When Bruno DeMolli is known to be visiting a particular district, there is usually a marked increase in fiduciary consciousness and in requests for copies of the State Bar's *Lawyer's Handbook.* Accounts that have not been reconciled in months are brought current. Efforts are made to determine the beneficial owner(s) of the small "mystery" balance that has been carried for several years without attribution. And resolutions are made never again to let the trust account get out of whack. This kind of activity "in contemplation of" audit is quite salutary in that it fosters the kind of care and precision that the handling of other people's money requires. The resulting improvements greatly lessen the likelihood that trust funds will be inadvertently mishandled and compromised. These benefits are usually compounded for those lawyers who actually receive a visit from our auditor. As those who have had the experience almost universally attest, Bruno is a tremendous source of information and advice, and he can generally be counted upon to assist lawyers and their bookkeepers in improving their procedures.

Unfortunately, improved procedures can't prevent stealing. It does appear likely, however, that the random audit program is fairly effective as a deterrent. Certainly, that was the hope of those who founded the program and is the reason many State Bar leaders continue to support it. Of course, it is very difficult to establish what may have prevented a tempted lawyer from stealing. But it does seem fair to suppose that the same "concern" that compels the honest lawyer to go to great lengths to prepare for an audit might also figure in a dishonest lawyer's decision to resist temptation.

Another purpose served by the random audit program is theft detection. Experience has shown that the embezzling lawyer, though often quite clever in the practice of her profession, is generally a mediocre crook. This is perhaps because most thefts are initially rationalized as "borrowings." The typical

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Is Justice Being Priced Out of the Common Man's Reach?

By Christopher R. Clifton

"Upon a plea of guilty there is a verdict of guilty. It's the judgment of this court that you pay all fees, fines, and costs of court associated with your traffic ticket, sir."

"How much is that, judge?"

"The clerk tells me it's $463."

"For a speeding ticket?"

Anyone who spends enough time in traffic courts in this state will tell you that this dialogue between defendant and judge is occurring all too often. For decades, citizens were able to handle *de minimus* offenses such as speeding or other traffic infractions by pleading guilty to a reduced charge and incurring slight court costs and fines. Likewise, the fees and costs of court related to civil matters such as filing for simple divorces, small claims, or estates were often just enough to generate some revenue without acting as a deterrent to filing said actions. Unfortunately, in the current economic environment, the General Assembly has become more inventive by both fashioning new fees and fines, and by raising existing ones in order to hedge a shortfall in the budget. These constant increases raise the question: Is the concept of equal justice for all citizens being unduly tested in the age of increased fines and court costs?

The current recession has affected most everyone in North Carolina in one way or another. Gas prices have skyrocketed, home values have plummeted, the prices of common goods has risen while employers and businesses cut back on raises or lay off employees altogether. However, another devastating impact of the recession is in the average person's access to the courts. Due to the lack of revenue required to balance the budget, the General Assembly has increased costs associated with the court system, and in some cases has fashioned entirely new fees for things that had always been free. Situations that many individuals find themselves in at some point during their lives—such as filing for divorce, paying off a speeding ticket, or bringing a small claim in civil court—carry the added difficulty of having to balance the need for these actions with the potential cost that will be incurred bringing them.

Bruno Budrovic/Illustration Source

The rise in court costs has been felt most keenly by the average citizen who is cited with a speeding ticket or other minor traffic infraction. Consider the following scenario: The average citizen is pulled over for driving ten miles per hour over the speed limit. Though this citizen has a flawless record and has never before been issued a ticket, the police officer, feeling the pressure to increase the amount of tickets written, issues the citation for this relatively minor speeding offense. In an attempt to save money, our citizen decides to handle the ticket himself instead of hiring an attorney. Our wayward defendant fails to understand the difference between an infraction court where attendance is not mandatory and traffic court where attendance is required. Our citizen is surprised when he receives a letter from the

clerk of court notifying him that he missed the court date that the officer set for him. Our hapless man runs to the court house and convinces an assistant district attorney to reset his court date for the following day. Encouraged and renewed in his belief that everything will work out, our citizen appears in court before the judge and assistant district attorney and requests a reduction in his speeding ticket due to his exemplary record. The ADA reduces the speeding ticket to an improper equipment infraction and explains that this carries no driver's license or insurance points. Ecstatic to realize he's been given a break, our citizen pleads responsible to the reduced charge only to find out that he owes approximately $463 in court costs, fines, and fees, and must pay that balance in cash. Unable to pay the full amount that day, he requests one extra day to pay the money. The court acquiesces to this request, but due to changes in the law, this delay in paying carries an additional $20 fee.

Though many will consider this example to be the exception, anyone who works in the court system knows that this is becoming the norm in traffic courts around this state. While several small increases in costs of court and fines were to be expected, the astronomical rise in such costs caught most by surprise. In 2010 the General Assembly increased the cost for criminal offenses in district court from $120 to $126. In July 2011 the Assembly increased the cost of court again from $126 to $155. A month later in August 2011, new fees, fines, and court costs were implemented that increased court costs from $155 to $188 for district court infractions. The Administrative Office of the Courts breaks down the $188 as follows: $129.50 for general court of justice fee, $12 facility fee, $4 telephone fee, $7.50 law enforcement retirement fee, $2 law enforcement training fee, $18 misdemeanant confinement fee, $5 service fee, and a $10 fee for a Chapter 20 offense. In addition to the over 50% increase in mandatory court costs, the General Assembly also created a new improper equipment fee. Beginning August 2011 a reduction of any speeding ticket or other infraction to improper equipment carries a mandatory $50 fine in addition to the regular speeding fine and costs of court. In addition to the cost of court increases, the General Assembly also raised the failure to appear fine by 100%. Prior to August 2011 if a citizen failed to appear in court, a $100 fine would attach to any other costs and fees in the case. The same failure to appear now carries a $200 fine in addition to any of the usual costs, fines, and fees associated with a traffic ticket or other criminal offense.

While there are mechanisms in place that allow for a judge to mitigate the severity of the costs involved with criminal offenses, the average citizen is usually either unaware that they exist or does not know how to request that the judge apply them to the case. For as long as people have been charged with crimes, there have been attorneys to aid them in the navigation of the court system. Yet, many are handling these traffic offenses themselves due to the failure to afford both attorney fees and court costs. However, the citizen in traffic court isn't the only person in the court house feeling the effects of the cost increases.

Civil court costs, though not as excessive as criminal, have also increased 50% or higher over the past year. Prior to July 2011 the cost for bringing an action in civil district court was approximately $100. Since passage of the new budget in 2011, the costs associated with filing a civil action have increased to $150. Since the filing for an absolute divorce (currently at $75) necessarily includes the cost of filing a lawsuit, a client can now expect to pay approximately $225 for an absolute divorce, close to 35-40% more than they would have paid a couple of years ago. The General Assembly increased the fee from $15 to $30 for each item of civil process served by the sheriff. Another new fee established by the legislature is the $150 fee to file a counterclaim. Formerly there was no cost associated with this action. North Carolina now charges a $20 fee to file most any motion in civil court, including motions to dismiss and motions for default judgment. You even get to pay $20 to ask for an extension of time to file answers, etc. All these fees and extra costs trickle down to the client or the pro-se litigant. The relatively simple action of filing for divorce or a small claim includes costs never imagined several years back.

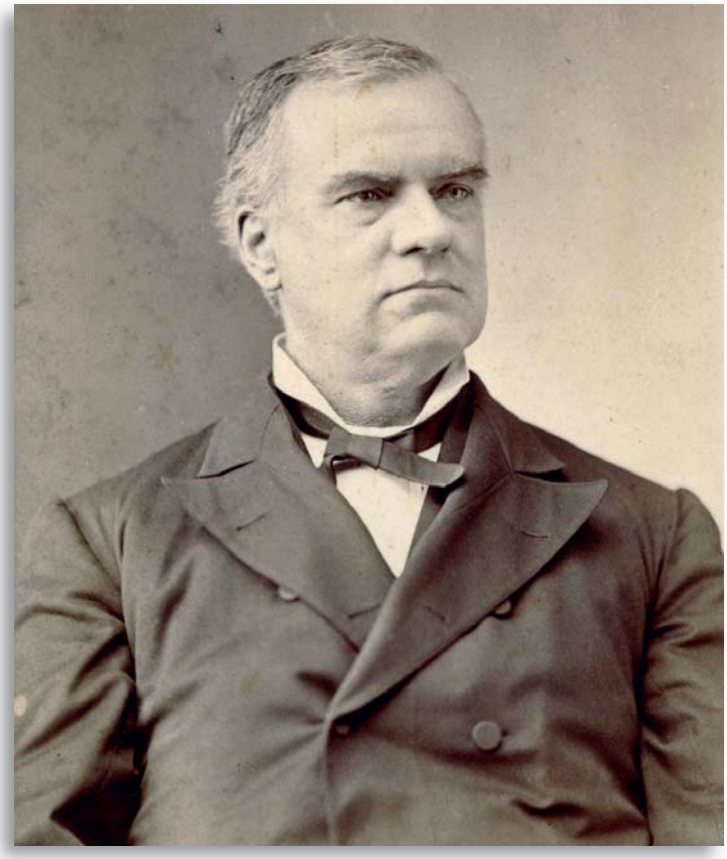
While many were aware that our state's budgetary problems would likely result in increases in criminal and civil court costs, few expected the changes to be as drastic as they have been. With further budget shortfalls on the horizon, it is a safe bet that the General Assembly will again look to the court system to generate the revenue needed to hedge the shortages. As long as the court system generates a large portion of the general revenue for the state, the average citizen should expect to bear the burden of the fiscal deficits in Raleigh regardless of the economic impact it has on said citizen. The sad irony of the whole situation is that though the court system has brought in more money than ever for the state, the funding for the Judicial Department was cut by over $4 million with the latest budget bill. How's that for gratitude. ■

Christopher R. Clifton practices with the firm of Grace, Tisdale & Clifton, PA. He is a Board Certified Specialist in state and federal criminal defense, and concentrates his practice on serious felonies in state and federal courts.

Their Other Brother—Why Have We Forgotten Samuel Phillips?

By Donna LeFebvre

Samuel Field Phillips might be the most extraordinary Chapel Hill lawyer and civil rights champion you've never heard of. His sister, the bell ringer, sure. His brother, CEO of the university for a couple of years, yes. Maybe even his father, a bigamist who deserted the British military, fled the country, and reinvented himself before settling into the Carolina faculty.



Samuel Field Phillips - photo from the North Carolina Collection Photographic Archives.

Sam, class of 1841, argued the most famous US Supreme Court civil rights cases of the 19th century as solicitor general under Ulysses Grant. He represented Homer Plessy in the landmark *Plessy v. Ferguson* and argued passionately in his legal brief against the "separate but equal" doctrine of racial segregation.

Now you're starting to get it. In the racially charged politics of the Reconstruction Era, Sam Phillips wasn't "one of us."

As a lawyer and teacher of law-related courses to undergrads at UNC, I'd read the *Plessy* case dozens of times, but not until about 15 years ago did I actually look closely at the line that immediately precedes any court's opinion, the line that identifies the lawyers: It reads "A.W. Tourgee and S.F. Phillips, for plaintiff in error."

I was astonished: I realized these lawyers were in fact North Carolinians. Albion Tourgee was the controversial "carpetbagger" lawyer, journalist, best-selling novelist, and judge who helped re-write the NC Constitution after the Civil War. And "S.F." was Phillips, a member of the very prominent 19th-century Chapel Hill family.

My interest was piqued: How did Sam Phillips end up being the lawyer for an African-American man from New Orleans, arguing *against* segregation—insisting that Louisiana, not Homer Plessy, was a lawbreaker? And why, as a lawyer, a graduate of the UNC law school, and a North

Carolinian, did I know nothing about Samuel Phillips?

Cornelia Phillips Spencer's name adorns the first women's dorm. Brother Charles (class of 1841) and their father James, along with Charles' son William Battle Phillips (1877, 1883 PhD), are on the plaque at Phillips Hall. Sam, whose law office was in the charming little stucco house at the corner of Franklin and Raleigh streets, is rather conspicuously missing from bronze or granite, though he was given an honorary degree in 1879.

He was on the unpopular side of the events of his homeland's most turbulent times.

Perhaps it is time for a new appraisal of Sam's legacy.

A Man Named Postlethwaite

Phillips was a Whig legislator in the 1850s and held state political offices in the early 1860s. In 1864, he was re-elected to the NC General Assembly, and he served as Speaker of the House in 1866. But at the end of the Civil War, he broke from his friends, family, and longtime political cronies when he publicly advocated immediate reunion of the South with the North. It was political and social suicide.

Years before Phillips' political and moral metamorphosis, his father, James, underwent an equally remarkable transformation.

In 1818, James Postlethwaite—a 26-year-old mathematically gifted Englishman with no prospects or money, son of a poor vicar at St. Gomonda-of-the-Rock in Roche, Cornwall—boarded a ship bound for New York.

A Royal Marine of low rank who had re-enlisted the year before, he lived in Plymouth, near the naval base. When he first joined the marines at age 16, James identified his occupation as a "farm laborer." He had no formal education, and his father likely had taught him at home. In 1814 at age 22 he married Agnes Robins, who was six years older; on their marriage certificate, Agnes marked an "X" because she couldn't write her name. By the time James left England, he and Agnes had two small children. Despite his considerable intellectual gifts, the best life that James could hope for in England was the one he already had: a dead end.

He decided to abandon England—leaving his wife and two children destitute—and pursue his dreams in America. He took with him the informal education his father had given him. He jettisoned everything, including his name.

When James Postlethwaite walked off that ship in New York City in 1818, he was James Phillips, with no accompanying family. The "new" James also had a university degree and was a scholar and gentleman, ready to open an academy for boys in the promised land. On his military record back in Plymouth, next to his name was written the word "run," which means he was a deserter. Perhaps only in America could a young Englishman; a laborer with no money or formal education; a military and family deserter, shed his class and life so thoroughly. James transformed himself into the man he obviously thought he deserved to be.

In 1821 he married Julia Vermuele, whose Dutch-American family in New Jersey was well off. James was now a bigamist. He did, indeed, start a private school for boys in Harlem, and he began publishing articles on mathematics. In 1825 a prominent mathematician recommended him for a position at a small university in the South: The University of North Carolina was looking for someone to be professor and chair of its math and natural philosophy department. James was offered the post, and he accepted.

Thus, through a complicated deceit, he finally had achieved position and status. At the time, UNC was made up of a handful of professors, a rowdy bunch of male students, four or five buildings, and a lot of mud. James transported his family to the village, where they moved into the Widow Puckett's house on East Franklin Street. There they raised Sam, Cornelia, and Charles.

James was not a popular professor. His UNC students complained about his rudeness and knew better than to ask him a question in class. (One student wrote that James acted like "a malignant scoundrel" in class and said the experience "left deep in my mind the impression of his perfect contemptibility, and I henceforth deem no revilings [sic] too severe.")

James' students were aware of his naval knowledge and background from his lectures but, of course, did not know the whole truth. Over time, James became quite religious and was ordained as a minister. His zeal for preaching to anyone he could corral was well known; folks were known to dart into hiding if they saw him coming down the street.

Julia Phillips apparently was not as enthusiastic about Chapel Hill as her husband. She was, after all, living in a southern backwater, a world apart from New York and New Jersey. Julia spent a lot of time during her marriage back north and was away in March 1867 when James, 75, died in Person Hall. A student found him there, shortly before the beginning of geometry class. Julia was not eager to come back to Chapel Hill even for her husband's funeral, and Cornelia had to persuade her mother to return.

James remained a well-respected member of the UNC faculty and the Chapel Hill community. No one knew the true story of his past until the middle of the 20th century, when some Phillips family descendants decided to take a trip to England to visit churches in St. Gomonda and Nevendon, near London, where James' father, Richard, also had been vicar.

One can only imagine their surprised confusion when they saw no record at the churches for a Reverend Richard Phillips. For the years that Richard Phillips was supposed to be the vicar, the name of Richard Postlethwaite was inscribed on the church walls. (I visited these churches a few years ago, as well as the vicarage in St. Gomonda, and verified this information.)

After that family visit to England, James' story about his past began unraveling, and the truth about his identity, education, and desertions of wife, children, and the military came out.

The Government's Lawyer

By the middle of the 19th century, Sam Phillips was a Chapel Hill favorite son, doing everything expected of him. And most likely, if he had kept to that script, he might have been written into North Carolina's law and history books after all. But Phillips took an unpopular stand during Reconstruction that made him a traitor to his state.

Phillips grew up in Chapel Hill, married the granddaughter of a former governor, shared top honors in his undergraduate class with brother Charles, received bachelor's and master's degrees from UNC, read the law under UNC President David Swain (who is described as having been like a second father to Phillips) and William H. Battle, and practiced and taught law in Chapel Hill. His law office doubled as a school where he taught Latin, Greek, math, geography, history, and English grammar to boys.

By most measures of success, Phillips—known around town as "Mister Sam,"—had everything.

His mentors were prominent Whigs, and that affiliation served him well through the war. But as reconstruction set in, Phillips had a change of heart and mind. As Phillips Russell, a UNC professor of creative writing, explained in *These Old Stone Walls*, "To Mr. Phillips…the Republican Party was the party of union and progress, and he told his friends he could not stomach the 'corruption and extravagance' of the Democratic Party, which was replacing the upper-class Whigs."

He'd not always felt strongly about black suffrage, and he admitted it.

But as Speaker of the House he deplored attempts to coerce blacks' voting by threatening their employment if they voted Republican. "How can we [the South] say [to the North], leave the freedman to us," he said in 1866, "we will do him justice, refusing in the same breath to allow him to tell his tale before a jury of white men and white judges?"

By 1870 he was a Lincoln Republican, running for state attorney general on the Republican ticket. His friends and colleagues felt betrayed. "He could not have drawn more fury on his head had he joined the part of Satan," Russell wrote.

At first his sister Cornelia, prolific writer and virulent Democrat that she was, took it easy on him, writing, "I have too much faith in the heart and head of my brother to be affected by what the newspapers say of him disparagingly."

Later she was embarrassed: "What a mistake it was, dear Sam's joining the Republican Party. When I recall those days of humiliation, exasperation, and despair it doesn't seem so very long ago."

He was defeated in the attorney general race, but not daunted. Phillips moved to Raleigh with his wife Frances (called Fanny) and their children, where he prosecuted Ku Klux Klan members for the federal government.

In 1872 President Grant appointed him solicitor general of the United States. Because of the solicitor general's enormous influence on the US Supreme Court, arguing all the government's cases, the person in that position often is called the "10th justice."

Fanny understandably was delighted about moving to Washington since she, like her husband, was likely *persona non grata* among folks in Chapel Hill and on the social circuit. Sam and Fanny lived in Washington for the rest of their lives.

As the government's lawyer before the Supreme Court, Phillips, a white southerner, argued against racial discrimination in the cases of *United States v. Reese* (1876) (concerning voting rights under the Civil Rights Act of 1870 and the 15th Amendment); *United States v. Cruikshank* (1876) (concerning the Colfax Massacre of African-Americans by a white Louisiana mob, the Civil Rights Act of 1870, and the application of the First Amendment to states); the five cases known as the *Civil Rights Cases* (1883) (concerning sections of the Civil Rights Act of 1875 and the 10th Amendment, as well as the applicability of the 13th and 14th amendments to racial discrimination in hotels and theaters and on railroad cars); *United States v. Harris* (1884) (also called the Ku Klux Case, in which a Tennessee sheriff led a lynch mob that beat African-American prisoners, one fatally, which focused on the constitutionality of the Civil Rights Act of 1871 under the 10th Amendment); and *Ex Parte Yarbrough* (1884) (regarding the constitutionality of the 1870 act and the federal government's right to protect African-Americans' voting rights).

Phillips said the doctrine of separate-but-equal "amounts to a *taunt by law* of that previous condition of their class."

Phillips was a serious contender for nomination to the Supreme Court, losing in 1877 to John Marshall Harlan, who later would write the profound prescient dissent — borrowing heavily from Phillips' brief — in *Plessy v. Ferguson* in 1896.

Phillips and co-counsel Albion Tourgee had argued that "separate but equal" is racial discrimination and unconstitutional under the 13th and 14th amendments. They lost, and racial segregation—and the violence that went with it—became in most places the norm. It took nearly 60 years for the Supreme Court to reverse *Plessy* in *Brown v. Board of Education* in 1954.

A Southern Hero

On November 18, 1903, Samuel Field Phillips died in Washington. He was buried back in the Old Chapel Hill Cemetery at UNC. He easily could have had a stellar career in North Carolina politics; secure in his standing among the southern aristocracy, courted by the press and public, and comfortable in the safe, successful life the rest of his family had at UNC and in the state.

Two months before he died, he wrote to a young scholar who had requested information about Reconstruction, "I have no regrets for any substantial part of the part that I took in Reconstruction."

Phillips followed his conscience into Chapel Hill anonymity.

His is an inspiring and powerful part of the story of North Carolina, the South, and civil rights, during and after Reconstruction. No white lawyer, northern or southern, comes close to Phillips' record in fighting race discrimination before the Supreme Court. He is a southern hero who took a moral, legal, highly unpopular, and very lonely stand against racial discrimination, and his contributions to American civil rights law are extraordinary.

Cornelia Phillips Spencer, because of her gender, was denied the education and careers open to her brothers. She fashioned her own journalism career, writing for publications in the state in the editorial and letters columns. After the Civil War she was bitterly, persistently critical of the Republican UNC president and the faculty he hired, and she was an important anti-Republican force in closing the university from 1871 to 1875. The "sanitized" Cornelia is known better for the triumphant re-opening of UNC. But an annual award for women given in her name was retired in 2005 because of concerns about her white-supremacist rhetoric and her role in closing UNC.

Charles Phillips, a minister by training, became a UNC professor of engineering in 1844 when Swain asked him to return to Chapel Hill from Princeton as his father's assistant. He was ousted from the faculty during Reconstruction and exiled at Davidson College until it was politically safe for him to return to UNC.

Both Sam and Charles Phillips destroyed their personal records.

All three Phillips houses, standing shoulder to shoulder next to Sam's law office, still are occupied today: the homes of Charles and James are owned privately, and Sam's house (with a porch added after he lived there) is now the Delta Delta Delta sorority house. Cornelia lived across the street, beside what is now the UNC System president's residence,

CONTINUED ON PAGE 37

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EQUAL HOUSING LENDER

Recovery of "Intrinsic Value" Damages in Case of Negligently Killed Pet Dog

By Calley Gerber and William Reppy Jr.

The North Carolina Court of Appeals, in a case where negligent killing of a pet dog with no market value was admitted, has denied recovery of "intrinsic" damages (also called "actual" damages). *Shera v. NC State University Veterinary Teaching Hospital*, 723 S.E.2d 352 (N.C. App. 2012). Because the holding is narrow and the type of damages denied are not the same as emotional damages, a close look at the decision is warranted.

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The Veterinary Hospital Admits Negligence; Minimal Damages are Awarded

Laci, a Jack Russell Terrier owned by Mr. and Mrs. Shera, began to be treated for liver cancer at the defendant state veterinary hospital in 2003. After treatment, the cancer was in remission, but Laci had quarterly checkups at the hospital. In 2007 Laci began experiencing problems with poor appetite, vomiting, and difficulty with urination, and Plaintiffs returned the dog to the hospital for treatment. She was admitted on March 31.

Following days of tests, Defendant determined that Laci should have an intranasal feeding tube, which on April 5 was inserted by the hospital staff. Laci was transferred to the intensive care unit. Unknown to anyone at the time, the feeding tube was placed into Laci's lungs rather than her stomach, and she began drowning due to the material forced into her lungs. The next day her heart stopped beating, and she could not be resuscitated. Not knowing the cause of their pet's death, Plaintiffs paid the hospital's veterinary bill in full. Three days later, Defendant advised them that the misplaced feeding tube had caused Laci's death.

In 2009, Plaintiffs filed a veterinary malpractice action against the hospital with the North Carolina Industrial Commission pursuant to the state's Tort Claims Act, seeking damages based on the "intrinsic" value of Laci to them and citing the 1988 decision in

Freeman, Inc. v. Alderman Photo Co.[1] Defendant's answer admitted negligence and requested a hearing on the issue of damages. The initial hearing officer awarded Plaintiffs only $2,755.72, the amount the pet owners had paid the hospital for treatment billed from March 31 through April 6, 2007. Reviewing this award, the full commission increased the damages by $350, which it found to be the cost of replacing Laci with another Jack Russell. The commission employed the replacement value measure of damages upon finding that the aged Laci had no fair market value. The commission noted that North Carolina courts have recognized intrinsic value as a category of damages that is appropriate in some circumstances, but declined to expand applicability of that measure of damages to cases involving injury to or death of companion animals.

The Court of Appeals Affirms Based on Insufficient Evidence

The court of appeals affirmed, initially holding that replacement value is properly employed to assess damages where damaged property had no market value (citing cases involving a damaged power pole and transformer and a stolen pay telephone). The court did note that in the *Freeman* case—where the defendant's negligence resulted in the destruction of "hundreds of architectural drawings, work papers, and surveys"[2] that had no market value—recovery of damages based on intrinsic or actual value to the plaintiff of the lost property was approved.[3] In *Freeman* the jury had been instructed that one factor to consider in determining intrinsic or actual value was "the uniqueness of that [destroyed] property."[4] The evidence in *Freeman* established that some, although not many, of the lost drawings—which were unique—could be reused if recreated. On the other hand, examination of the evidence in the *Shera* case led the court of appeals to conclude, in essence, that Laci was not a unique pet. In sum, the plaintiffs could not get the benefit of *Freeman* because of a failure of proof.

The inadequate evidence included testimony that Laci "brought so much joy" to the Shera home and "brought so much comfort" to Mr. Shera, who suffered from a heart condition; and that Laci "was just very helpful in stressful situations."[5] The court of appeals acknowledged that Mrs. Shera testified that "Laci was unique. She had her own personality."[6] But apparently this was viewed as too conclusory to support an award of damages based on intrinsic value. Said the court: "The testimony reveals no absolute unique tasks or functions that Laci performed for plaintiffs, aside from her calming presence...."[7]

Plaintiffs also argued that the large sums of money they had spent treating Laci for cancer proved that Laci had an intrinsic value or actual value to them in excess of replacement value.

The court of appeals rejected the argument, stating: "[P]laintiffs fail to adequately explain how amounts spent on the dog's care prior to 31 March 2007, when Laci was admitted to defendant's care and negligently killed, were proximately related in any way to defendant's negligent act on 6 April 2007 and plaintiffs' resulting injury."[8] While this statement does not address the point made by Plaintiffs, it would seem to establish that, for some reason, amounts spent on health care for a pet are not relevant when intrinsic damages are sought.

"The sentimental bond between a human and his or her pet companion," the Shera court concluded, "can neither be quantified in monetary terms or compensated for under our current law.... [H]ow to value the loss of the human-animal bond between a pet owner and his or her companion animal...is more appropriately addressed to our legislature."[9]

Unfortunate Dictum for Pro-Animal Advocates

While the narrow holding of *Shera* is that the plaintiffs failed to prove any intrinsic value to them of their dog, apparent dictum in the case renders *Freeman* (the architectural drawings case) and its intrinsic value theory of damages essentially worthless in future litigation concerning death of or injury to a pet. *Shera* read *Freeman* as employing the intrinsic value measure of damages "rather than the property's replacement value," which it inferred would be greater.[10] "Thus, the 'actual value' instruction in *Freeman* was applied to limit, rather than enhance, the plaintiff's recovery...."[11] Intrinsic value "damage awards," said the *Shera* court,

> have proven to be the rare exception and have never been applied to either enhance a damages award or to the recovery of damages for the loss of companion animals. This is surely due in part to the fact that a multitude of companion animals are available in society, and...replacement of the type of property—a companion animal—

currently is possible under our law.[12]

This seems to tell pet owners as future litigants that they should just prove replacement value in the absence of market value, as the *Freeman* case and its theory of intrinsic value will not entitle them to recover anything more. A highly trained service dog will have intrinsic value, but will also have a market value, a fact that will preclude resort to the intrinsic value theory of damages.

The Shera Decision has No Effect on Future Claims for Emotional Damages

The actual holding in *Shera* leaves wide open the question whether in North Carolina emotional damages may be recovered for the tortiously-caused injury or death of a pet that was treated by its owners as a member of the family. That is so because the plaintiffs in *Shera* rested their claim to intrinsic value damages on the *Freeman* case where the property damaged—architectural drawings—was non-sentient personal property, and where the court specifically held that intrinsic value damages did not include "purely emotional value" that the property may have had.[13]

The court of appeal in *Shera* stated: "The current law in North Carolina is clear that the market value measure of damages applies in cases involving the negligent destruction of personal property, ***whether sentient or not.***"[14] Since the plaintiffs in *Shera* had not argued that a special rule of damages—that permitted recovery of emotional damages—applied where the property negligently destroyed was a sentient pet, the quoted statement is at best dictum. It is also wrong. It cannot be "clear" that North Carolina law bars recovery of emotional damages where a pet has been negligently killed (or injured) because the issue has not been before the courts of the state in a reported decision. On the other hand, as discussed previously in this journal,[15] a 1913 decision of the North Carolina Supreme Court can readily be construed as establishing the right by a plaintiff-owner to recover emotional damages for the willful killing of a pet dog in the plaintiff's presence.[16] This older decision could lead North Carolina courts to follow the precedents of Florida, where emotional damages are recoverable for the willful or grossly negligent killing or injury of a pet, but not if the level of fault by the tortfeasor is ordinary negligence.[17] In other states there is a trend to allowing emotional damages to be awarded where a pet has been injured or killed willfully.[18] Such decisions recognize pets as a

special type of personal property subject to unique rules concerning recovery of damages.

The Hospital had Grounds to Appeal the Award of Economic Damages

Because the veterinary hospital in *Shera* did not appeal, the decision there is not precedent supporting the amount of economic damages awarded to the pet owners by the commission panel. The $350 replacement value surely was based on the cost of buying a young Jack Russell Terrier, but Laci was a sickly 12 3/4-year-old dog.[19] Should not her age and health status have guided the determination of replacement value?

In addition, the veterinary hospital could have objected on appeal to being ordered by the commission to refund all of the veterinary bills paid by a pet owner after the hospital conceded there had been veterinary malpractice. Much of the $2,755.72 that the pet owners had paid the hospital related to veterinary care during the period March 31 through April 4, which involved no malpractice. Should the improper placement of the feeding tube on April 5 have tainted the non-objectionable veterinary services rendered prior to that negligent act?[20]

Must a Non-Veterinarian Tortfeasor Who Injures a Pet Reimburse for Reasonable Veterinary Bills that Exceed the Market or Replacement Value of the Animal?

Even if North Carolina courts establish a precedent that a veterinarian guilty of malpractice that injures or kills a pet cannot retain sums paid by the pet's owners for treatment, such a development would not necessarily dictate how the state's judiciary will answer the question whether a non-veterinarian tortfeasor who injures a pet is liable to reimburse the pet owner for veterinary expenses reasonably incurred to save (or attempt to) the life of the animal when those expenses exceed the fair market value or, if there is no market value, the replacement value of the animal. Where an item of inanimate personality has been tortiously damaged, North Carolina measures recoverable damages as "the difference between its fair market value immediately before and immediately after the injury."[21] Where the damaged item of inanimate personal property has no market value, the cost of repair is the measure of damages.[22]

Other states with similar rules applied where damaged personality is inanimate permit recovery of veterinary expenses far in excess of replacement value of an injured pet that had no market value (for example, because it was an older mixed-breed dog). In a 2011 California decision,[23] after defendant shot Plaintiff's cat, Plaintiff spent $36,000 to save the cat's life and treat it for paralysis. Reversing the trial court, the appellate court's holding was that if the veterinary expenses were reasonable the defendant was liable for them. Suppose, however, the cat was a young and attractive pure-bred Persian, and the trier of fact was convinced it had market value of $25. That such a finding should bar Plaintiff's claim for recovery of all but $25 of the veterinary bills is grossly unfair, yet the California court stressed the absence of market value for the cat in question.

North Carolina should follow the lead of New Jersey, which holds that a tortfeasor who has injured a pet—whether negligently or through willful misconduct—is liable for reasonable veterinary costs incurred to save or attempt to save the animal's life even though the animal had a market value far less than the total of the bills for veterinary care. In 1998 New Jersey's intermediate appellate court affirmed a judgment awarding reimbursement of the full amount of $2,500 in veterinary bills paid to save the life of a tortiously injured pet dog despite a finding that the dog's replacement value was $500, holding: "[A] household pet is not like other fungible or disposable property, intended solely to be used and replaced after it has outlived its usefulness." The New Jersey Supreme Court subsequently approved this decision on the ground "that pets are a special variety of personal property."[25]

Market or Replacement Value Should Not Be a Cap on Intrinsic Value Damages

New Jersey's approach should also be applied to cases where the pet owner seeks damages based on intrinsic value of the tortiously injured or killed pet and proves that the pet had—before the injury—provided special services but could no longer do so. For example, in a 1980 case from New York, a finding that a negligently killed pet dog had no market value as a mixed breed entitled the owner to recover $550 in damages on proof that "plaintiff relied heavily on this well-trained watchdog and never went out into the streets alone at night without the dog's protection."[26] The law should not let the negligent defendant escape paying such damages by convincing the trier of fact that because of its training as a watchdog, the mutt had a market value of $25. ■

Calley Gerber is the principal attorney in Raleigh's Gerber Animal Law Center and was counsel for the pet owners in the Shera *case discussed in this article. William Reppy is the Charles L. B. Lowndes Professor of Law Emeritus at Duke University.*

Endnotes

1. 365 S.E.2d 183 (N.C. App. 1988).
2. *Shera*, 732 S.E.2d at 355.
3. The intrinsic value damages recovered in *Freeman* totaled $73,600. 365 S.E.2d at 184.
4. *Id.* at 186.
5. *Shera*, 732 S.E.2d at 355.
6. *Id.* at 356. Plaintiffs also placed in evidence this statement found on the defendant hospital's website:
   > The bond formed between humans and animals is unique....They become members of our family and can provide a sense of constant support through various life changes in our lives....This special human-animal relationship is what makes the death of a pet one of the most significant losses we experience in our lives.

   Trial Transcript Exhs pp 687, 24.
7. 732 S.E.2d at 356.
8. *Id.* at 357.
9. *Id.*
10. *Id.* at 355.
11. *Id.*
12. *Id.* at 357.
13. *Shera*, 723 S.E.2d at 355, quoting *Freeman*, 365 S.E.2d at 186.
14. *Shera*, 723 S.E.2d at 357 (emphasis added).
15. William A. Reppy Jr., *A New Specialty: Animal Law*, NC State Bar Journal, spring 2002, at pp. 12-13.
16. *Beasely v. Bynum*, 163 N.C. 3, 79 S.E. 270. The cause of action asserted there was apparently trespass both to the home where the slaying occurred and to a chattel, the pet dog. The court held that damages could be based on evidence that "the alarm and shock caused by defendant's conduct had caused her [Plaintiff] great suffering." *Id.* at 4, 79 S.E. at 271. The opinion would not have focused on the killing of the dog, in addition to the entry into the home, if the pet's death had not been pertinent to the assessment of damages.
17. Compare *LaPorte v. Associated Independents, Inc.*, 163 So.2d 267 (Fla. 1964) (willful tort) and *Knowles Animal Hospital, Inc. v. Wills*, 360 So.2d 37 (Fla. App. 1978) (gross negligence), with *Kennedy v. Byas*, 867 So.2d 1195 (Fla. App. 2004) (ordinary negligence).
18. *See, e.g., Plotnik v. Meihaus*, 2012 W.L. 3764874 (Cal. App., Aug. 31) (recovery of over $50,000 for clubbing of pet dog); *Womack v. Von Rardon*, 135 P.3d 542 (Wash. App. 2006).
19. Although the defendant in *Shera* admitted negligence, that should not have resulted in the imposing on it the burden of proving that there was no market in mature

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Professionalism – The Loss of Civility in the Legal Community

By Clifton W. Everett Jr.

Some time ago, Charles Hardee asked if I would consider writing an article for the *Journal* on the subject of professionalism. After giving the matter some thought, I decided that after 27 years of practicing law and 18 years on the superior court bench, I was probably as knowledgeable about the subject as anyone else who would agree to undertake a discussion of professionalism. In addition, one of my private disappointments—and, to a few of my friends, a public sadness—is the lack of participation of the practicing bar east of Raleigh in bar activities that further the progress of the legal profession. I have been asked on several occasions to lecture at CLE seminars, and have always agreed to give freely of my time and resources to the legal community. Hopefully, those of us who do participate will encourage others to also give of their time, talents, and resources in this endeavor.

It is hard to really comprehend that this past summer—August 2012—I was licensed to practice law in North Carolina for 45 years. When I finished law school, we were still operating under the old Rules of Civil Procedure (we were required to learn both the old and new rules at Wake Forest), and the district court system as we know it in North Carolina had not yet been fully implemented throughout the state. In fact, in my home district, my first appearances in court were before Judge Dink James, the county recorder's court judge. All of the local mayor's courts, the justice of the peace courts, and the various recorder's courts and city courts then in existence were utilized by the attorneys in their practice. The district attorney was then referred to as the "solicitor." In the 33 counties comprising the 1st Division of the North Carolina Superior Court, there were eight elected resident superior court judges. They were all very distinguished gentlemen who had all enjoyed a successful career at the bar before assuming the bench, and most were no younger than 50 years of age. With the exception of maybe two, these superior court judges ran their courtrooms with a tight hand, expected you to be prepared to try your case and be knowledgeable in the law, be prompt in your attendance to your court functions, be well mannered and courteous to the bench, and be civil to your opposing counsel.

At that time, lawyers made an effort to converse with each other prior to the filing of civil actions in an effort to spare their clients the undue expense of protracted litigation, resolved the dispute in an expeditious manner, and tried to keep parties out of court. Pleadings were detailed and extensive. Pre-trial discovery—including interrogatories, requests to admit, depositions, and the ever persistent pre-trial motions, which are prevalent today—were virtually unknown. Lawyers who practiced alone or with small groups did most of their own investigations, interviewed witnesses themselves, and took an active role in the nuts and bolts of preparing cases for trial. I am proud to say that I came to the bar during the twilight years of the great civil trial lawyers and criminal defense attorneys. It was a great time to be a lawyer. We all had a good time practicing law and socializing. There was a marked absence of carping and sniping. Older members of the bar made a conscious effort to mentor and direct

younger members of the bar in developing their legal skills. Certain lawyers who had the judge's confidence were often asked privately to counsel on a knotty legal problem the court was then involved with which, of course, did not involve that lawyer.

I remember well an episode involving Judge William J. Bundy and my father. They were very close friends, and the good judge would often seek out my father's advice on a legal matter with which he was uncertain. The story goes something like this: At the outset of Judge Bundy's appointment to the superior court bench, he was scheduled for Tarboro in Edgecombe County. It was a will case. Judge Bundy related to my father the nature of the case, and his uncertainty and trepidation in having to try a matter with which he had little experience. My father advised Judge Bundy that it was not a difficult matter to handle—most of the evidence relating to the testator's state of mind and relationship with others could be admitted. Judge Bundy was still not satisfied, and my father gave him a will brief that he had worked up containing all the will law and caveat proceeding law to that date. He told Judge Bundy to read it over and it would familiarize him with the matter he was to handle. Some time during the next week, My father was in Tarboro attending to a matter and decided to go to the superior courtroom to see what Judge Bundy was all about. He walked into the courtroom and sat in the fourth row. Judge Bundy was up on the bench, his head back in the chair and his eyes closed. (Judge Bundy, as some of you may remember, had a speech impediment in which he stuttered rather obviously until after 5 PM, when his stuttering calmed down.) Momentarily, one of the attorneys rose to his feet and, in a loud voice, shouted, "Objection, Your Honor." Judge Bundy popped open his eyes, wheeled his chair around, and looked directly at my father. My father nodded his head in the affirmative. Judge Bundy then said to the lawyer, "objection sssssssssssustained." A few minutes later, one of the lawyers on the other side arose and exclaimed, "Objection, Your Honor." Judge Bundy, following the same practice, turned and looked at my father who, on this occasion, shook his head in the negative. Judge Bundy then said, "Objection oooooooooverruled." Later, my father visited Judge Bundy in his chambers and was told, "Cliff, I think I am getting the hang of this." I am sure this story is very amusing and somewhat amazing to some of you who read this article, but I can assure you that it is absolutely true and is probably something not entirely uncommon in that era. Such an event this day and time might have the judge and the lawyer brought up on disciplinary charges since we have to be, like Caesar's wife, beyond reproach. I will have to admit to you that my view from the bench in present-day times is somewhat different than my view of the bench at the beginning of my legal career and during it.

The handling of civil litigation matters, which encompasses discovery practice, deposition matters, and especially the motion practice, is the most onerous and burdensome duty I have to perform as a judge. When a civil action finally reaches a trial posture, it is fairly pleasant. However, it takes an undue amount of time to reach that posture. My observation from the bench as a trial judge and in my district as a resident judge is that very little interaction, cooperation, conversation, or accommodation goes on between litigant attorneys. It appears that neither side—the plaintiff nor the defen-

dant—is anxious to resolve any civil litigation until the proper amount of "time" has been spent filling the court file with reams of paper. Civil motion day in my district is a real back-breaker. The last motion day I conducted some several weeks ago included a calendar of 32 motions running the gamut from A to Z. Of course, I was unable to hear all of the matters, some of which were very protracted, and left the bench about 6 PM that day. It was only because I had arranged to have the following week free that I was able to come back Monday and Tuesday and finish the calendar for some of the lawyers who actually begged me to do so. I was about to leave my home district for a new rotation, and I guess the lawyers wanted to get their best shot in while they had me. This was somewhat of a dubious honor, but I took it.

On the rarest of occasions do lawyers attempt to resolve matters in the motion field or discovery field, or the perceived sanction field, by conversation prior to coming to court. There is an air of hostility and suspicion between many lawyers who appear before me, and it is readily evident and apparent to the court. This attitude makes a day on the bench for this old judge hard and tiring, and it detracts from the professionalism that should be evident between colleagues at the bar even while representing different opinions and points of view.

As was stated by Judge Doug Albright, retired senior resident superior court judge from Gilford, in his excellent article in the Spring 2007 *Journal*, which I enthusiastically and whole-heartedly recommend that you read and assimilate:

> I am sad to say, however, that some very observable negative developments have crept into the practice. I see tangible evidence demonstrated all too frequently that there is an insidious, perceptible decline in respectful professionalism (noticed by just about every objective observer of the scene). Professional civility, common courtesy, polite cordiality, and mutual respect between lawyers too often gives way to open rancor, bitter acrimony, adversarial hostility, and abrasive gamesmanship. Lawyer relations at times become contentious and sometimes just plain rude. The old days when most, if not all, problems in litigation could be cleared up by a single five-minute telephone call are long gone, to put it mildly. Harsh allegations and abusive epithets fly about with reckless abandon. There is a rush to take technical advantage of one's opponent and openly question his or her ethics. Suspicion of motives hovers over the length and breadth of professional actions. Have I overstated the case? Would that it be so. This sort of thing just poisons a well and makes trying cases too unpleasant to bear. I for one have become sick of it. Relations between lawyers shouldn't be like that.

What an apt and brilliantly stated observation of the present state of civil litigation. You should read this article, not only for its content, but also for a brilliant perspective of a seasoned trial judge who has been on the firing line of developing civil litigation for more than 30 years. Although Judge Albright is now retired, I could not have better expressed to you today what he said in his article, and I wanted to refer to it to highlight what I have said and will say further in this article. As a trial judge, it is always a pleasure to hear good lawyers argue and present their legal positions, which are always done in a civil, polite, and professional process. Neither side will interrupt the other during presentation and neither side ever has a caustic or accusatorial comment about the other lawyer during any point of the hearing. This is as it should be.

Study after study has been done about the problem with professionalism in the legal practice. The chief justice has even established a commission on professionalism to address these problems I have mentioned. The North Carolina State Bar and the North Carolina Bar Association have various programs dealing with chemical dependency by lawyers, depression among lawyers, and the general lack of civility among those appearing in the civil trial courts of our state. Sadly, the day is almost gone where members of the legal profession avail themselves of the opportunity to participate in civic endeavors, serve on commissions and boards, and serve in the General Assembly, where the lack of legal knowledge on matters being taken up by the House and Senate has resulted in the unwieldy legal approach to legislation, and the problems and pitfalls could be addressed by lawyers if they were willing to serve.

So what does the term "professionalism" entail? *Black's Law Dictionary* defines a "profession" as follows: "A vocation or occupation requiring special, usually advanced, education and skill; such as law or medical professions. The term originally contemplated only theology, law, and medicine, but as applications of science and learning are extended to other departments of affairs, other vocations also receive the name, which implies professed attainments in special knowledge as distinguished from mere skill." Professionalism is defined by *Webster's Dictionary* as "the conduct, aims, or qualities that characterize or make a profession."

Several months ago I was honored to participate in the presentation and hanging of an oil painting of Mr. Louis W. Gaylord Jr., a prominent Greenville attorney who retired from the practice of law several years ago and is now 94 years old. A vigorous 94, I might add. He is truly a remarkable individual. I well remember coming to Greenville with my father to attend to court business and other work at the courthouse. I remember seeing Mr. Gaylord as a young boy—he was a sight to behold. Tall, erect, possessing a booming and very persuasive voice, he effectively represented his clients before the court. A skilled trial lawyer in every respect, Louis Gaylord primarily devoted his courtroom appearances to defense work—both criminal and civil—and handled some of the more complex cases that have come before the court in Pitt County. He and my father were adversaries on many occasions, but were always, always good friends, and were courteous and professional to each other. I say all of this to you to let you know that Louis Gaylord, and those of his generation at the bar, practiced law in the grand manner. They were always well prepared, possessed skill in the trial of cases, professional to their opposition, never entered into any picks or quarrels in the courtroom before the court, never made any insulting remarks about the perceived integrity of the other lawyer, or any of those things that daily come before me as a judge now. I am saddened by the fact that I have to listen to those things from lawyers when they should never be personal to each other. As my father said, "always remember, son, it is the client's case and not yours." We all have a duty to represent our clients professionally, ethically, and strenuously, but we should never fall victim to personal swipes and demeaning comments of our opposing counsel. Louis Gaylord never stooped to this level. Nor, I

am sure, did he enjoy seeing it take place during the latter year of his practice. Louis Gaylord was a mentor to all the younger lawyers. He viewed his example of law practice as the gold bar or standard, which everyone should try to emulate. He, as well as others I have mentioned of his generation, did set the standard for younger lawyers, and older lawyers of that era were quite free in giving their advice and counsel to younger lawyers who sought them out. It made a great deal of difference in the type of lawyers we had during that period of time—their demeanor and their interaction with their fellow members of the bar. That is sorely missing these days, and it shows itself, unfortunately, in the civil as well as the criminal arena. I can truly say that I began my legal career in 1967 during the swan song of the golden era of law practice. I enjoyed it immensely and enjoyed my relationship with those lawyers I have mentioned, all of whom I knew personally, as well as having practiced 22 years with my father, who was also of that generation and was always ready and willing to assist others with their legal problems. I am sure Louis Gaylord had the same experience and that is why, to a great degree, he was such a successful practitioner of the law. Additionally, Mr. Gaylord devoted a considerable amount of time to matters outside of his law practice, such as serving on the Board of Education for a number of years, actively participating in the business of his church, serving on the regional bank board, and other such examples of public service. Several years ago, Mr. Gaylord was recognized by the North Carolina Bar Association as an inductee into the General Practice Hall of Fame. This designation is awarded yearly to those lawyers who have distinguished themselves in the various fields I have mentioned, and Louis Gaylord was so rewarded prior to the time he ceased his active practice of law. I use Mr. Gaylord as an example of what the legal profession and professionalism should be about. As stated by The Honorable Edwin Godwin Reade, attorney at law and later justice of the Supreme Court, on July 9, 1884:

> What shall be your behavior in your profession? Your oath will oblige you, to well and truly demean yourselves. This comprehends the whole duties of a courteous gentleman and faithful agent. There must never be the slightest departure from the strictest rule of propriety, nor the shadow of a shade of professional delinquency.
>
> Temptations, in whatever shape they may come, and whether they threaten, harm or promise favor, must not only have no force or charm, but they must be severely despised. But this inquiry is intended mainly, as to your general and public bearing as lawyers, officers of the court, engaged in administering the law. The laws of this country are its majesty. The courts and their officers are the representatives of majesty. Your deportment should be as in the presence of majesty; not with arrogance, but with gentleness and dignity, towards the court, and all who have business there.
>
> The best practitioner sometimes finds themselves at fault: and then indulgence or favor from the opposing counsel is very grateful. Some are so liberal as to

> grant any favors at any time, others neither grant nor ask them. There may be nothing dishonorable in either, but I advise liberality where a brother has made a slip, a slip which would injure him if taken advantage of and where no substantial right of your client is surrendered, and when you do not put yourself in fault by seeming indifference to your client's advantages. My own practice was to allow a brother to supply defects, correct errors, and do almost anything he desired to do in fixing up his case before trial; but, when the trial commenced, and swords were drawn, I threw away the scabbard and fought for a funeral.

How apt are Justice Reade's remarks to the problems we face today with professionalism. He summed it up beautifully.

I can say to you that I am acutely aware of the financial and economic pressures exerted by law firms on their lawyers. Hourly billing has run amok and has placed the cost of civil litigation beyond the means of most citizens. Mediation and arbitration and other alternative resolutions to courtroom trials will and could do a great deal to alleviate many civil disputes, but only if it is effectively embraced by the parties. I place specific emphasis on the word "effectively" in this regard. Statistics show that the great majority of civil litigation is resolved other than by trial to a jury. Statistics also show that only 10% of civil litigation is carried to a jury verdict. With the exception of medical malpractice action, class action lawsuits, and large personal injury actions, civil courtroom trials have virtually dwindled down to rear-end collisions and soft tissue injuries, which are more often than not tried to a jury verdict simply because the insurance company is well aware that most jurors are fed up with this type of lawsuit and are not going to award any sizeable verdict. As a consequence, the day of the great trial lawyers is fast approaching its demise.

We have, unfortunately, over the last 30 or 40 years strayed from the definition of professionalism and what the legal profession should be. This is due in large part to the introduction of hourly billing, which requires a lawyer to produce a certain number of hours per year in order to substantiate his or her position in the firm. Needless time is spent generating needless reams of paper in order to fill the file and increase compensation. As one lawyer said, it is not the rate per hour so much as it is the number of hours that are billed. That statement directly correlates to the lack of professionalism we are now experiencing. Money is the ruler and until we, as a profession, get a handle on the money problem, we will continue to discuss the problem of professionalism ad nauseam. Legal practice has slipped away from a profession into a business. Law firms are operated with a view to the bottom line and not necessarily what is in the client's best interest. Of course, this subject is taboo and is not discussed in any seminars I have attended regarding professionalism. The lack of responsibility by newer lawyers is so evident that it smacks you in the face as a judge. Law schools are evidently not doing a proper job of educating the new lawyer on the professional aspects of the law practice, and the fact that it is not necessary to pursue a matter with "winning" being the only driving force of the litigation.

In my small way, I always try to encourage lawyers to discuss their differences and to attempt to avoid the unpleasantness of seeking motions of retribution. I can say, however, as an old civil lawyer myself, that during my time on the bench I have attempted not to meddle with lawyers when they are trying their cases. I always resented that of a judge when I was practicing. My normal practice during a civil term is to call the lawyers into my chamber and receive an assessment as to the nature of the case and where they are in an attempt to resolve the dispute. After having obtained that information, I ask if there is anything I can do to assist them in resolving the lawsuit. If I am advised that consultation with the trial judge will help, I participate in their discussions. If I am advised that the litigants are so far apart that there is no reasonable expectation of settlement, then I begin the trial and that is the end of my bullying. I allow justice to take its natural course. In addition, I allow the attorneys to pick their jury because, in my view, that is what their clients have paid them to do, and clients like to see their lawyers perform. If certain lawyers are not able to do this effectively and expeditiously, I may attempt to help them "move along." But, generally, I try not to meddle with lawyers during the trial. I am aware that this is not a uniformly accepted practice among my colleagues, but it is my practice.

If I were asked to give some pointers to lawyers involved in civil litigation, I might start by relating what a classmate of mine told me his father—who was an attorney—told him were the two most important attributes of being a lawyer. The first, he said, is to dress and look like a lawyer; and the second, show up. All too often these days that is not the case. Also, I might tell you what my father told me when I began the practice of law so many years ago. He said there are three things a lawyer needs to know how to do to be successful. He told me, first, a lawyer needs to know how to charge for his or her work—if a lawyer does not know how to charge for his or her work, no substantial income will ever be made. Second, a lawyer needs to know how to retreat—that is, back away from a conflict and not go full boar all of the time. Third, he said, a lawyer needs to know when his "A" is whipped and get out (he related that he had seen lawyers cost their clients more money by not knowing that third element than anything else he knew). I might add to those that a lawyer needs to be prompt in attendance, be attentive to the business of the court, always be well prepared to argue his or her point for a client's case, be knowledgeable about the law, be conversant with the facts, and, when citing case authority, give the court a factual situation analogous to the case at hand and not just boiler plate language from the opinion. Also, be straight-up with the judge and never, never ever prepare an order for a court to sign finding facts which are not supported by the evidence, or try to slip in some provision not considered by the court or supported by the testimony or other evidence and exhibits. Your reputation in this regard is paramount and, if ever breached, will slacken your reputation with the court forever and make the practice of law in civil litigation that much more rigorous and unpleasant.

In closing, I want to say that I hope these remarks on the subject of professionalism will be a benefit to the bar as an insight into how one judge views the legal practice and the professional aspects of it during our time. I hope you find herein something that will awaken your duties as a member of the legal profession and the professionalism that is required of that position. ■

Clifton W. Everett Jr. was elected in 1994 as a resident superior court judge for District 3A (Pitt County). Prior to assuming the bench, he practiced law for 27 years in Greenville.

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State Taxation of the *Pro Hac Vice* Lawyer

By Jerry Meek

In 2010 the NC State Bar amended its *Pro Hac Vice* Admission Registration Statement to require the out-of-state attorney to sign a statement verifying that he or she will report to the NC Department of Revenue any income earned in the case, "if required to do so by law." The amendment prompts the obvious question: When will an out-of-state attorney be required to pay North Carolina income tax? And, relatedly, when should a North Carolina attorney be concerned about paying income tax in another state?

Both the Due Process Clause and the Commerce Clause limit a state's ability to tax non-residents. As the United States Supreme Court held in *Complete Auto Transit, Inc. v. Brady*,[1] a state can tax non-residents only if the non-resident is engaged in an activity which has a "substantial nexus" with the taxing state, and if the tax imposed is "fairly apportioned" among the states.

For income tax purposes, it's not clear what is required for "substantial nexus" to exist. In *Quill Corp. v. North Dakota*,[2] the US Supreme Court held—in the context of requiring a non-resident to collect sales taxes—that substantial nexus required physical presence in the taxing state. But in *A&F Trademark, Inc. v. North Carolina*,[3] the North Carolina Court of Appeals rejected the argument that the physical presence test applied to taxes other than sales taxes. According to our court of appeals, the existence of sufficient economic ties will subject a non-resident to income taxation in our state, even absent physical presence.

Often, the *pro hac vice* attorney will travel into our state in furtherance of the representation, thereby indisputably creating substantial nexus. When the non-resident attorney performs services without ever physically appearing in our state, there is a continuing dispute over whether or not North Carolina has jurisdiction to impose an income tax. Notwithstanding this dispute, ultimately whether any tax is owed depends upon how any income generated from the representation is apportioned.

Each state, including North Carolina, has adopted legislation to implement the Constitution's requirement for fair apportionment of multistate business income. The goal of apportionment statutes is to roughly approximate the income that can be said to be fairly related to the services provided by the respective states. In the context of multi-

state legal services, this is rarely the same as what the client actually paid for the services.

Under most statutes, states employ a three "factor" formula for apportioning the business income earned by multistate actors, including lawyers. Usually these formulas take into account the taxpayer's property, payroll, and sales in each state, relative to the taxpayer's total property, payroll, and sales. Different states apply different weights to these factors. North Carolina weighs the sales factor twice as heavily as either of the other two factors.

Since it is unlikely that a non-resident attorney appearing *pro hac vice* in North Carolina will own or rent any real or tangible personal property in our state, the property factor is likely to be zero. Similarly, since the non-resident attorney typically will not pay compensation in our state, the payroll factor is likely to be zero.[4]

As a result, the sales factor is of greatest concern to the non-resident attorney. The sales factor represents the gross revenue sourced to North Carolina, divided by the gross revenue from all states. Especially in the context of services revenue, the critical task is determining to what state the revenue should be sourced. Two main approaches have developed.

First, in states that have adopted the Uniform Division of Income for Tax Purposes Act (UDITPA), services revenue is attributed to the state in which the greater proportion of costs are incurred to perform the activities that give rise to the income. Second, in the 11 states which have adopted a market-based sourcing rule, services revenue is attributed to the state where the customer or client receives the benefit.

North Carolina employs a variation on the UDITPA approach. Services income is sourced to our state if the "income-producing activities are in this state."[5] This rather unhelpful rule is explained through guidance issued by the NC Department of Revenue, which provides that when services are performed across state lines, gross receipts for performing those services "shall be attributed to this state based upon the ratio which the time spent in performing such services in this state bears to the total time spent in performing such services everywhere." Consequently, a non-resident lawyer who spends no time in North Carolina will owe no North Carolina tax, even if paid for appearing in a North Carolina action.

Let's take a practical example. A nonresident lawyer is admitted *pro hac vice* in North Carolina. She has no real or tangible property in our state and pays no "compensation" within our state. The property and payroll factors are therefore zero. She is paid $150,000 for 500 hours of work on the case. She spent 100 of those 500 hours in North Carolina. The numerator of the sales factor is therefore $150,000 x [100/500], or $30,000. Assuming that her gross receipts from *all* states during the year was $600,000, the sales factor is $30,000 / $600,000, or 0.05.

To calculate the apportionment factor, all of the factors must be combined, with the sales factor weighted twice: [0 + 0 + 0.05 + 0.05] / 4 = 0.025. This apportionment factor is then multiplied by her net business income from all states to determine the income that must be reported in North Carolina. Thus, if her net business income for the year was $320,000, the amount which must be reported to North Carolina is $320,000 x 0.025, or $8,000.

Fortunately, her home state will typically give her a credit for any tax she paid to North Carolina. She will in the end face a higher total tax burden only if her North Carolina tax bill is greater than her home state's bill. Obviously, if her home state has no income tax, this burden can be significant.

A similar calculation results when a North Carolina lawyer performs legal services in a foreign state. But since the Supreme Court's interpretation of the Commerce Clause gives the states considerable discretion when adopting apportionment formulas, differences abound. South Carolina, for example, adopts a single factor formula, under which only sales sourced to the state are considered in determining the tax. As a result of this diversity, apportionment formulas could overlap, resulting in double taxation of the same income. When a firm's employees are physically present is another state, some states may even require the payment of payroll taxes.

Finally, if the non-resident attorney is a partner, member, or shareholder of a partnership, LLC, or S-corporation, must each partner, member, or shareholder file a tax return in North Carolina? Because the distributive share of each owner of a pass-through entity will include income apportioned to North Carolina, the answer is generally yes. Fortunately, North Carolina—along with most other states—permits the partnership, LLC, or S-corporation to file a "composite return," thereby paying the tax on behalf of all of the firm's owners. This will avoid the administrative and compliance burdens associated with filing and processing multiple individual returns, often with little income to report. ■

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Endnotes

1. 430 U.S. 274 (1977).
2. 504 U.S. 298 (1992).
3. 167 N.C. App. 150 (2004).
4. This is true because, under N.C.G.S. § 105-130.4, compensation is considered "paid in this state" only if: (a) the individual's service is performed entirely in North Carolina; (b) only an incidental amount of the service is performed in another state; or (c) the base of operations, or place from which the service is directed, is in our state. Typically, the *pro hac vice* attorney will perform a substantial (and therefore non-incidental) amount of the services in his or her home state—drafting pleadings, preparing or responding to written discovery, or preparing for depositions or trial.
5. N.C.G.S. § 105-130.4(l)(3)(c).

Animal Damages (cont.)

Jack Russells in which a replacement for Laci could have been bought for less than $350.

20. Consider, too, whether ordering the refunding of veterinary charges paid by the Sheras was a remedy sounding in breach of contract that was not available in their suit against state veterinary hospital under the North Carolina Tort Claims Act.
21. *Heath v. Mosley*, 286 N.C. 197, 199, 209 S.E.2d 740, 742 (1974). Costs of repairs are some evidence of the decrease in value.
22. *Givens v. Sellars*, 273 N.C. 44, 51, 159 S.E.2d 530, 536 (1968).
23. *Kimes v. Grosser*, 126 Cal. Rptr. 3d 581 (App. 1911). *See also Burgess v. Shampooch Pet Industries*, 131 P.3d 1248 (Kan. App. 2006) (full amount of veterinary bills recoverable, although plainly in excess of replacement value, where 13-year-old dog had no market value).
24. *Hyland v. Borass*, 719 A.2d 662, 664 (NJ App. Div. 1998). *Accord, Leith v. Frost*, 899 N.E.2d 635, 641 (Ill. App. 2008).
25. *McDougall v. Lamm*, 48 A.3d 312, 324 (NJ 2012).
26. *Brousseau v. Rosenthal*, 443 N.Y.S. 2d 285, 286 (Civ. Ct NY Cnty, 1980).

Meet the Federal Judges—Chief Judge Robert J. Conrad Jr.

By Michelle Rippon

In the early 1990s what was then the State Bar Quarterly *published a series of articles loosely held together with the theme, "Meet the Federal Judges." In the next few editions of the State Bar* Journal*, we will be updating that series.*

Chief Judge Robert J. Conrad Jr.

"He has shown you, O Mortal, what is good. And what does the Lord require of you? To act justly and love mercy and to walk humbly with your God." Micah 6:8.

These words give insight into the experiences and character of Judge Bob Conrad.

Judge Conrad credits his father—a corrugated box salesman—with his early success as a litigator, at least to the extent that he learned the art of "a good sales pitch." He grew up with his younger brother and two sisters in a suburb of Chicago. He was 14 years old when his youngest sister was born and she became a nice "magnet" for the good looking girls!

It was a basketball scholarship to Clemson University that enticed Bob Conrad to move south. He majored in history, minored in German, and played point guard for what could be considered the university's best basketball team—the Elite Eight of the NCAA Basketball Tournament in 1980. In fact, he is now included on a poster that he keeps in his office depicting the "25 Man All-time Team" which was recognized as part of the 100 year anniversary of basketball at Clemson. However, he is quick to point out that he embraced a love of learning once he began his studies at Clemson. While he jests that he might be the only ACC player whose grade point average was higher than points scored, it's hard to argue with his eight for eight free throws in an upset overtime victory over #1 Duke—the first time in the school's history that Clemson had beaten a first-ranked team. The combination of excellence in athletics and scholarship earned him the Atlantic Coast Conference James Weaver Award for top student athlete, and Clemson's Norris Medal for Most Outstanding Student.

Basketball not only afforded Bob Conrad with an opportunity to attend college, but also provided him with tools for success. He explains that the game is not only competitive, but also requires a constant striving for excellence and building relationships, as well as respect for the dignity and worth of others. He certainly carries this forward in his work at the court where he has the utmost respect for court personnel—the administrative staff, the marshalls, his clerks, the maintenance crews, and, of course, the parties and attorneys who appear before him.

Judge Conrad isn't entirely sure what motivated him to choose law as a vocation. He does remember a lawyer who lived close by and whom he wanted to emulate. Once there, he says, he thoroughly enjoyed every aspect of law school from the challenge of study to the collegiality and campus life at the University of Virginia, where he graduated in 1983.

The practice of law began with Michie, Hamlett, Donato & Lowry, a 12-person law firm in Charlottesville, where he handled plaintiff's litigation. He then moved to Charlotte where he practiced general litigation with Horn & Conrad, and later with Bush, Thurman & Conrad. In 1989 Conrad was appointed as assistant US attorney for the Western District of North Carolina, and in 2001 he was promoted to US attorney. Although he found the private practice of law appealing, occasionally he would pick up the old billable hour notepad that he first used in his law practice to remind him that he didn't miss having to keep time in the least bit!

Judge Conrad's career as a United States attorney brought its own challenges. In 1999

Attorney General Janet Reno appointed him as head of her Campaign Financing Task Force charged with investigating fundraising improprieties during the 1996 election campaigns. He deposed both President Clinton and Vice-President Gore in the same week! Then in 2001 Attorney General John Ashcroft appointed him to the Advisory Committee on Terrorism. In connection with that assignment he prosecuted supporters of a Hezbollah terrorist cell in North Carolina and testified on terrorism related matters before the US Senate.

In 2004 Conrad became a partner at Mayer Brown where he remained until he was appointed to the federal bench by President Bush and later confirmed by the Senate in April 2005. He has been the chief judge since 2006. His seven-year term will expire in June 2013 at which time Judge Whitney has been

selected to take over this responsibility. He finds the work on the court enjoying and enriching. "No case is typical," he says, which also makes the work always interesting. He can still be a lawyer, but with a different skill set where the role is deciding instead of advocating. It does give him the opportunity to take time to research and to work on a case until he "gets it right"—a real luxury! "Sentencing hearings," he says, "are the most intense and challenging aspect of this work, particularly now that the judge must take the facts of each case into consideration and exercise discretion in reaching a decision." Close to 90% of all criminal cases are resolved with a plea, which explains the significant caseloads.

Judge Conrad enjoys trying cases. He respects the work that the trial lawyers put into their cases and believes in the jury system as the best way to resolve cases. For the most part, "the jury gets in right." He also believes that trials are "cathartic for the litigants." In fact, the judge worries that while dispute resolution may be less expensive and offer a faster resolution, important legal issues remain unresolved. He refers to Joe Anderson's law review article, "The Vanishing Civil Jury Trial," and observes that as fewer and fewer cases reach a trial, there is a lessening of trial skills among attorneys—especially a good grasp of the rules of evidence and civil procedure. Rather, attorneys "work at becoming skilled at taking depositions and resolving cases in mediation."

Judge Conrad has the greatest respect for his law clerks with whom he enjoys both a collegial and a coaching relationship. He explains that if students are "obsessive" in law school, they will generally carry that obsessiveness over to the practice of law. Instead he looks for clerks who have not only excelled in law school, but who also bring with them good judgment and a balanced approach to life. His advice to them is, "people matter, your word matters, your character matters." His respect and consideration for those who work with him is no better illustrated than with the decision to hire his career law clerk.

Bob Conrad first met TJ Haycox in 1987 when he came to work at Bush, Thurman & Conrad as a summer intern between high school and college. Even at that early age, TJ recognized that Conrad was someone special in that he was remarkably able to balance his law practice while genuinely caring for his family. Once in law school, TJ decided that he wanted to practice criminal law. By then Conrad was working in the US Attorney's Office, and with Conrad's help TJ was able to intern in that office between his second and third year of law school. After graduation, TJ took a job in the District Attorney's Office in Nashville, Tennessee. They continued to keep in touch. The two worked together again when, with the blessing of Janet Reno, Conrad asked TJ to join him on the Campaign Financing Task Force, and he was appointed as an assistant US attorney out of the Nashville division. As the work on the task force phased out, TJ returned to the US Attorney's Office to work as a federal prosecutor. By 2005 TJ was married with a family. He had never forgotten the lessons he learned from his early coach and mentor about making family count and he was finding it more and more difficult to work the kind of hours he was expected to work and devote time to his family. He knew that Judge Conrad would appreciate his priorities and together they decided that TJ would be the career clerk.

Coaching has been a major influence in Judge Conrad's life. Basketball was his passion and coaching was, at one time, his goal. This, he explains, is maybe why none of his five children followed his example and became lawyers. He instilled in them his love of the sport and used the "coaching method" to raise them. All except the youngest have graduated from university and all are successful—"They all have jobs!" His youngest son is a senior at Belmont Abby where he plays on the basketball team and plans a career as a college basketball coach. His older brother teaches religion at Charlotte Catholic and will be coaching the basketball team at Belmont Abby this year.

As is the case with many of his colleagues, Judge Conrad feels a sense of isolation—one of the few negatives to the job. If he socializes with attorneys he is "funnier and right more often." He does actively support the Mecklenburg County Bar and the North Carolina Bar Association where he has served on the Board of Governors. He will be participating with a panel on, appropriately, sports law at the Southern Conference of Bar Association Presidents later this year. He, along with his clerks and other court personnel, run on Fridays before work. And he participates in "lunch and learn" opportunities for interns to meet and talk with other law clerks, judges, and court personnel.

No summary of Judge Conrad's life or career would be complete without mentioning the pride and devotion he has for his family. In an article written by his daughter Kim in 2004, she began, "He is a storyteller and a reader, an adventurer and a homebody, a jokester and a leader. Bob Conrad is a man of contradictions, two people in one personality—a distinguished career man and a giving father." This is a worthy tribute by a talented and proud daughter for a loving and deserving father. His daughter also recalls the time when Conrad spent 15 months from January 2000 to April 2001 working in Washington, DC, in connection with his work on the Campaign Financing Task Force. He would come home on weekends and begin to do laundry. When his wife Ann asked him why he was suddenly doing laundry, he told her, "I just tried to think of something that would make your life easier." His ability to maintain the priorities of family life with a strong work ethic has been entirely intentional as he integrated his family life with his work. As the children were growing up the ritual was Saturday morning breakfast together at Anderson's and then all off to the office. When he traveled he would make a point of taking one child at a time with him for quality alone time. The family meets together on a regular basis and his children have remained best friends.

Judge Conrad presides in the courtroom once occupied by his friend and mentor Bob Potter. Under the glass top of Judge Potter's desk were these words of wisdom: "Bad planning on your part does not necessarily constitute an automatic emergency on my part!" The saying is no longer there, but his colleague's sense of humor has not been forgotten. While attorneys see the serious and deliberate side of Judge Conrad in the courtroom, behind that exterior is the gentle, often humble humor of a man who is comfortable with himself.

Behind his desk hang two portraits: one is of Sir Thomas More the English lawyer, social philosopher, statesman, and author of *Utopia*, who died the king's servant but God's first. The other is of Fr. John Bradley, one time assistant to Bishop Fulton Sheen and president at Belmont Abbey College. Also decorating his office walls are two beautiful oil paintings of children done by his wife Ann, an accomplished artist; a framed flag given to him at his swearing-in; and a framed rendition of the famous Shroud of Turin. He also keeps a copy of the Bible and a treatise on the United States Constitution on a table in the sitting area of his office.

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An Interview with New President M. Keith Kapp

Q: What can you tell us about your roots?

I'm a native of North Carolina with deep Tar Heel roots on both my mother's and father's side. I was born in Winston-Salem and grew up between Rural Hall and Bethania in Forsyth County. My parents live on a farm in Forsyth County that has been in my father's family since the 1790s. My mother is from the Yadkin River Valley in Wilkes County, where her family history is equally as long.

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

I studied history and English at UNC-Chapel Hill. As a Morehead Scholar, I had the privilege of participating in a program that strongly emphasizes leadership and responsibility. I took advantage of leadership opportunities on campus, particularly in the Dialectic and Philanthropic (Di-Phi) debating societies, which I served as president. However, at first I had no clear idea what profession would combine my interest in scholarship with the chance for leadership. Academia looked like a good option. I could see myself as an American history teacher. Ministry within the Moravian Church was a possibility, too. I chose to apply to law school in part because a number of the mentors I met at the university—especially among Di-Phi alumni—were lawyers. John Sanders, past director of the Institute of Government and past vice-president of the university system, is an outstanding example. Another is Chuck Neely, who hired me at Maupin Taylor and Ellis. That grueling first year at UNC Law did *not* convince me that I had made the right choice! The movie *The Paper Chase* was just a couple of years old at that time, and I promise you – I understand completely why that first-year student literally lost his lunch, because my seatmate did exactly the same thing in the face of UNC's version of Professor Kingsfield! What made the difference for me were, again, the people of the law—the lawyers themselves practicing an honorable profession. After my first year I was fortunate to obtain a summer clerkship with the Winston-Salem firm of Hall, Booker, Scales and Cleland. Back then, law students didn't always have clerkships that first summer. Some firms preferred to wait until the end of the second year to offer that experience. From the first week I knew that the law was where I was meant to be. One of the partners, Roy Hall, was a terrific lawyer and a county commissioner, demonstrating that a demanding profession and public service can go together. Everybody put in long hours of hard work yet seemed to have time for great families and interesting lives. They treated me as one of the team. 2012 marks the 33rd anniversary of my admission to the bar. I have been glad of my choice and proud of my profession for every one of those years.

With his wife Chancy looking on, M. Keith Kapp is sworn in as president of the State Bar.

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

I have a commercial and administrative litigation practice. To my knowledge, I was the last associate hired by Maupin Taylor and Ellis who was required to try a case, draw a will, draft a contract, close a piece of real estate, and go to an administrative hearing. What stuck with me out of all that was the dispute side rather than the transactional side. However, I am thankful for the broad knowledge I got in those early years of taking every file in the firm that either nobody knew how to handle or that nobody wanted to handle. I believe because of that training I am able to see issues in cases that lawyers who are more focused and specialized do not necessarily see.

Q: You are a partner in a large interstate law firm and the majority of lawyers in North

Carolina are practicing alone or in very small firms. Can you relate to the average lawyer and understand his or her problems?

My service to the bar at the local, regional, and the state level has brought me into contact with what you describe as the "average lawyer" in North Carolina. I've practiced with the "average lawyer" throughout my career. At each level of service, whether as president of the Wake County Bar or on the Board of Governors of the North Carolina Bar Association, or as a councilor to the State Bar, I've tried to focus on what is best for the practicing lawyers in the state. I'm also supported by a State Bar Council where the great majority of the members are practicing in small firms or as solo lawyers in their judicial districts. They were a constant source of help to me as a fellow councilor and will continue to be so as a State Bar officer.

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

I was elected as a councilor for Wake County 10th Judicial District in 1999 and served three terms. This was my first involvement with the Bar Council. However, my State Bar involvement goes back to the era of Roy Davis, as president of the Bar, and Bill Davis, as chair of the Ethics Committee. At that time, the State Bar embarked on a program to get young lawyers' views on issues, and I was appointed the only young lawyer on the State Bar Ethics Committee. In that service I wound up drafting the initial ethics opinion adopted by the committee and the council which led to the case of *Gardner v. State Bar*, wherein it became the law in North Carolina that an insurance captive law firm could *not* represent the insureds of insurance companies (316 N.C. 285 (1986)).

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

My experience with the State Bar Council has been wonderful. I've never met a more dedicated group of people. The ability to have people on board from literally Manteo to Murphy and from small towns and large cities and different parts of the profession makes it truly a diverse group. As to how it differed from what I anticipated, it has been more rewarding than I expected it would be when I came to serve the first year of my three terms as a councilor.

Q: Can you tell us about the most difficult issue you've faced as a member of the Bar Council?

The most difficult issue I've faced was my participation in the special committee that looked into the Hoke/Graves matter or, as some people call it, the Gell matter. It was very hard to reconcile the decision of the Disciplinary Hearing Commission and to explain the State Bar's part of it as the prosecutor. Perhaps we didn't present the best case, but still, justice was done and administered by the Disciplinary Hearing Commission. The public does not understand the distinctions for due process for the accused provided by the investigator, the prosecutor, and the judging body.

Q: What do you think are the biggest issues currently facing the council?

The increased globalization of the practice of law and the technology changes that are wrought on a daily basis are the biggest issues with which we must wrestle in the State Bar. Change is constant, but change is much more rapid than it was in the past.

Q: You have indicated that the State Bar ought to assist lawyers as they enter the profession and as they leave it. What do you see as the biggest problems facing new lawyers and what should the organized bar being doing about them?

This year we had the highest number of applicants in our history for the bar exam in July. Our state has seven schools of law. This year 42,000 people nationwide took the bar exam, and only half that number of legal positions are open in the country. How many of these new lawyers have taken on huge debts in order to earn their law degrees, expecting that at least a decent living awaits them? How many hesitate to go into public service law because government salaries can't keep up with debt payments? Our State Bar already works with law school deans and others to make sure that prospective students have a clear, accurate understanding of the demands and rewards of the profession—and of the realities of potential employment.

Q: Are there too many lawyers? Is that a legitimate concern of the State Bar?

There are too many lawyers. Most statistics I've seen in the past year support that. As I mentioned earlier, we have twice as many people sitting for bar exams in this country as we have job openings for lawyers. I personally trust in the free market, and I believe there will be correction in that regard. However, it is a legitimate concern of the State Bar because many of these people who have licenses and no employment have problems with addiction, stress, or mental illness, and we are seeing them in the LAP program. Inexperienced, unmentored young lawyers do not know what they are doing, and we are seeing grievances filed against them. They do things that are unethical because they do not know the North Carolina Rules of Professional Conduct or State Bar ethics opinions. It is one thing to pass the multistate ethics exam and another to know what the North Carolina Rules and ethics opinions require in practical application.

Q: What about lawyers who are approaching the end of their legal careers? Does the State Bar have a role to play facilitating their retirements?

Lawyers now practice and live longer and, with the aging of baby boomers (myself included!), we must acknowledge that more lawyers will be facing illness, family stresses, addictions, and dementia. The State Bar has an excellent LAP in place, and interventions for cognitive impairment due to age are on the rise in LAP. In the coming year, we will be looking at additional ways to assist lawyers as they exit practice.

Q: Are you concerned at all about globalization and whether the State Bar ought to be involved in the regulation of foreign lawyers?

We should regulate only those for whom we provide licensure. The question is whether we should license foreign lawyers, and that is a question first for the Board of Law Examiners.

Q: You've been an officer during the past two years, first as vice-president and then as president-elect. What has that been like? Does the president generally call the shots unilaterally or does he seek consensus among all the officers before taking action?

The presidents I have served under have always sought consensus. I plan to do absolutely the same thing. I also plan to get the involvement of the councilors. Being president of a licensing body does not make one a czar.

Q: Can and should anything be done to facilitate the licensure of lawyers whose military spouses are transferred to bases in North Carolina from other states?

This has already been done. I commend the work of our immediate past president, Tony di Santi, and his committee made up of members of the Board of Law Examiners and councilors of the State Bar. Their work

resulted in changes to the Board of Law Examiner's rules which will allow these spouses to timely seek licensure in this state. The military is very important to our country and this state. We have reached out as a self-regulating, licensing entity and provided assistance in this area by: (1) giving the spouses of those in the military priority in processing of applications, (2) providing a comity rule that recognizes their need to move between jurisdictions as often as every two years, and (3) recognizing the cost burden to them. These are excellent actions. I will be pleased to preside in January at the meeting where these rules are brought by the Board of Law Examiners to the council for approval.

Q: The State Bar has been sued by LegalZoom. What's the dispute about, what is the status of the case, and why is the litigation important?

LegalZoom is an online legal document preparation service that operates nationwide. At its website, LegalZoom asks the customer—a member of the public—a series of questions. Based upon the customer's answers, LegalZoom prepares a legal document which it either delivers to the customer or files for the customer. In 2008 the State Bar's Authorized Practice Committee sent LegalZoom a letter advising it to cease and desist engaging in the unauthorized practice of law in violation of N.G. Gen. Stat. §§ 84-2.1, 84-4 and 84-5. LegalZoom sued the State Bar, asking the court for a declaration that it is not engaged in the unauthorized practice of law. It also asked the court to compel the State Bar to register a purported prepaid legal services plan. LegalZoom contends that the State Bar is violating the anti-monopoly and equal protection clauses of the North Carolina Constitution. The case has been designated by the chief justice and by the chief judge of the North Carolina Business Court as a Mandatory Complex Business Case under N.C. Gen. Stat. § 7A-45.4. The court denied the State Bar's motion to dismiss under Rule 12(b)(6). The State Bar filed a counterclaim asking the court to enjoin LegalZoom from engaging in the unauthorized practice of law. The State Bar expects to file additional dispositive motions. The case has not been scheduled for trial. The State Bar's interest in this case is to fulfill its duties under Chapter 84 to protect the people of North Carolina from harm resulting when legal services are provided by those unqualified to provide such services.

Q: In your opinion, does it make sense for lawyers to be regulating themselves? Is it good public policy? Do we deserve the public's trust?

It does make sense for lawyers to regulate themselves. It is part of our heritage beginning with the Temple Bar and other Bars in London that go back to the Middle Ages. These are early examples of lawyers policing and regulating themselves. It is a tested policy that is tried and true. As long as we have the public trust, then we should be allowed to regulate ourselves. I believe, at present, we have the public trust in the manner in which we regulate the profession.

Q: You served on the State Bar's Ethics Committee for many years. What was that like? Was all that arguing worthwhile? Does the Ethics Committee make a difference in the professional lives of attorneys? Does the process benefit the public?

The North Carolina State Bar Ethics Committee is one of the last great debating societies in the western world. The debate that goes on within that committee on the fine points and the broad strokes of where ethics covers the profession is just amazing. Chairing the Ethics Committee and giving everybody the opportunity to be heard has been one of the most challenging things I've done in my professional career. It is much better to have a chance to ask what is ethical before being informed that what you have done is in violation of the rules and subjecting yourself to the potential loss of your license. This is the first step in protecting the public. The Grievance Committee and its recommendations to the Disciplinary Hearing Commission protect the public, but many, many more reap the benefits when lawyers are able to get guidance on what is and is not right before they make a mistake.

Q: At one time you chaired the State Bar's Facilities Committee. Can you tell us where we are in regard to the construction of the State Bar's new headquarters?

The State Bar exists to regulate the profession and to serve North Carolina's citizens who deserve quality representation from lawyers of integrity. For years the staff and facilities that enable the Bar to carry out those functions have been scattered across several locations, many of them leased. The new building at the corner of Blount and Edenton Streets will have space and technology to enable staff to do their jobs effectively and efficiently and, very importantly, to provide the convenient public access we have not had in previous facilities. The State Bar is a state agency, and our council meetings, disciplinary hearings, and trials are open to the public. We are on time with the construction, within our original cost estimates, and we plan to occupy the building in early 2013. I look forward to presiding when the ribbon is cut for the new building in April. We have had phenomenal support for the building from inside and outside the profession. I'm very appreciative of the work of the governor's staff, the Department of Administration, the State Construction Office, and the Council of State. I am grateful for the North Carolina State Bar Foundation, which was created by some of our past presidents to provide an opportunity for lawyers in the state to contribute if they so desire to the enhancement of the building project.

Q: The North Carolina State Bar Foundation, which is independent of the Bar Council, is running what appears to be a very successful fund-raising campaign in support of the new building. Do you think lawyers ought to contribute?

I'm not yet a past-president and, as part of the group that continues to regulate the profession, I've not been heavily involved in the activities of the North Carolina State Bar Foundation. I'm appreciative of what they have done, and I have thanked a number of people as I've become aware of their contributions to and through the North Carolina State Bar Foundation. The opportunity to give is a matter of personal choice, and I appreciate those who are willing and able to make gifts.

Q: Is there anything else you would like to accomplish during your year as president?

Always and foremost I will seek to protect the public as well as support the legal profession in North Carolina. I hope that we will be able to keep moving forward with all the good work my predecessors have put in place. Again, I am interested in working to make sure that as the regulatory body, we are doing the best we can for the lawyers who are at the beginning of their practice and those who are at the end of their practice.

Q: If you had not chosen to become a lawyer, what do you think you would have

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Depression, stress, career issues, and addictions. Believe it or not, this is an uplifting story.

Actually, there are many stories. Every one of them about someone in the legal field.

Lawyers are as vulnerable to personal and professional problems as anyone else.

Competition, constant stress, long hours, and high expectations can wear down even the most competent and energetic lawyer. This can lead to depression, stress, career problems, relationship issues, financial problems, or alcohol and substance abuse.

So where's the uplifting part? That's where we come in.

The Lawyer Assistance Program was created by lawyers for lawyers. While we started as a way for attorneys to deal with alcohol related problems, we now address any personal issue confronted by those in the legal profession.

Our message to anyone who may have a personal issue, whether a lawyer, a judge, or a law student, is don't wait. Every call we take is confidential and is received by a professional staff person. You can be confident that you're talking to the right person and that no one will know about it.

We understand what it's like to face personal problems within the profession, because we only help lawyers.

Our service is not only confidential, it's free, paid for with your yearly bar fees.

If you have a personal issue, or know someone who does, we can be the crucial first step in turning things around, a role we've played for many of your peers.

We have countless success stories we could tell, and yes, they are uplifting. But we do our work quietly, confidentially, and professionally so the stories will stay with us.

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FOR THE ISSUES OF LIFE IN LAW

The Ring

By Terry Orndorff

"To be yourself in a world that is constantly trying to make you something else is the greatest accomplishment."

—Ralph Waldo Emerson

* * * * *

Every nerve in Luke's body tingled as he crossed into enemy territory. Shouldering his gear, he drew a deep breath and carefully made the initial climb to the top of the incline. That was the easy part, he thought. Here the hot, damp air seemed almost viscous. His lungs struggled at twice their normal rate, and his chest shook as his heart hammered against his rib cage. Even as his body began the required turn to the left, his brown eyes were already scanning ahead for any hint of danger. He paused briefly to assess what lay ahead. It was too quiet—an unnatural quiet. He could almost sense an evil presence ahead. A ribbon of sweat trickled down his forehead and burned in his right eye. He removed his glasses, ran his sleeve across his face, and replaced them in one smooth motion. This is insanity, he thought, but I have no choice. I must move now, before I am noticed. Only a few more yards to go, but they would be the most treacherous of all. Luke knew from experience that he should continue with a slow, careful, stealthy approach. Unfortunately, the adrenaline surging through his body began to wrestle control from his prefrontal cortex. Fight or flight. He put his head down and began a quick forward drive. Only a few more feet...he could still make it.

A silent projectile rocketed toward Luke. Its aim was true. He felt a swarm of angry hornets attack the base of his skull just before a blanket of darkness encompassed him.

As the haze slowly lifted, Luke awoke to a throbbing pain in his head. He was groggy, but alive. He lifted his face from the ground and brushed the sand off his cheek. But it wasn't sand. It was gritty like sand, but it had a familiar, unpleasant odor...and it was sticky. His hands instinctively began searching for his glasses. "The ring!" he thought. He reached to his chest to find that the ring was still on the chain hanging from his neck.

"Kid, get in a seat now!" the bus driver yelled at Luke as he struggled to his feet.

The school bus was already moving and Luke fought to maintain his precarious balance. As he bent down to retrieve his glasses, he saw the weapon at his feet—an eighth grade algebra book. The laughter subsided, and Luke attempted to obey the bus driver's command as the vehicle jostled him from side to side.

"Yeah, sit down, freak!" a voice barked from the back.

This comment initiated another wave of laughter. As he approached each row, the seated passengers scooted toward the aisle. No one wanted to sit next to a target for fear that they might catch some shrapnel as well. He searched for Amy's face without success. Amy always saved a seat for him. Well, not really "saved" a seat, since no one wanted to sit with her either. But her bus stop was one of the first in the morning, so she was usually able to find a seat for herself, and for Luke.

The other students regularly terrorized Amy because of her weight and how she dressed. She wore long sleeves even on the hottest of days. Luke thought he knew why she wore the long sleeves. Last month, the school bus had hit a bump that almost sent Amy's clarinet case to the floor. When she reached out to keep it from tumbling, Luke was able to see a series of straight scars running up and down her forearm like railroad tracks. Amy quickly pulled her sleeve over the disfigurement and turned away. It was never discussed by either of them.

As Luke's left buttock finally caught hold of the corner of a crowded seat, he reached for the ring, closed his eyes, and thought about his father. Though he would never admit this to anyone, Luke felt like he somehow connected with his father when he held the ring.

Only seven months had passed since the "dark day," the worst day of his young life. On August 18th, Luke's father was driving home through the angry remnants of a tropical storm known only as "TS Four." Five miles from home, he spotted a stranded motorist through the downpour. While he assisted the elderly gentleman with a flat tire, a green van suddenly swerved out of the mist. The impact threw his father's body over 15 yards. It was the next day that Luke received the ring.

Luke had just made it into the school when he heard a voice that made his bones turn to liquid.

"Hey Puke! You got my report yet?" Ned Barfield said.

"I have to get to class," Luke replied, as he tried to move ahead through the herd of students.

Luke felt a hand grab the collar of his shirt and he was suddenly slammed against the lockers. Ned then turned him around so that they were face-to-face, or in this case, face-to-chest.

Ned had his hand on Luke's throat, pinning him against the lockers. Breathing became difficult.

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 second prize is published in this edition of the *Journal*.

"It's due tomorrow, and I better get it tomorrow. You understandin' me, Puke?"

Luke hesitated, and then nodded slightly.

Ned leaned down and spoke softly so that others couldn't hear. His yellow teeth were only inches from Luke's ear and his thick, hot breath smelled like old eggs.

"And you better not think I'm going to feel sorry for you because your daddy died, you little puke. What a waste he was. He sure didn't teach you how to be a man. Do you cry for your daddy at night like a little baby? Huh? Do you curl up in a little ball and whimper? Do what I tell you, or I just may show up at your house and get rid of your mommy, too. Then you'll be an orphan baby. How 'bout that? I know where you live. Maybe I'll sneak in your house and put rat poison in her coffee maker. You like that? Or how 'bout I just show up one night and take my ball bat to the back of your mommy's head? I'll do it—you think I'm kidding, Puke? Do you?"

Luke shook his head.

"Is there a problem here?" Assistant Principal Coffman asked. Neither boy had noticed his approach.

"No sir," Ned said immediately. "My buddy Luke and I were just playing around."

"I don't believe you," Coffman said, "and I don't know who started it, but I want it to end right now!"

"Really?" Luke thought, "You don't know who started it? Seriously?" But he said nothing.

"Now get to class, both of you," Coffman ordered.

* * * * *

"Luke, did you see Amy in school today?" his mother asked as he slung his book bag up on the kitchen table.

"No, she must be sick again," Luke replied.

"I spoke to her mother this morning. She was having a time trying to get Amy to go to school. She said that her depression has gotten so bad that she may have to take her to the doctor to get medication."

"She doesn't need medication, Mom. She needs kids to stop picking on her because of her weight. All the girls call her Fats McCoy."

"Well, kids do tease, especially girls at that age."

"It's not just teasing when you're being cruel to someone every minute of every day," Luke said.

"Sweetie, I was not defending the girls, it's just something that we all went through. It will all work out eventually.... Luke, how in the world did you manage to get dirt there?"

Before Luke could react, his mother had already reached out and began rubbing his neck with her thumb.

"Ow Mom, stop!" Luke reached up, protecting his neck.

"Luke, are those bruises?"

"It's nothing Mom, we were playing football today at recess."

"Are you sure?" Luke's mom asked. He could tell from her tone that she was suspicious. Now her hand palmed the top of his head and tilted it slightly, first left, then right, all the while scanning for other marks.

"Yes Mom, it was football. I'm kinda hard to take down," he said with a crooked smile.

At 13 years old, he was the man of the house now. He had to take care of himself and his mother. Mom had enough to worry about. Sometimes, late at night, he could still hear her crying softly in their room...her room.

"Are you still getting picked on by the kids at school...that Barfield boy?"

"No, Mom." Luke drew out the word "Mom" like she'd just asked if she could walk him to class on the first day of a new school year.

"It's kind of odd how he suddenly stopped bothering you after your father..." her voice trailed off.

"Everything is fine! Ok Mom?" He had made it to his room before she could reply.

"Ok, honey," she said to the closing door.

Luke lay in his bed, staring at the ceiling. His face burned with shame as tears silently glided down to the pillow. He closed his eyes. The room was silent, other than the quiet hum of the Batman clock, and the whisper that escaped his trembling lips, "I miss you, Dad." Then he allowed his mind to relax, to drift back...to better times...a time before...

* * * * *

They were a complete family again, playing on the beach where they had spent many happy times before the Dark Day.

"Wow, nice throw!" Ken Winston said as Luke whipped the ball over the waves.

"Thanks, Dad," Luke grinned.

He wasn't about to tell his dad that he had practiced his throws every chance he could since they bought the water ball. The ball, made of a soft rubbery material covered in cloth, was designed to skip across the top of the water. But it could also be used just to play catch, as Luke and his dad often did. They would usually make it a contest to see how far apart they could get and still throw accurately. Luke didn't have a friend to practice with, so every day after school he would throw rocks at different targets in the woods.

"You really should consider trying out for the baseball team this year."

"Nah, I just like throwing with you, Dad."

Luke's mom called from the beach, "You boys need to finish up if you still want to have time to get to Fort Macon."

It was almost a tradition by now. Before the drive home, Luke's mom would take a book and read by the pool, "one last slice of bliss" she called it, whatever that meant. "Borrring," Luke thought. But the men would do something fun. They would drive up to Fort Macon State Park and walk around the old fort.

As Luke and Ken Winston sat on a set of steps inside the fort, they watched the swollen clouds drifting over the ocean. Luke's fingers traced the century old grooves in the steps that were left by a shot from a Union cannon. The shot had chipped the edge of each step as it slid down the stairway. Eventually, the Confederates who manned the fort had surrendered to the Union Army.

"Did they surrender because they weren't brave enough?" Luke asked.

"No, Luke. There were many brave men and women on both sides in that war. Choosing not to fight is often the right thing to do. You can't worry about what others think, you have to do what you know to be right."

After a pause, Luke said, "last week in the cafeteria, some of the guys dumped their garbage on my tray while I was eating. I couldn't eat the rest of my food."

"Did you tell a teacher?" his father asked.

"I told one of the cafeteria workers, but they just told me to clean it up. While I was cleaning it up, a boy at the next table called me a 'wimp.' I guess he thought I should have fought them," Luke said.

"Do you think you should have?"

"I guess not. If I had tried, I would have been beaten up, and probably would have gotten suspended, too."

Luke looked down at the steps so his father wouldn't see the tears beginning to well up in his eyes. "I can't wait until I'm out of school and I don't have to worry about bullies anymore."

His father reached down and placed his hand over Luke's. The ring on his right hand glared in the sunlight.

"Luke, you need to understand that you will run into bullies all of your life."

Luke looked into his father's eyes, hoping that he was joking, but knowing he wasn't.

"Even after I'm out of school?" Luke asked.

"Yes," his dad said. "It doesn't matter where you go or what you do, you will come across bullies. Most of the officers I work with are very good, honorable people, but over the years I have met some that use their authority to bully others. I've seen it happen with politicians, lawyers, prosecutors, even judges. Anybody with power over someone else can be a bully."

"Do they hit people and dump garbage on them?" Luke asked.

Luke's father smiled at the question. "When an adult bullies another adult, it's usually not physical abuse, it's an abuse of power. They use some advantage they have over others to try to demean them, to make them feel weak and helpless."

"Why would anyone do that?"

"Often, it's because they themselves have been the victim of abuse in the past."

His father reached down to the bottom of one step and picked up a small flat piece of black and gold paper. He unfolded it into its original cylindrical shape, and handed it to his son. Luke could just make out the word "Macanudo" on it.

"Abuse can be a circle, like that cigar band. In some families, children are bullied by their own parents, and that violence can travel through many generations."

Luke frowned. "Does everyone who is bullied later become a bully?"

"No. We don't know why a change occurs in some victims of abuse but not others."

"How can you tell who has been changed into a bully?" Luke asked.

"Unfortunately, if abuse changes someone, you won't know until they acquire some type of power over others—and that may take years or even decades."

Luke and his father got up and walked through the fort, past the field cannon, and toward the entrance. As they reached the sally port, Luke asked, "If someone is being abused, how can they make sure that they aren't being changed into a future bully, Dad?"

His father smiled and led him to a bench. As they sat down, Luke watched his father begin working the gold ring off his right hand.

"With this," he said, as he held the ring up to Luke.

Luke took the ring and studied it. It was the first time he'd ever held it. There was no stone, and only one word on the face of it - "Love." It was the ring Luke's grandpop and memaw had given his father the day he'd left for basic training.

"Is this supposed to be a magic ring?" Luke grinned.

"The ring itself is only a symbol. Do you still have that cigar band?"

Luke held it up beside the gold ring.

"The cigar band represents a circle of abuse, but this ring represents a circle of love. Your grandpop and memaw were loved deeply by their parents. They were treated with fairness and respect throughout their childhoods. Then, when I was born, they treated me that way. I was brought up in an open, loving home, where I could talk to my mom and dad about anything.

"Just like me!" Luke interrupted.

"Yes, and when they disciplined me, they did it for me, not to me—even punishment was done in love, not anger. On the day I left for the marines, your grandpop told me that as I got older, I would probably forget much of my childhood. He made me promise that I would remember one thing above all else...that I was loved. That's when he gave me this ring."

Luke's father's eyes seemed to glisten as he looked thoughtfully into the distance. "And it's that foundation of love that gives you the ability to resist becoming a bully."

"I guess not every kid gets a Luke sandwich?" Luke asked with a grin.

The "Luke sandwich" had first begun when he was very young. As far back as he could remember he would call for a Luke sandwich. Usually this occurred while he and his parents were on the sofa together, or sometimes as he was going to bed at night. The unwritten rules declared that upon his cry of "Luke Sandwich!" his father and mother were then obligated to wrap around him on either side, thereby becoming the bread of the sandwich—a family hug. And though there were no minimum time requirements, the hug would always last at least a full minute, and often longer.

"That's right, not every child is raised in a loving home. Always remember that the cycle of love can overcome the cycle of abuse and hate, okay?"

Luke nodded as he watched the gold ring slide back onto his father's right hand with the word "Love" upside down. If he had pointed this out to his father, the response would be the same as always, "It's more important that I can read it."

They left the fort and began walking up the cobblestone tracks toward the parking lot. "Sometimes I have nightmares about you getting hurt, getting killed..." Luke said.

"Well, I was in the marines for eight years and I've been a police officer for five now...so far, so good," he said with a grin.

"I'm serious, Dad. Don't you ever worry about getting hurt or killed?"

"I don't worry about it," Ken Winston said. "Worrying isn't helpful. I try to always do what's right, which is not always what's safe. Besides, I figured out the secret to living forever."

"Sure you did," Luke smiled, "What is it?"

As they approached the car, Ken Winston stopped, looked his son in the eyes, and said, "Your whole life, day after day, little by little, I've been downloading myself into you. Whenever we spend time together, each time we talk like this, I leave a little more of me in you. Through you, and then through your children, I will live forever." Then he winked at Luke as he opened the car door.

"Ha! Sure, Dad," Luke laughed.

Suddenly, Luke heard a scream from across the parking lot. But it wasn't the parking lot any more. It was...Luke shot upright in bed. The screaming sounded like his mother, and it was coming from outside. Luke bolted out the front door.

"Luke, stay back!" his mother cried.

Luke's body instinctively froze as his eyes took in the immensity of the beast that was in front of her. It was Bear, the large mixed-breed dog that brutally mauled a 16-year-old girl in the neighborhood last year. The dog's great round head seemed the size of a basketball. As the dog snarled and growled, long strings of foamy, white saliva swung from its jaws. The lips drew back to reveal impossibly large teeth. Luke looked around for a weapon, but saw none. Finally, his eyes fell upon the water hose laying in the yard. Within seconds, a hard stream of cold water struck the dog in the face. Bear yelped in surprise, and jumped back, but immediately recovered and advanced toward this new adversary. The low rumbling growl penetrated Luke's body. Luke adjusted the aim of the water stream and gave Bear another hard shot in the face. Bear shook his fur, looked at Luke, and then turned and ran

down the road, out of sight.

"Luke!" his mother ran to wrap her arms around him. Though the dog had never gotten closer than five feet to him, his mother's eyes took a quick inventory of his body parts, making sure everything was present and accounted for.

* * * * *

"Are you okay, Amy?" Luke asked.

She just nodded and looked at him with a slight smile, but what was troubling was the way she seemed to be looking right through him. It's the medication, he thought.

When she didn't board the bus home, Luke searched for her, and eventually found her at the edge of school property, beside the old supply shed.

"Amy, if we don't leave now, we'll miss the bus. We may have missed it already."

"Oh, you're going to miss the bus, Puke." Ned Barfield had appeared by the supply trailer holding a liquor bottle. Worse yet, his two accomplices, Mike Bradford and Kevin "Goat" McMillan, were with him. Mike wasn't too bad when he was by himself. He was really just an immature punk who liked to disrupt class with fart noises, both imitation and authentic. But Goat was almost as mean as Ned.

"So you decided to skip the report and make me fail history, huh Puke? Maybe you thought I was joking before? Is that it, Puke?"

Before Luke could even get to his feet, Mike and Goat grabbed him, twisted his arms behind him, and jerked him up. Pain shot through his elbows.

"And looky here, the skinny wimp's girlfriend is a big tub of lard." Ned laughed. He leaned over and put his face close to Amy's. "Heya, Fats." Amy just stared ahead.

"Take him to the creek," Ned ordered. "It's time for little Puke here to get a lesson in respect. And I'll take Princess Jabba along as well. She seems like lots of fun."

Ned reached down, grabbed onto Amy's hair, and pulled until she rose to her feet.

Mike and Goat began forcing Luke to the woods with Ned and Amy following. They were holding Luke so tight that every time he hesitated, or stumbled, it was a new adventure in pain. The creek lay only a few yards inside the woods. It was about 30 feet across and lined with rocks and pebbles. They forced Luke to his knees at the water's edge. Ned sat Amy down on the side of a large fallen tree about 20 feet away.

"Look Fats, we have front row seats," Ned said. He then turned toward Mike and Goat and said two words: "Dunk him."

Luke had just opened his mouth to say something when suddenly his head was forced into the water. Murky, slimy water rushed into his mouth. He struggled without success. "This is how I'm going to die," he thought. "I'm going to die and they will get away with it. I will be just another kid who drowned while playing in a creek where he shouldn't have been. And Amy isn't in any condition to tell what really happened." Luke began convulsing and just when he was sure that he was about to lose consciousness, he was brought up, sputtering and coughing.

Luke was only up for a few seconds, and had almost caught his breath, when Ned said, "Again," and he was back in. Luke could feel the gritty residue in his mouth. His lungs burned as he fought against the autonomic reflex to breathe. As the burning became white-hot, he involuntarily released his remaining air in a great "Huuffff!" Just as he was about to inhale the filthy water, he was brought up again.

"Woo hoo!!" Ned was euphoric from Luke's near drowning.

"Now that's how you teach respect, isn't that right, Fats?" Ned eyed Amy up and down. "You know you need to learn a little respect, too. I mean, how can I respect you if you don't respect yourself?" Ned said mockingly. "Just how many rolls do you have under there?" He pulled a knife from his pocket and placed the blade under one of the buttons on her blouse. With the flick of his wrist, the button was gone.

Luke heard Mike say, "Ned, what are you doing? I don't want to be part..." and Luke was back under water.

This time it was only Goat pushing him down. Maybe Mike was still arguing with Ned, or maybe he just got scared and left, but it didn't matter—Luke was too weak to fight.

Time began to slow. Luke felt the ring on the chain tap, tap, tapping on his nose in the water's slow current. Words from his father swirled in his mind—not to let the bullying change him—but there had been a change. I act like a coward now, but is that who I really am? He thought of facing Bear with nothing but a hose, protecting his mother. I am not a coward. He recalled his father talking about "downloading" himself into Luke, and Luke had laughed at that, but didn't some truth lie behind those words? Wasn't he, at least partly, becoming the man his father was? His father did what was right, not only what was safe. Luke felt the truth hit him like a great rushing wave. "My father fought injustice until the day he died. He was not a bully or a coward...and neither am I."

This time as he was brought up out of the water, Luke put all the strength he had left into whipping his head backwards. The back of his skull made crunching contact with something soft and squishy.

"Ahhhrr! My nose!" Goat screamed.

Luke looked back to see Goat rolling on his back with both hands over his face. Blood was already streaming from between his fingers.

Luke rapidly sucked in the sweet oxygen as he struggled up to his hands and knees. He noticed three things in quick succession. First, Mike was nowhere around. Second, Ned was still cutting at Amy's clothes while laughing maniacally. And third, he felt a familiar, smooth, cold object beneath his right hand. He palmed it as he rose to his feet. Ned's cackling laugh was so loud that it took a few seconds for him to notice that Goat was no longer laughing with him, but instead was screaming in pain.

Even as Ned turned and advanced toward Luke, Amy didn't take the opportunity to run. "She's completely retreated into herself now," Luke thought.

"You die today, Puke. They will find your body downstream in a few days and your mommy will cry for her stupid little baby."

Despite the knife in his hand, Ned didn't sound as confident as he once did. Maybe it was the way Luke's eyes locked on his, or just maybe he, too, sensed the change in Luke. Not really a change, Luke thought, a reversion his true self, to the Luke that had existed before the fear, the Luke who hated injustice, just as his father before him. A feeling of calm focus flowed through Luke's body.

"Run or die, Puke!" Ned yelled. Rather than retreating, Luke began to walk slowly toward Ned. When Ned's leading knife hand was about 15 feet away, Luke leaned back and then snapped forward, his right arm was a blur. He fired the cue ball size rock with flawless aim. As it slammed into its mark, there was no scream of pain, but only a dull thud. Ned crumbled to the ground. Luke checked that he was breathing, and picked the knife up

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Profiles in Specialization—Laurie Burch, Robert Joneth, and Kevin Rodgers

BY DENISE MULLEN, ASSISTANT DIRECTOR OF LEGAL SPECIALIZATION

I recently had an opportunity to talk with law partners Laurie Burch, Robert Joneth, and Kevin Rodgers, all board certified specialists practicing in Raleigh. Burch attended Campbell University School of Law, Joneth attended the University of Wisconsin Law School, and Rodgers received his law degree from Wake Forest University School of Law. Each began their legal career in Social Security disability law, Joneth working for the Social Security Administration, Rodgers as a Hyatt lawyer,[1] and Burch in private practice. They formed Burch, Joneth and Rodgers in 2000 after working together at a larger firm for nearly a decade. In 2006 when the Board of Legal Specialization launched the new certification in Social Security disability law, they quickly signed up for the exam. Their firm is one of the few in the state in which all of the lawyers are board certified specialists. Following are some of their comments about the specialization program and the impact it has had on their firm.

Q: When you established Burch, Joneth and Rodgers, what was your vision for the firm?

Burch – We knew that the firm would specialize in Social Security disability law. We knew that we worked well together and that we shared the common goal of doing our absolute best for clients with Social Security and disability problems.

Joneth - Our common vision was to reach out to this segment of the population that has traditionally had a great deal of difficulty finding qualified legal assistance.

Rodgers – The reality is that the work has become much more difficult in recent years as procedures are changing and the Social Security Administration has faced budget problems. Our firm's vision, however, remains the same—to provide our clients with the best representation and counsel possible.

Q: Does certification help the firm and your clients?

Rodgers – Yes, it does. We've all had extensive training in Social Security law and have attained a depth of knowledge in that one practice area. We don't handle a mix of cases—we handle this one type of case and we are committed to doing it well. Clients are better educated now than even ten years ago; they know what to look for in a lawyer.

Kevin Rodgers, Laurie Burch, and Robert Joneth

Joneth - They come in with a list of questions about how long we've been handling these types of cases, what our success rate has been, the other types of cases we handle, etc. They are typically happy to find a lawyer with substantial expertise in the practice area.

Q: What do your clients say about the certification?

Burch – Some come in to the office having done a lot of research beforehand and already knowing that we are board certified. They see it as a good thing. They appreciate the extra effort that we've made and our commitment to Social Security disability law.

Joneth – Social Security law is unique in that there are also non-lawyer representatives that handle these cases. Some of them are good at what they do, but some of them are misleading about their ability to handle a complicated case in its entirety—through an appeal. Some clients come to us confused and dissatisfied with their former non-lawyer representation. We can assure our clients that we are able to handle their case through an appeal at the highest level—to federal court.

Rodgers – Clients can now file their own forms with the Social Security Administration. There are so many different types of claims to choose from that it can be very confusing. In many cases there are also peripheral issues, like retirement or unemployment benefits or workers' compensation claims that really require a sophisticated understanding of the law. Our clients look to us to help them figure out what's best for their particular situation.

Q: How do clients find you? What are your best referral sources?

Burch – Most of our referrals come from former, satisfied clients.

Rodgers – We also get a fair number from workers' compensation attorneys.

Joneth – Also television advertising, other attorneys, and doctors. We have satellite offices in Rocky Mount, Fayetteville, Smithfield, and Goldsboro. In those smaller towns, the television advertising is really the most effective way of reaching individuals facing these types of problems.

Q: Are there any hot topics in your practice area?

Joneth – One issue that's really having an impact on the practice of Social Security law is the distancing of the client from the judges

and even from the lawyers.

Rodgers – There are a few very large, out-of-state law firms handling cases here in North Carolina. They send forms to clients through the mail and don't actually meet their clients or appear in person at the hearings. In addition, many of the hearings are now handled through video conferencing rather than in person.

Joneth – This places even greater barriers between the judge and the client. Barriers in terms of education and socioeconomic status already exist. When you add to that, it makes it even more difficult for a client to be heard, understood, and believed.

Burch – That's why it's so important to us that we meet our clients before and at the hearing. We view our clients' credibility as a very important part of the case that we're handling.

Q: Does certification benefit the legal profession?

Rodgers – Attorneys do a better job, in general, when they focus on learning one area well. When we studied for the specialization exam, we all learned something new that then helped us in our practice.

Joneth – Just like in the medical profession, if you choose a board certified specialist you can safely assume that you will be getting a more sophisticated level of service.

Q: Any tips for other lawyers preparing to take the exam?

Burch – There are many resources available to help with studying, including the NOSSCR (National Organization of Social Security Claimant's Representatives) monthly newsletters and the North Carolina Advocates for Justice list-serve.

Rodgers – It is a challenging test, so I would recommend taking a review course, talking with other lawyers who took the exam, and to start memorizing numbers—things like limits, dates, and exceptions. Having some of those things memorized will help answer some of the questions quickly and leave additional time for thought on the more complicated questions.

Q: How do you see the future of specialization?

Rodgers – These days you can't be competitive unless you specialize, particularly in a city like Raleigh where there are so many attorneys. It's more and more difficult to have a general practice and do good work. And you have to do good work—clients figure out which attorneys are good at handling complex cases.

Joneth – I think that the program will continue to expand. As the law gets more and more complex, you have to have a way of denoting which lawyers are really up to speed in different practice areas. ■

For more information on the State Bar's specialization program, please visit us on the web at nclawspecialists.gov.

Endnote

1. *Hyatt* was a class action brought in the 1980s on behalf of NC claimants who were denied benefits due to failure of the Social Security Administration (SSA) to consider complaints regarding pain, hypertension, and diabetes. The federal courts required the SSA to readjudicate thousands of cases that were improperly decided.

State Bar Outlook (cont.)

light-fingered lawyer, finding herself in the throes of a temporary cash-flow crisis and knowing that a big personal injury case will settle next week, rationalizes that she is simply borrowing from Peter to pay Paul and gives little or no thought to disguising the transaction. This is, it seems, most likely to happen in the context of solo practices, probably because no one else is looking. Inevitably, the PI settlement falls through, necessitating additional "borrowing" from the trust account. Sooner or later the lawyer is so far "out of trust" that even a cursory comparison of the books with the latest bank statement fairly screams misappropriation and portends the disbarment that generally results. Imagine her dismay when Bruno calls for an appointment. Although his methodology is not that of a full financial audit, he is always advertent to irregularities that are in plain view. Perhaps not surprisingly, several lawyers visited by Bruno have fully confessed before he has even had a chance to hang up his coat.

You just can't beat that kind of moral authority and, regrettably, it's in fairly short supply. Fortunately, we have found a man in Tim Batchelor who has what it takes and is equal to the task, but no one expects him to compel compliance like his predecessor simply by showing up. They broke the mold when they made that guy. In that regard I am reminded of a story told by Coach Dean Smith at an alumni gathering shortly after the Tar Heels won the national championship in 1982. As I recall, he said that he happened to be standing among a large group of people at another social function earlier in the week and had overheard one Carolina fan commiserating with another regarding the then recent decision of star forward James Worthy to forego his last year of eligibility and jump to the NBA. The gentleman was heard to say, "Don't worry. Ol' Dean will just go out and get himself another Worthy." After recounting this conversational fragment, Coach Smith sighed audibly, shook his head, and said, "That fellow couldn't have been more wrong. Ol' Dean will never find another Worthy."

In much the same vein, I'm here to tell you that I doubt we will ever find another Bruno. ■

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

Samuel Phillips (cont.)

in the house built by her daughter's husband; it is now occupied, somewhat fittingly, by the UNC Center for the Study of the American South.

Samuel Field Phillips has been forgotten, with no record or reminder of his brave, remarkable legacy. So, the next time you're at UNC and walking around the beautiful campus, I hope you will wonder as I do: Where is the monument that honors our own Sam Phillips? ■

Donna LeFebvre is a senior lecturer in UNC's political science department and teaches law-related courses to undergraduates. She has won 13 teaching awards, including two Tanner Undergraduate Teaching Awards and three Students' Undergraduate Teaching Awards, and she has won the UNC Bryant Public Service Award for extraordinary service to the University community. She was elected to the Order of the Golden Fleece, UNC's highest and oldest honor society, for outstanding contributions to undergraduate education.

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Being a Lawyer Saved My Life

By Anonymous

I am a lawyer and an alcoholic, but not necessarily in that order. I was an alcoholic long before I even considered becoming a lawyer. I don't believe that the inherently stressful nature of the practice of law caused or even exacerbated my alcoholic drinking. I do believe that because I am a lawyer I was offered the care and assistance of the Lawyer Assistance Program of the North Carolina State Bar, and that the program, quite frankly, saved my life.

I grew up with few challenges. My father was a doctor, and my mother stayed home to raise me and my three older brothers. We lived in a nice neighborhood with great public schools. My parents loved and respected each other and never raised a hand in anger to us or each other. While my father was far from savvy as a businessman or investor, finances were never an issue. I always felt loved and watched over.

Alcohol was present in the home, but not of particular importance. My mother and father frequently shared a drink together after he came home from work while she was preparing dinner. There was an occasional beer on summer evenings while they sat in the yard listening to the ballgame, or played Yahtzee with my aunt and uncle. I have no recollection of either of them exhibiting mood changes related to their alcohol consumption.

Like many alcoholics, I remember that in my childhood and adolescence I had distinct feelings of emotional unease. I felt I was somehow different from, and did not measure up to, the other kids in my neighborhood and school. While other kids seemed to carry themselves with confidence and ease, I was self conscious, a bit depressed, and just uncomfortable in my own skin. Just after I turned 15, my father went to work one morning and suffered a massive heart attack, dying on the spot. My siblings were already in or past college, so the household was suddenly just me and my grieving mother. She was amazing in her grief, and managed the home with quiet care and grace.

It was in the year following my father's passing that I began my relationship with alcohol. My very first time drinking alcohol was the typical experimentation with friends—a carefully-planned outing with a stash of alcoholic contraband. My recollection of the intense feeling of that first intoxication remains to this day more vivid than any other childhood or adolescent memory. At that moment, I felt accepted, self-assured, and connected to my friends as never before. I did not know it at the time, but a switch was thrown in my brain that would affect and direct my decision making for many years to come.

High school became a framework for alcohol-related social functions. Weekends were for drinking with my close-knit group of like-minded friends, either at parties or otherwise. The excitement would begin with the anticipatory planning, peak with the consumption, and continue with the talk about it the following week. I went to college because everyone did, and relished the freedom it offered me. I was 300 miles away from home and could pursue my passion for alcohol as an adult and on my own terms. I took college seriously and did well enough, but pursued and obtained a degree with no thought of its use.

After college I married a woman with a decent job, and continued my life of underachievement. After several years my wife pushed me to obtain a graduate degree. It seems ridiculous in retrospect, but the choice of law school resulted primarily from my inability to come up with any profession I really wanted to pursue. I did not even intend to practice law, but as fate has it, I was accepted into law school and my journey with the legal profession began.

Law school demanded more effort and focus than I had ever been called on to give to that point in my life. I took it seriously, worked hard, and achieved a modicum of success. Looking back, I think the concentration of time and thought required from me to make it through was healthy for me, and upon graduation I felt a real sense of accomplishment for the first time. Armed with the degree and licensed to practice, I took a job with a local firm and joined the fraternity of lawyers. Learning to practice law was not without its challenges. It is for many of us another opportunity to feel that we don't measure up, to wait for the curtain to be thrown back, displaying for the world that we have no idea what we are doing. But the fraternity of lawyers in the local community proved to be helpful, accepting, and friendly, and I felt both proud and comfortable to be one of them. What I lacked in brilliance, I made up for in work ethic, and I did well for the firm.

A few years into practice my marriage began to go downhill, and my alcohol consumption began to grow. I focused all the energy necessary to continue performing well in my practice, but beyond that I spent most of my time drinking. While it might have seemed obvious to those around me that I was on a path to destruction, we alcoholics are masterful at segmenting our lives to hide what is really going on. I was not a social drinker and rarely drank in public. I drank by myself, where I did not have to be concerned about anyone forming a judgment about the amount or frequency of my consumption.

In another few years the trajectory of my drinking really took off, and it became more and more difficult to be in an alcohol-free office all day. I began drinking before work,

coming in later, drinking at lunch, and leaving the office early to drink. At this point, even I could not ignore the fact that I could not manage my drinking. I was not ready to admit I was an alcoholic, but I knew I needed to change my drinking or I was going to wreck my career, cause an accident, or become sick. I began a series of attempts to curb or stop my drinking by the sheer force of my own will and the power of decision. Night after night I swore off the alcohol and prayed for an end to the drinking. I was convinced that if I could only stop long enough for the alcohol to get out of my system, I would be free to not drink again. These were futile efforts. If I was determined enough to make it through the next morning without a drink, I might get by for a few weeks. However, I never lasted more than a couple of weeks before I was back to my normal routine.

My "bottom" lasted about a year. First came a car accident resulting in an arrest and conviction for driving while impaired. I earnestly told the judge I had learned my lesson and that this was the wake-up call I needed. I earnestly believed it. My limited driving privilege allowed me to drive to work and back, and I did not miss a beat. My law partners were relieved and appreciative when I told them the good news that I was dedicating myself to cleaning up my act. I attended my first 12 step program meeting, listened intently, and tried to fit in. After about ten meetings, I stopped going. I was not like those folks. I was a professional with an important job that took up all of my time. After a few weeks of doing it on my own, I began drinking again and embarked on my final spree.

I separated from my wife and moved into a small apartment. The second arrest came less than a year after the first conviction. The humiliation and fear that followed the arrest were unbelievable. The house of cards that was my life was collapsing before my eyes, and I was seemingly powerless to stop it. I was sure my career was over and that I would lose everything. The morning after the second arrest I walked into my senior partner's office and told him I had been arrested again, certain the result would be my immediate termination. In an act of absolute grace, rather than terminate me, he told me to call the Lawyer Assistance Program (LAP). I made the call and asked for a call back. Within an hour I received a call from the LAP director. He explained that everything we discussed would be subject to attorney-client privilege and held in strict confidence, and I told him I needed help. In a matter of days, we met in person and he laid out for me the framework for a plan of action. He arranged an appointment for an alcohol assessment with the director of an alcohol and substance abuse treatment program, leading to my enrollment in an intensive outpatient program.

I was introduced to a LAP volunteer who took me to dinner and an AA meeting. We spoke freely, and for the first time I was able to share the secret of my alcohol addiction with a fellow lawyer. The things I shared with him that I thought were unique to me he could immediately relate to. When we walked into the meeting, it was clear he was completely at home with the members of this same fellowship I had felt so uncomfortable with on my own. After the meeting we went for coffee and we talked about what the Lawyer Assistance Program could offer me. The program would be an advocate for me as I worked through my legal challenges. In exchange, I would be expected to follow a regimen of recovery actions. I was introduced to the LAP "contract"—a written contract between me and LAP in which I agreed to complete my outpatient treatment program, attend regular peer support meetings, and submit to random chemical analysis to confirm my abstinence. In addition, I was assigned to a monitor—a LAP volunteer in my community who would monitor my compliance with the terms of my contract.

The first six months of sobriety were filled with extreme emotions. Work served at times as a distraction from the fear, anger, and remorse typical in early sobriety, but only at times. With the legal consequences of my actions still in front of me, I had no choice but to soldier through it. But the newfound fellowship and support of my colleagues in the LAP enabled me to face the consequences from a position of increased personal strength. With a statement from the Lawyer Assistance Program confirming six months of abstinence from alcohol and compliance with my LAP contract, the court exercised the little discretion it had and allowed me to do my time monitored at home followed by probation. The relief of putting this behind me was almost indescribable, and marked the beginning of the process of putting my life back together.

The next few years were spent doing the right things. I attended peer support meetings, met with my LAP monitor, worked hard in my practice, and stayed clean and sober. I remarried, had two children, and came to know a peace in my life that had previously eluded me. After I successfully completed my LAP contract, I was asked to become a LAP volunteer. As a LAP volunteer I have the privilege of helping other attorneys imprisoned by their addiction. When an attorney's struggles come to the attention of the LAP, volunteers reach out to the attorney, share with them their stories, and let them know of the opportunities the Lawyer Assistance Program has to offer. For those attorneys who are ready to accept help, volunteers work with them as mentors, contract monitors, friends, and colleagues. As any alcoholic in recovery will tell you, working with other alcoholics is an integral and essential part of successful, long-term recovery, and being a LAP volunteer provides a continuing opportunity to do just that.

I began my story by stating that becoming a lawyer and having the opportunity to reach out to the Lawyer Assistance Program likely saved my life. Like so many active alcoholics, I would not allow myself to open up to and become part of a recovery fellowship of which I (incorrectly) believed I had nothing of significance in common. It was only when I finally asked for help from my fellow lawyers that I was able to see that I was not so terminally unique. Had I not gained the ability to accept the grace of the fellowship of recovery, I'm convinced I would have long ago met an all-too-common alcoholic death. It was the Lawyer Assistance Program that gave this alcoholic lawyer that ability to reach for the prize, and for that I will be forever grateful. ■

The North Carolina Lawyer Assistance Program is a confidential program of assistance for all North Carolina lawyers, judges, and law students, which helps address problems of stress, depression, alcoholism, addiction, or other problems that may lead to impairing a lawyer's ability to practice. If you would like more information, go to www.nclap.org or call: Cathy Killian (for Charlotte and areas west) at 704-892-5699, Towanda Garner (in the Piedmont area) at 919-719-9290, or Ed Ward (for Raleigh and down east) at 919-828-6425.

To contact the author, send an email to Robynn Moraites, robynnmoraites@gmail.com.

NC IOLTA Income is Boosted by New Sources of Funds

Income

NC IOLTA income has suffered more than a 50% decline from our highest income—just over $5 million—in 2008, and 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 two quarters of 2012 showed declines of 17% and 15%. We expect this situation to continue as banks are now recertifying their comparability compliance at even lower interest rates. Additionally, the Federal Reserve is predicting that they will keep interest rates at the current unprecedented low level into 2015.

Class Action Residuals. Fortunately, however, total income for 2012 had already surpassed our 2011 income figure of $2.4 million by the end of August due to the over $1.2 million received from residual funds directed to IOLTA programs across the country in a Washington state class action case. After following the Washington state court rule that sent 25% of such residual funds to the state's IOLTA program, the court ordered that the remaining 75% of the funds go to all other IOLTA programs on a *pro rata* basis using an estimate of the statutorily prohibited activity (fax blasting of unsolicited advertisements) 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 had claims under consumer protection and other laws, desire and need.

Receiving these funds raised the visibility of the North Carolina 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 NC 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, and the NC IOLTA website, nciolta.org.

Settlement Agent Accounts. We are now receiving some funds from settlement agent accounts as an amendment to the Good Funds Settlement Act (N.C. Gen. Stat. 45A-9)—requiring that interest bearing trust and escrow accounts of settlement agents handling closing and loan funds be set up as IOLTA accounts—became effective on January 1, 2012.

Though many of these accounts are not interest bearing and are not being set up as IOLTA accounts, we have identified over 45 new accounts as settlement agent only accounts (those not associated with an attorney licensed in North Carolina), and received over $20,000 from those accounts through August. We are hopeful that we will gain additional income from these accounts as the volume of transactions increases.

The State Bar Council and the NC Supreme Court have approved an IOLTA 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 company accounts will now be NC IOLTA accounts.

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 a total of almost $1.4 million from our reserve fund over three consecutive years, grants have dramatically decreased--by over 40%. Following those decisions, we have under $450,000 remaining in reserve for future use. The cy pres funds from Washington state will make a significant difference in our ability to make 2013 grants. We should be able to keep grants at the 2012 level without using any additional funds from reserve.

State Funds

In addition to its own funds, NC IOLTA administers the state funding for legal aid on behalf of the NC State Bar. Total state funding distributed for 2011-12 was $3.8—down from over $5 million administered for 2010-11. The decrease was the result of reductions to both the appropriated funds (decreased by $112,500) and the filing fee allocation for legal aid (from $2.05 to $1.50). The work of the Equal Access to Justice Commission, NCBA, and legal aid programs saved state funding from another serious decrease in 2012-13—a proposed loss of the appropriated funds. Funding for the 2012-13 year remains at the 2011-12 levels. ■

NC IOLTA Grantee Spotlight

Charlotte Nonprofits Celebrate and Recognize *Pro Bono* Attorneys and Advocates

The North Carolina Rules of Professional Responsibility recognize that, "Every lawyer has a professional responsibility to provide legal services to those unable to pay. A lawyer should aspire to render at least 50 hours of *pro bono publico* legal services per year." Support for *pro bono* service has been an important part of NC IOLTA's grant-making from its inception. Beginning in 1992,

the NC IOLTA increased its commitment to *pro bono* by proactively offering to make grants to volunteer lawyer programs based on a per lawyer formula to make sure that volunteer lawyer assistance could be provided statewide. Support for such programs has continued, and, through 2012, NC IOLTA has granted over $10 million to support such programs. In Charlotte we currently support a volunteer lawyer program jointly operated by Legal Aid of NC (LANC), Legal Services of Southern Piedmont (LSSP), and the Custody Advocacy Program at the Council for Children's Rights (CFCR), which uses an innovative team approach (using volunteer attorneys and lay advocates with staff attorney supervision) to handle cases by court appointment.

Brett A. Loftis, Executive Director, Council for Children's Rights; Kenneth L. Schorr, Executive Director, Legal Services of Southern Piedmont; Distinguished Pro Bono Service Award Winner George V. Hanna III, Moore & Van Allen, PLLC; Theodore O. Fillette, Senior Managing Attorney, Legal Aid of North Carolina-Charlotte. Photo courtesy of David Ramsey Commercial Photography,

This year these three NC IOLTA grantees in Charlotte—that area's largest recipients of *pro bono* services—hosted their first annual *Pro Bono* Awards celebration sponsored by *Lawyers Weekly,* Bank of America, and Moore and Van Allen. More than 200 attorneys, judges, advocates, and community members gathered on September 11 at the Charlotte City Club to honor the advocates who have generously given their time and expertise to local indigent families, and to celebrate their accomplishments. In 2011 approximately 300 attorneys and advocates gave more than 5,500 *pro bono* hours to CFCR, LANC, and LSSP, serving upwards of 450 local families and individuals in need, and donating the equivalent of almost $1.4 million in legal services. The local firms, attorneys, and advocates recognized and honored at the event made considerable *pro bono* contributions toward the community's access to vital legal services, which transformed the lives of hundreds of area residents.

In addition to recognition for the outstanding service of law firms and individuals, George V. Hanna III of Moore & Van Allen received the Distinguished *Pro Bono* Service Award, a lifetime achievement honor recognizing an individual whose longstanding and exceptional dedication to *pro bono* legal service has made a meaningful impact on access to justice in the community and state. In his remarks, Hanna said, "Participating in and supporting *pro bono* efforts is not merely a benefit for the client; it is a rewarding and enriching endeavor as counsel. We as lawyers have the unique and privileged opportunity to increase access to counsel and legal assistance for those in need. In doing so, we help the justice system deliver outcomes that are fair and accessible to all."

As the need for legal services for low-income families grows each year, more attorneys are stepping outside of their private practices to volunteer with legal aid organizations to help eliminate the financial obstacles to accessing justice. You can offer your assistance anywhere in the state through the NC Equal Access to Justice website, ncaccesstojustice.org. ■

The Ring (cont.)

from the leaves. The large gash in Ned's forehead quickly filled with blood. Luke considered cutting Ned's clothes off of him, to let him wake up naked and humiliated. He considered doing things much worse than that...gruesome things...but as his left hand reached up to hold the ring, he thought, "No, that's not who I am."

Luke never saw either Ned or Goat again after that day. His mother said that they were taken to a place where they trained kids who "misbehaved."

* * * * *

But that was 15 years ago, Luke thought as he forced his attention back to the present...back to the oath of office he was now taking as a North Carolina prosecutor.

"...I will, in the execution of my office, endeavor to have the criminal laws fairly and impartially administered, so far as in me lies, according to the best of my knowledge and ability; so help me, God."

Luke didn't know what type of prosecutor he would be, but he was confident of two things. He would be neither a coward nor a bully.

As he finished the oath, nobody noticed as Luke reached with his left hand to hold the worn gold ring on his right ring finger...and not even the most seasoned court reporter would have detected the whisper that came from his lips. "I remember, Dad. I was loved."

Luke walked over to where his mother was wiping her eyes, put his arm around her, closed his own eyes, and thought, "Luke sandwich." ■

Terry Orndorff lives in Wilson, North Carolina, with his wife Merry and their son Logan. He has served as an assistant district attorney in the 7th District for the past 16 years.

Lawyers Receive Professional Discipline

Disbarments

Wilmington lawyer **Linda Clark** cashed counterfeit money orders. She was disbarred by the DHC.

Russell Crump of Gainesville, Florida, was disbarred pursuant to an Order of Reciprocal Discipline entered by the chair of the Grievance Committee. In April 2012 the Supreme Court of Florida disbarred Crump after he was convicted of one count of child abuse, a 3rd degree felony.

In three different real estate closings, **Jodi Ernest** of Greensboro erred in a variety of ways, including committing acts of dishonesty, neglecting clients, and failing to properly maintain and deliver entrusted funds. Ernest surrendered her law license and was disbarred by the DHC.

Creighton ("**Zeke**") **Sossomon** of Highlands misappropriated entrusted funds. Disciplinary proceedings were stayed for several months because Sossomon contended he was disabled due to ADHD. The DHC determined that Sossomon was not disabled. Just before the October 11 disciplinary hearing, Sossomon surrendered his license and was disbarred by the DHC.

Suspensions & Stayed Suspensions

Valderia Bruson of Creedmoor violated multiple trust accounting record keeping rules. The DHC entered a consent order of discipline suspending Brunson for two years. The suspension is stayed for five years upon Brunson's compliance with extensive conditions.

Dawn Johnson of Graham disrupted the court by failing to appear in court on time, or at all, and was untruthful with the court. The DHC suspended her for three years. After serving one year of active suspension, Johnson may apply for a stay of the balance upon compliance with numerous conditions.

Steven McFarlane and **Susan McFarlane** of Louisburg knowingly failed to timely file state and federal tax returns and did not pay their tax obligations for four years and two years, respectively. Steven McFarlane received a two-year suspension, stayed for two years, and Susan McFarlane received a one year suspension, stayed for two years.

Jan P. Paul, a former prosecutor from Durham, instructed law enforcement officers to take out charges unsupported by fact and/or law against the mother of a child sexual abuse victim. The mother had just testified in support of the perpetrator. Paul authorized the charges to prevent the mother's imminent visitation with the child pursuant to a civil court order. Paul's license was suspended for one year and the suspension was stayed for one year upon Paul's compliance with conditions.

Louie Wilson of Windsor did not properly reconcile his trust account, leading to misappropriation by a staff member. The DHC entered a consent order suspending Wilson for two years. The suspension is stayed for two years upon his compliance with numerous conditions.

Show Cause Hearings

The DHC found that **Robert J. Burford** of Raleigh did not comply with the conditions for a stay of his disciplinary suspension by failing to timely and unconditionally refund money to his former clients, and violating the Rules of Professional Conduct during the stay. The DHC lifted the stay and activated the two-year suspension of Burford's license.

Censures

Ralph L. Gilbert of Shelby was censured by the Grievance Committee for numerous violations of the trust accounting rules and for failing to respond to the State Bar.

Jeffery P. Boykin of Raleigh was censured by the Grievance Committee. Boykin neglected his client's personal injury case, did not communicate with his client about the case, and misled his client about the status of the case.

Reprimands

Colin P. McWhirter of Shelby was reprimanded by the Grievance Committee. McWhirter did not communicate with his client, did not promptly prepare an order that would have allowed his client to collect a judgment, and did not timely respond to the Grievance Committee.

William I. Belk of Charlotte was reprimanded by the Grievance Committee. Belk was custodian of funds for his minor daughter and violated his statutory duty by making expenditures that were inappropriate and not for his daughter's direct benefit.

Benjamin Small of Concord was reprimanded for failing to respond timely to the Grievance Committee.

Timothy D. Smith of Charlotte was reprimanded by the Grievance Committee. Smith did not communicate with his client, did not diligently represent his client, did not provide a copy of a final divorce judgment to his client, and finalized the divorce judgment without first determining if he needed to file for equitable distribution.

Transfers to Disability Inactive Status

The DHC transferred **Albert Neal Jr.** of Candler to disability inactive status.

Reinstatements

Dean Humphrey of Wilmington was suspended for one year. After serving six months, Humphrey was eligible to obtain a stay of the balance upon compliance with conditions. Humphrey complied with those conditions. The secretary entered an order staying the balance and reinstating Humphrey to active practice. ■

I Brake for Notarial Certificates!

By Kelly Farrow

Before I joined the State Bar I worked as an intellectual property paralegal for over ten years. Intellectual property, like many areas of law, is extremely detail-oriented—one wrong numeral in a patent number or not following the Patent Office rules precisely can cause big problems for your client and your firm.

A part of my job now is to process the incoming initial certification applications and recertification applications. My review procedure is quite regimented, and there are specific things that I must check for when reviewing these applications. One of these things is a notarized signature.

Being a person who is all about details and following rules, I have been surprised by the number of applications that are not correctly notarized. Not all certified paralegals are notaries, and not all notaries are paralegals, certified or not. However, a paralegal should be able to review a document (especially a document that he or she has signed) to make sure it has been correctly notarized, regardless of his or her status as a notary.

If you have not taken the Notary Public Course or read the Notary Public Act in the North Carolina General Statutes (N.C. Gen. Stat. §10B), you may not be familiar with the statutory notarization requirements in North Carolina. As a paralegal, however, you may handle or review notarized documents as a part of your job. Even if you are not a notary, it is beneficial for you to be familiar with the rules for notarizing documents so you can ensure that they are notarized correctly to better assist your supervising lawyer and your clients. Incorrectly notarized documents can lead to invalidated documents and lawsuits against the notary and/or the law firm involved.

What Are the Notarial Requirements?

I have several things that I look for when I am checking the notarization of an application. The first thing I do is make sure the date of the notary execution and the date of the applicant execution are the same. This is the most common error I see on the applications, by far. The notarial certificates on the applications are "oaths" (N.C. Gen. Stat. §10B-3(14)), and include the language "[s]worn to (or affirmed) and subscribed before me." For this type of notarial act, the notary must verify the applicant's identity, and then must administer an oath and have the applicant make a vow of truthfulness. (This is the "sworn to (or affirmed)" part.) The applicant must also sign the document *in the presence of the notary*, meaning that the notary must physically see the applicant sign his or her name on the application. (This is the "subscribed before me" part.) Therefore, the date of the applicant's signature and the date of the notary's signature should always be the same. If they are not, it could be an indication that the applicant was not present to sign the document in front of the notary, and thus the document was not notarized properly. According to the National Notary Association, "[n]otaries are sued and have their commissions revoked more for a failure to require personal appearance than for any other violation."[1] Yes, it's that serious.

A notarial "oath" is different than an "acknowledgment," (N. C. Gen. Stat. §10B-3(1)) which is another very common type of notarial act. For acknowledgement, the document can be signed by an individual before presenting it to the notary to be notarized, and thus the date of the individual's signature and the date of notarization can and may be different. However, the individual must still appear *in person* before the notary to present the document, and the notary must still verify the identity of the individual before notarizing the document.

Most of the time the differences in dates in the notarial certificates on the applications are due to either the applicant or the notary simply writing down the wrong date. This is surprising, given the high standards to which certified paralegals are held. It is an error that is easily fixed with a quick review of the signature page by both the notary and the certified paralegal. Two sets of eyes are always better than one!

Any violation of the Notary Act should be reported directly to the Notary Enforcement Section of the Secretary of State's Office. The paralegal certification program has adopted a policy of notifying the applicant and the notary of the error, asking the applicant to fix the error by signing a new signature page and having it notarized correctly, and telling the notary to report the violation to the Notary Enforcement Section himself or herself. The Notary Enforcement Section will investigate the matter and contact the notary directly. To resolve the matter, the Notary Enforcement Section will usually ask the notary to: 1) acknowledge that he or she made an error; 2) tell and show what he or she should have done; and 3) state if he or she needs to be a notary public as part of his or her job. If the Notary Enforcement Section finds that there was a violation, it can warn the notary; require the notary to retake the notary public course; restrict, suspend, or revoke a notary's commission; or, in extreme cases, prosecute the notary for a misdemeanor or felony.

Most errors are usually due to haste and can be easily prevented with a quick review of the application before mailing. Being a certified paralegal is much more than just meeting certain requirements or passing an exam. It's about doing your best work and proudly representing the paralegal profession. Even when you are busy, slow down and take a minute to double-check your work. As a certified paralegal you are only an asset to your supervising lawyer and your clients if you are careful, accurate, and thorough. ■

Kelly Farrow is the assistant director of the Paralegal Certification Program.

Endnote

1. nationalnotary.org/bonds_and_insurance/minimize_liability/index.html.

Mum's the Word

By Suzanne Lever

We all know that Rule 1.6 of the Rules of Professional Conduct governs a lawyer's disclosure of client information. However, in addition to Rule 1.6, there are other rules pertaining to client information. These rules may distinguish between one or more of the following: (1) current and former clients; (2) use versus the disclosure of the information; and (3) information that is, or is not, "generally known." Let's take a look.

The Low Down

Rule 1.6(a) provides that a lawyer shall not ***reveal*** information acquired during the professional relationship with a client unless (1) the client gives informed consent; (2) the disclosure is impliedly authorized; or (3) one of the exceptions set out in Rule 1.6(b) applies. Interestingly, neither Rule 1.6, nor any of the other rules discussed below, actually refer to "confidential information." Rather, these rules protect information "acquired during the professional relationship with a client" or information "relating to representation of a client."

There is no distinction between current and former clients in Rule 1.6. The duties under Rule 1.6 continue after the termination of the relationship. Rule 1.6(b) does not contain an exception pertaining to client information that is "generally known." The bottom line of Rule 1.6 is that a lawyer may never ***disclose*** information obtained during the representation of a client, even if the client becomes a former client, and even if the client's information becomes "generally known."

In contrast to Rule 1.6, which deals with disclosure of information, Rule 1.8(b) pertains to a lawyer's use of client information. Rule 1.8(b) is limited to current clients. The rule provides that a lawyer may not use information relating to representation of a client to the disadvantage of the client, unless the client consents. There is no exception for information that is "generally known." However, the prohibition in Rule 1.8(b) only applies if the lawyer is using the information "to the disadvantage of the client." By implication, Rule 1.8(b) allows a lawyer to ***use*** (but not reveal) current client information, so long as the use is not disadvantageous to the client.

Say What?

Now on to what I believe is one of the more confusing rules addressing client information, Rule 1.9(c). Lawyers often fail to realize that, unlike Rule 1.9(a) and (b), which address a lawyer's duties in a representation adverse to a former client, Rule 1.9(c) applies even when the lawyer has not undertaken a representation adverse to the former client.

Rule 1.9 is limited to former clients. Rule 1.9(c)(1) addresses use of a former client's information, while Rule 1.9(c)(2) deals with disclosure of a former client's information. Rule 1.9(c) is the only rule with an exception for information that is "generally known." Rule 1.9(c)(1) allows a lawyer ***to use*** a former client's information if it is not being used to the disadvantage of the former client *or* if it has become "generally known." Rule 1.9(c)(2) prohibits disclosure of a former client's information, regardless of whether the information has become generally known. (Rule 1.18, dealing with prospective clients, prohibits the use or disclosure of a prospective client's information except as permitted by Rule 1.9.)

Let's take a closer look at the distinctions present in the various rules. First, what is the difference between "using" client information and "revealing" it? In discussing the use of information related to a current representation (Rule 1.8(b)), comment [5] to Rule 1.8 provides:

> Use of information relating to the representation to the disadvantage of the client violates the lawyer's duty of loyalty. Paragraph (b) applies when the information is used to benefit either the lawyer or a third person, such as another client or business associate of the lawyer. For example, if a lawyer learns that a client intends to purchase and develop several parcels of land, the lawyer may not use that information to purchase one of the parcels in competition with the client or to recommend that another client make such a purchase. The Rule does not prohibit uses that do not disadvantage the client. For example, a lawyer who learns a government agency's interpretation of trade legislation during the representation of one client may properly use that information to benefit other clients.

In each of the examples above, the lawyer is using the current client's information without actually revealing the information. The use of a current client's information is not permissible if it is being used to the disadvantage of the client. As noted above, a lawyer may use a former client's information, even to the disadvantage of the former client, if it has become "generally known." Rule 1.9(c)(1).

Duh!

So when is information "generally known"? Comment [8] to Rule 1.9 provides the following explanation:

> The fact that a lawyer has once served a client does not preclude the lawyer from ***using*** generally known information about that client when later representing another client. Whether information is "generally known" depends in part upon how the information was obtained and in part upon the former client's reasonable expectations. The mere fact that information is accessible through the public record or has become known to some other persons does not necessarily deprive the information of its confidential nature. If the information is known or readily available to a relevant sector of the public—such as the parties involved in the matter—then

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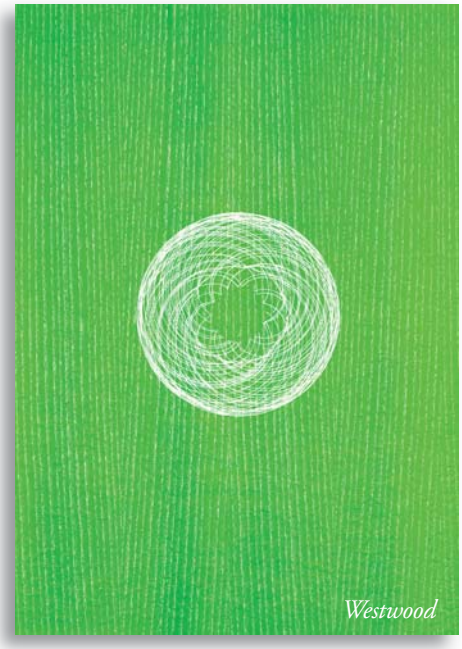
Featured Artist—Ann Conner

Ann Conner lives and works in North Carolina. Using non-endangered native wood and brilliant color palettes, Conner creates colorful, conceptualist woodcuts that reveal the intrinsic grain of the wood. These vibrant woodcuts employ the isolation of hard-edged abstraction to create a space defined exclusively by shape and color. Her prints, which use templates of sophisticated patterns and symmetry are, nevertheless, reminiscent of the spirograph drawings that so many of us made as children.

Recent exhibits include Two Visions, New Elements Gallery, Wilmington, NC; New Prints 2012/Winter, IPCNY, International Print Center New York; 2012 Delta National Small Prints Exhibition, Arkansas State University; Boston Printmakers 2011 North American Print Biennial; New Prints/Autumn, IPCNY; Advancing Tradition Twenty Years of Printmaking at Flatbed Press, Austin Museum of Art, 2010–2011; ColorPrint USA 40th Anniversary, Museum of Texas Tech University, 2010; and Boston Printmakers' 2009 North American Print Biennial.

Conner's work is included in over 40 major museum and corporate print collections in the US including Philip Morris New York; Federal Reserve Bank of Richmond; Neiman Marcus; Ritz-Carlton Hotels; New York Public Library; Museum of Fine Arts, Boston; Library of Congress; Credit Suisse First Boston, London; RJR Nabisco; and Ackland Art Museum, Chapel Hill. ■



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 owner Rory Parnell at (919) 896-7503 or info@themahlerfineart.com.

Judge Conrad (cont.)

For Judge Conrad, his life, skills, and talents are gifts from God and his commitment is to insure that his life reflects those gifts. As he looks back on his life, he sees a divine plan. As there is no way to determine the future, "the best we can do is pursue excellence in the moment," and so he takes advice from Proverbs 3:5-6, "Trust in the Lord with all your heart, and do not rely on your own insights. In all your ways acknowledge Him, and He will make straight your paths." ■

Michelle Rippon is of counsel with Constangy Brooks & Smith in Asheville. She is also an adjunct professor in the Business Management Department at UNC-Asheville and serves as the attorney for the Asheville Area Chamber of Commerce.

Kapp Interview (cont.)

done for a living?

I would have been a minister or a teacher of history.

Q: Tell us a little about your family.

My wife Chancy and I have been together since we were undergraduates at UNC-Chapel Hill. Our daughter Mary Katherine "Katie" Muto, the apple of my eye, lives in Kernersville with her husband Daniel Muto. Katie is a social worker. My parents Bill and Betty Kapp live on the family farm between Rural Hall and Bethania. My younger brother Karl and his wife Toni live in Winston-Salem. They have two sons, Jonathan and Jacob Madison.

Q: What do you enjoy doing when you're not practicing law or working for the State Bar?

I enjoy spending time with my family, cheering for the Tar Heels, working in my garden—particularly my herb garden—walking on the family farm, and reading nonfiction, particularly biographies and Byzantine history.

Q: How would you like for your administration to be remembered when the history of the State Bar is finally written?

I would like it to be remembered as a time when we provided a facility for our dedicated staff to better serve the public and the profession. I also hope that it will be remembered as a time when the State Bar took on the tough challenge of addressing rapid changes in the business and the technology of legal practice while continuing to uphold the status of the law as a profession. ■

Committee Analyzes the Roles a Lawyer May Perform When Appointed to Represent a Child in a Contested Custody Case

Council Actions

At its meeting on October 26, 2012, the State Bar Council adopted the ethics opinions summarized below:

2012 Formal Ethics Opinion 5

Reviewing Employee's Email Communications with Counsel Using Employer's Business Email System

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.

2012 Formal Ethics Opinion 6

Use of Leased Time-Shared Office Address or Post Office Address on Letterhead and Advertising

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.

2012 Formal Ethics Opinion 8

Lawyer's Acceptance of Recommendations on Professional Networking Website

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

Ethics Committee Actions

At its meeting on October 25, 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,* and Proposed 2012 FEO 7, *Copying Represented Persons on Email Communications.* The Ethics Committee also voted to publish the following two revised opinions and seven new proposed opinions. The comments of readers are welcomed.

Proposed 2012 Formal Ethics Opinion 2
Lawyer-Mediator's Preparation of Contract for *Pro Se* Parties to Mediation
October 25, 2012

Proposed opinion rules that a lawyer-mediator may not draft a business contract for pro se parties to mediation.

Inquiry:

May a mediator, who is also a lawyer, draft a business contract for two business proprietors at the conclusion of a successful mediation concerning a matter that is not currently the subject of litigation when neither party is represented by individual counsel?

Opinion:

No. It is a non-consentable conflict of interest.

Rule 1.12(a) allows a lawyer to represent a party in connection with a matter in which the lawyer participated personally and substantially as a mediator if all parties to the proceeding give informed consent, confirmed in writing. However, under Rule 1.7(a), joint representation of two parties to an agreement presents a concurrent conflict of interest even if the lawyer-mediator has their consent.

Although Rule 1.7(b) provides for circumstances under which a lawyer may represent joint clients, an analysis of the risks associated with the proposed joint representation leads to the conclusion that such representation is not appropriate. Therefore, the lawyer-mediator should not draft the business contract.

When contemplating joint representation, a lawyer must consider whether the interests of the parties will be adequately protected if they are permitted to give their informed consent to the representation, and whether an independent lawyer would advise the parties

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.

to consent to the conflict of interest. Representation is prohibited if the lawyer cannot reasonably conclude that he will be able to provide competent and diligent representation to all clients. *See* Rule 1.7, cmt. [15]. As stated in comment [29] to Rule 1.7, the representation of multiple clients "is improper when it is unlikely that impartiality can be maintained."

The complex issues that must be addressed when crafting a comprehensive business contract may result in adverse interests. Even if the parties agree on the broad outlines of a business contract at the conclusion of the mediation, a disinterested lawyer will not be able to conclude that the interests of each party can be completely represented. With respect to the terms on which there appear to be agreement, one or both parties may benefit from a disinterested lawyer's advice as to whether the agreement meets with the party's legitimate objectives, and what other procedural alternatives may be available to achieve more favorable terms. In the instant inquiry, neither party is represented by individual counsel.

Joint representation could lead to questions about the integrity of the mediation process. The lawyer's duty to provide each client with necessary and appropriate advice might require informing one party that they made a "bad deal" during the mediation process. It is untenable for a lawyer to counsel a client that an agreement the lawyer-mediator has assisted him to reach in mediation may not be in that client's best interests. If the ultimate agreement turns out to be one-sided and unfavorable to one party, the lawyer-mediator's role could be closely scrutinized.

Finally there is the risk that the proposed joint representation will fail or that the business contract will be the subject of future litigation between the two parties. In either event, the parties will have to retain new lawyers for the subsequent litigation.

For the reasons cited above, the lawyer-mediator in the facts presented may not jointly represent both parties by drafting their new business contract.

Regardless of the above analysis, the lawyer-mediator will be governed by the Supreme Court's Standards of Professional Conduct for Mediators, which may also prohibit the lawyer's representation of one or more of the parties following the mediation.

This opinion does not prohibit a lawyer-mediator from assisting the parties in preparing a written summary reflecting the parties' mutually acceptable understanding of the issues resolved in the mediation, as long as the lawyer-mediator does not represent to the *pro se* parties that the summary is being prepared as a legally enforceable document.

Proposed 2012 Formal Ethics Opinion 4
Screening Lateral Hire Who Formerly Represented Adverse Organization
October 25, 2012

Proposed opinion rules that a lawyer who represented an organization while employed with another firm must be screened from participation in any matter, or any matter substantially related thereto, in which she previously represented the organization, and from any matter against the organization if she acquired confidential information of the organization that is relevant to the matter and which has not become generally known.

Inquiry #1:

Attorney J was employed with Law Firm H where she did workers' compensation defense work. During this time, Attorney J handled many such cases for Large Manufacturer and its insurer. In addition, Attorney J was privy to Large Manufacturer's workers' compensation policies and procedures, litigation strategies, and system for case preparation. Attorney J participated in workers' compensation strategy meetings with representatives of Large Manufacturer as well as with defense counsel from Law Firm Y, another firm providing workers' compensation defense representation to Large Manufacturer.

Attorney J resigned from Law Firm H to work for Law Firm S, a plaintiffs' personal injury firm that routinely handles workers' compensation cases against Large Manufacturer.

May Attorney J work at Law Firm S?

Opinion #1:

Yes, if Attorney J is properly screened from participation in (1) any matter in which Attorney J represented Large Manufacturer or any other adverse party; (2) any matter that is substantially related to a matter in which Attorney J represented Large Manufacturer; and (3) any matter in which a lawyer with Law Firm H represents or represented Large Manufacturer or any other adverse party and about which Attorney J acquired material confidential information while she was employed with Law Firm H. Written notice of the screen must be given to Large Manufacturer and any other affected former client.

Rule 1.9(a) prohibits a lawyer who has formerly represented a client in a matter from thereafter representing an adverse party in the same or a substantially related matter unless the former client gives informed consent. This provision of the rule prohibits Attorney J from representing any workers' compensation claimant on a claim for which she formerly defended Large Manufacturer and from representing any claimant on a claim that is substantially related to a matter upon which Attorney J formerly represented Large Manufacturer.

Comment [3] to Rule 1. 9 provides the following explanation of disqualification because of substantial relationship:

> [m]atters are "substantially related" for purposes of this Rule if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter... Information that has been disclosed to the public or to other parties adverse to the former client ordinarily will not be disqualifying. Information acquired in a prior representation may have been rendered obsolete by the passage of time, a circumstance that may be relevant in determining whether two representations are substantially related. In the case of an organizational client, general knowledge of the client's policies and practices ordinarily will not preclude a subsequent representation; on the other hand, knowledge of specific facts gained in a prior representation that are relevant to the matter in question ordinarily will preclude such a representation.

The substantial relationship test serves as a proxy for requiring a former client to disclose confidential information to demonstrate that the lawyer has a conflict of interest:

> A former client is not required to reveal the information learned by the lawyer to establish a substantial risk that the lawyer has information to use in the subsequent matter. A conclusion about the possession of such information may be based on the

Rules, Procedure, Comments

All opinions of the Ethics Committee are predicated upon the Rules of Professional Conduct as revised effective March 1, 2003, and thereafter amended, and referred to herein as the Rules of Professional Conduct (2003). The proposed opinions are issued pursuant to the "Procedures for Ruling on Questions of Legal Ethics." 27 N.C.A.C. ID, Sect .0100. Any interested person or group may submit a written comment or request to be heard concerning a proposed opinion. Any comment or request should be directed to the Ethics Committee at PO Box 25908, Raleigh, NC 27611, by December 31, 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.

> nature of the services the lawyer provided the former client and information that would in ordinary practice be learned by a lawyer providing such services.

Rule 1.9, cmt. [3].

Rule 1.9(b) prohibits a lawyer from representing anyone in the same or a substantially related matter in which a firm with which the lawyer was formerly associated had previously represented the adverse party and about whom the lawyer acquired confidential, material information, unless the former client gives informed consent. This provision of the rule prohibits Attorney J from representing a workers' compensation claimant in a matter in which one of the other lawyers at Law Firm H defended Large Manufacturer and about which Attorney J acquired confidential information that is material to the matter.

If Attorney J is disqualified under any provision of Rule 1.9, Rule 1.10(c) permits screening of Attorney J to avoid imputing her disqualification to the other lawyers in her new firm. The rule provides:

> [w]hen a lawyer becomes associated with a firm, no lawyer associated in the firm shall knowingly represent a person in a matter in which that lawyer is disqualified under Rule 1.9 unless:
>
> (1) the personally disqualified lawyer is timely screened from any participation in the matter; and
>
> (2) written notice is promptly given to any affected former client to enable it to ascertain compliance with the provisions of this Rule.

Comment [4] to Rule 1.9, which relates to lawyers moving between firms, elucidates the policy considerations justifying the use of screens in this situation:

> [w]hen lawyers have been associated within a firm but then end their association, the question of whether a lawyer should undertake representation is more complicated. There are several competing considerations. First, the client previously represented by the former firm must be reasonably assured that the principle of loyalty to the client is not compromised. Second, the rule should not be so broadly cast as to preclude other persons from having reasonable choice of legal counsel. Third, the rule should not unreasonably hamper lawyers from forming new associations and taking on new clients after having left a previous association. In this connection, it should be recognized that today many lawyers practice in firms, that many lawyers to some degree limit their practice to one field or another, and that many move from one association to another several times in their careers. If the concept of imputation were applied with unqualified rigor, the result would be radical curtailment of the opportunity of lawyers to move from one practice setting to another and of the opportunity of clients to change counsel.

As long as a screen is implemented to isolate Attorney J from participation in these matters, the consent of Large Manufacturer to the representation of the claimants by a lawyer with Law Firm S is not required. *See* Rule 1.0(l) and 2003 FEO 8 (setting forth screening procedures).

Inquiry #2:

Large Manufacturer contends that any new workers' compensation claims against Large Manufacturer that Attorney J handles at Law Firm S will be substantially related to her prior representation of Large Manufacturer because Attorney J was privy to information about Large Manufacturer's defense of workers' compensation cases and this information will materially advance the interests of any client with a workers' compensation claim against Large Manufacturer.

May Attorney J represent claimants on new workers' compensation cases against Large Manufacturer if the claimant did not seek representation from Law Firm S until after Attorney J's employment?

Opinion #2:

It depends. If a new matter is not the same or substantially related to Attorney J's prior representations of Large Manufacturer, she is not disqualified from the representation unless, during her prior employment with Law Firm H, she acquired confidential information of Large Manufacturer that is material or relevant to the representation of the new client, may be used to the disadvantage of Large Manufacturer, and is not generally known. Attorney J has a continuing duty under paragraphs (a) and (b) of Rule 1.9 to monitor any new matter involving Large Manufacturer to determine whether it is substantially related to her prior representation of her former client or she acquired confidential information from Large Manufacturer that is material to the matter. If so, she is personally disqualified and must be screened. *See* Opinion #1.

Even if the matters are not substantially related, however, Attorney J has a continuing duty under paragraph (c) of Rule 1.9 to ensure that the representation will not result in the misuse of confidential information of Large Manufacturer. Rule 1.9(c) prohibits a lawyer who has formerly represented a client in a matter or whose former firm has formerly represented a client in a matter from thereafter using confidential information relating to the representation to the disadvantage of the former client except as allowed by the Rules or when the information has become "generally known." A screen must be promptly implemented to isolate Attorney J from participation in any such case. *See* Opinion #1.

Comment [8] to Rule 1.9 explains the exception for information that is "generally

known" as follows:

> ...the fact that a lawyer has once served a client does not preclude the lawyer from using generally known information about that client when later representing another client. Whether information is "generally known" depends in part upon how the information was obtained and in part upon the former client's reasonable expectations. The mere fact that information is accessible through the public record or has become known to some other persons does not necessarily deprive the information of its confidential nature. If the information is known or readily available to a relevant sector of the public, such as the parties involved in the matter, then the information is probably considered "generally known."

Similarly, the *Restatement (Third) of The Law Governing Lawyers* adopts an access approach to the determination of what information is "generally known":

> Whether information is generally known depends on all circumstances relevant in obtaining the information. Information contained in books or records in public libraries, public-record depositaries such as government offices, or in publicly accessible electronic-data storage is generally known if the particular information is obtainable through publicly available indexes and similar methods of access. Information is not generally known when a person interested in knowing the information could obtain it only by means of special knowledge or substantial difficulty or expense. Special knowledge includes information about the whereabouts or identity of a person or other source from which the information can be acquired if those facts are not themselves generally known.

Restatement (Third) of the Law Governing Lawyer, §59, cmt. d.

Attorney J's general knowledge of Large Manufacturer's workers' compensation case management, settlement, and litigation policies and practices may be sufficient in some matters to disqualify her. As observed in the discussion of "substantial relationship" in comment [3] to Rule 1.9, "[i]n the case of an organizational client, general knowledge of the client's policies and practices ordinarily will not preclude a subsequent representation; on the other hand, knowledge of specific facts gained in a prior representation that are relevant to the matter in question ordinarily will preclude such a representation."

When evaluating whether a representation is substantially related to a prior representation of an organizational client or whether a lawyer acquired confidential information of a former organizational client that is substantially relevant to the representation of a client and may be used to the disadvantage of the former client, the following factors, among others, should be considered: the length of time that the lawyer represented the former client; the lawyer's role in representing the former client, including the lawyer's presence at strategy and decision-making sessions for the former client; the relative authority of the lawyer to make decisions about the representation of the former client; the passage of time since the lawyer represented the former client;[1] the extent to which there are material factual and legal similarities between former and present representations; and the substantial relevance of the former client's litigation policies, strategies, and practices to the new matter.

Inquiry #3:

May the other lawyers in Law Firm S represent claimants on new workers' compensation cases against Large Manufacturer?

Opinion #3:

Yes, if Attorney J is screened from those matters for which she acquired confidential information of Large Manufacturer that is disqualifying. *See* Opinion #2.

Inquiry #4:

Should Attorney J be screened from participation in workers' compensation cases against Large Manufacturer that were defended by lawyers from Law Firm Y while Attorney J was employed by Law Firm H?

Opinion #4:

Yes, if she acquired confidential information of Large Manufacturer that is disqualifying. *See* Opinion #2.

Inquiry #5:

Large Manufacturer has many long-term employees who over time may file multiple workers' compensation claims against Large Manufacturer. If Lawyer J or another lawyer with Law Firm H defended Large Manufacturer against a particular employee while Attorney J was employed by the firm, it is contended that there is a substantial risk that Attorney J will have specific confidential information of Large Manufacturer that would be relevant and useful to the representation of the particular claimant. For example, a manager's thoughts and opinions regarding the claimant could be information that would not be generally known and which might be used to the disadvantage of Large Manufacturer.

May Attorney J represent a claimant on a new workers' compensation case against Large Manufacturer if the claimant had previously filed a workers' compensation case against Large Manufacturer that was defended by a lawyer from Law Firm H while Attorney J was employed by the firm?

Opinion #5:

As stated in Opinion #2, Attorney J has a continuing duty to monitor any matter involving Large Manufacturer to be sure that the representation will not result in the use of confidential information of Large Manufacturer that has not become generally known to the disadvantage of Large Manufacturer in violation of Rule 1.9(c). A screen must be promptly implemented to isolate Attorney J from participation in any such matter.

Endnote

1. For an example of a timeframe deemed to be sufficient to manage post-employment conflicts of interest for federal government employees, see the Ethics in Government Act of 1978, 18 U.S.C.§207(c).

Proposed 2012 Formal Ethics Opinion 9
Identifying the Roles and Responsibilities of a Lawyer Appointed to Represent a Child or the Child's Best Interests in a Contested Custody or Visitation Case
October 25, 2012

Proposed opinion holds that a lawyer asked to represent a child in a contested custody or visitation case should decline the appointment unless the order of appointment identifies the lawyer's role and specifies the responsibilities of the lawyer.

Introduction:

This opinion is limited to an examination of the role of a lawyer appointed to represent a child in a contested custody or visitation proceeding. It does not examine other contexts in which a lawyer may be appointed to

represent a child[1] such as when a child is alleged to be abused or neglected or is a party in civil litigation. To avoid confusion, the label "guardian ad litem" will not be used in this opinion when referring to a lawyer appointed to represent a child in a contested custody or visitation proceeding although a court may choose to apply this label. This opinion does not address or seek to question the authority of a court to appoint a lawyer to represent a child in a contested custody proceeding. It seeks only to assist the lawyer and the court to clarify the responsibilities of a lawyer serving in such a role.

In a contested custody or visitation proceeding—especially a "high conflict" proceeding—the court will, on occasion, appoint a lawyer to represent the child or children whose custody is at stake. Although the authority for such appointments is not clear[2] and may reside with the court's inherent authority to administer justice, such appointments are becoming more common as seen in recent inquiries to the Ethics Committee.[3] The appointment presents a number of difficult issues of professional responsibility for the appointed lawyer. These issues cannot be resolved unless the lawyer's role is clearly designated and understood by all of the parties to the proceeding, especially the appointed lawyer and the court.

This opinion identifies the possible roles that a lawyer appointed in a contested custody case may play and recommends that the order of appointment specify the role and responsibilities of the appointed lawyer. The opinion also addresses some specific issues of professional responsibility that arise from those roles. Although there are limited references to the Rules of Professional Conduct in this opinion, identification of the client and of the lawyer's role relative to that client is fundamental to the application of the Rules.

Inquiry #1:

What are the roles for a lawyer who is appointed to represent a child in a contested custody or visitation proceeding?

Opinion #1:

Two distinct roles for a lawyer for a child are recognized: (1) "Child's Attorney" and (2) "Best Interests Attorney."[4] As described in the *American Bar Association, Section of Family Law Standards of Practice for Lawyers Representing Children in Custody Cases* (2003)("*ABA Standards*"), the Child's Attorney "provides independent legal representation in a traditional attorney-client relationship, giving the child a strong voice in the proceedings"; the Best Interests Attorney, on the other hand, "independently investigates, assesses, and advocates the child's best interests as a lawyer."[5] The former role is "client directed" in which the lawyer serves as the traditional advocate for the objectives articulated by the child and owes the child "the same duties of undivided loyalty, confidentiality, and competent representation as are due to an adult client."[6] The latter role is "advocate directed,"[7] where the advocate's judgment is substituted for that of the child with "the purpose of protecting a child's best interests without being bound by the child's directives or objectives."[8]

Because the differences in the two roles are fundamental—particularly with regard to the lawyer's relationship to the child and responsibilities to the court—a lawyer who is appointed to represent a child in a contested custody proceeding must be sure that she knows which role she has been appointed to perform.

There is another possible role for a lawyer to play. The court may appoint a non-lawyer or a lawyer to be an advisor ("court-appointed advisor") to assist the court by investigating and reporting information to the court or by providing the court with an opinion on some matter.[9] The lawyer in such a role is not acting as an advocate or serving as counsel for either the child or the child's interests. As an advisor to the court, the lawyer may become a witness who is subject to examination by the parties. The lawyer appointed to serve in this function should also take steps to insure that the order of appointment specifies this role and its duties.

Inquiry #2:

What are the professional responsibilities of a Child's Attorney?

Opinion #2:

A Child's Attorney serves in the traditional role of counsel for the child and must fulfill that role in accordance with the Rules of Professional Conduct. The lawyer must ascertain the child's objectives for the representation and then seek to obtain those objectives within the bounds of the Rules of Professional Conduct. Rule 1.2. The lawyer owes the duty of confidentiality to the child and her communications with the child are protected by the attorney-client privilege. *See* Rule 1.6. If the lawyer is appointed to represent more than one child of the dissolving marriage, the lawyer must monitor the representation for potential conflicts of interest between the children's differing objectives for the representation. *See* Rule 1.7. If a conflict evolves that cannot be managed, the lawyer may have to decline the representation or withdraw.[10]

A lawyer who is appointed a Child's Attorney must determine whether the child is sufficiently mature and articulate to participate meaningfully in the client-lawyer relationship. As permitted by Rule 1.14(a), when a client's capacity to make adequately considered decisions is diminished "because of minority," the lawyer "shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client." However, if a child is too young to articulate his or her objectives for the representation or to make decisions about the representation, the lawyer should recommend to the court that the lawyer be appointed to serve as a Best Interests Attorney rather than a Child's Attorney.

Inquiry #3:

What are the professional responsibilities of a Best Interests Attorney?

Opinion #3:

A Best Interests Attorney is bound by the Rules of Professional Conduct "except as dictated by the absence of a traditional attorney-client relationship with the child and the particular requirements of [her] appointed tasks."[11] The lawyer must determine the child's best interests based upon objective criteria "as set forth in the law related to the purposes of the proceedings."[12] Any objectives or preferences expressed by the child are but one factor to be taken into consideration when determining the best interests of the child.

The child's communications with the Best Interests Attorney are subject to Rule 1.6, the confidentiality rule, except that "the lawyer may use the child's confidences for the purposes of the representation without disclosing them."[13] This means that the lawyer may use confidential information received from a child to develop other evidence. The example provided in the *ABA Standards* is of the child who discloses a parent's drug use to the Best Interests Attorney. The lawyer may not disclose the source of the information but she may investigate and present evidence of the drug use.[14]

Representation of multiple children does not create a conflict of interest for a Best Interests Attorney because the lawyer is not bound, as in a traditional client-lawyer relationship, to advocate for a client's objectives. As explained in the *ABA Standards*, "[a] Best Interests Attorney in such a case should report the relevant views of all the children...and advocate the children's best interests..."[15]

Inquiry #4:

What are the professional responsibilities of a court-appointed advisor?

Opinion #4:

The court-appointed advisor is not acting as a lawyer; he is not an advocate and does not represent a client or a particular interest. Rather, the advisor serves as an investigator for the court and owes the court the duty to investigate thoroughly and impartially and to report back to the court.

As an investigator who is responsible only to the court, the lawyer has no duty of confidentiality or loyalty to any of the parties or witnesses. Moreover, it is unlikely that the attorney-client privilege will attach to the lawyer/advisor's communications with parties or witnesses. When a lawyer is serving in this role, he must disclose the capacity in which he is acting to anyone who may misunderstand his role. *See, e.g.*, Rule 4.3(b). It is not a conflict of interest for a lawyer to serve as a court-appointed advisor if he does not represent any person appearing in the matter and he does not mislead others about his role. In particular, the lawyer must explain that communications will not be held in confidence and may be reported to the court. Since the lawyer is not representing a client in the matter, the prohibition on contact with a represented person in Rule 4.2 does not apply to his communications with represented persons. However, it is recommended that the lawyer/advisor inform the other lawyer prior to speaking to his client.

Non-lawyers, such as social workers and psychologists, who are more appropriately trained to investigate and offer opinions on issues of child welfare, may be better suited to serve in the role of court-appointed advisor. At the time of appointment, a lawyer should consider whether a non-lawyer would fulfill the role better than the lawyer and, if so, the lawyer should express this opinion to the court.

Inquiry #5:

How does an appointed lawyer know which role he is being appointed to perform?

Opinion #5:

Ideally, the order of appointment will specify which role the lawyer is to perform.[16] However, because confusion about the roles is not uncommon, a lawyer who is asked to serve must help the court to articulate the lawyer's role. Standard 1.3 of the *Standards for Attorneys for Children in Custody or Visitation Proceedings of the American Academy of Matrimonial Lawyers* ("*AAML Standards*") is instructive:

> Whenever a court assigns counsel for a child, the court should specify in writing the scope of the assignment and the tasks expected, preferably in the form of an order. In the event that the court does not specify these tasks at the time of appointment, the counsel's first action should be to seek clarification from the court of the tasks expected of him or her.[17]

Similarly, the *ABA Standards* state:

> The lawyer should accept an appointment only with full understanding of the issues and the functions to be performed. If the appointed lawyer considers parts of the appointment order confusing or incompatible with his or her ethical duties, the lawyer should (1) decline the appointment, (2) inform the court of the conflict and ask the court to clarify or change the terms of the order, or (3) both.[18]

If the order fails to identify the role and the lawyer's accompanying responsibilities, the lawyer should first request clarification. In particular, the lawyer should ask that the order articulate whether the lawyer is to be a Child's Attorney, a Best Interests Attorney (as those roles are defined above), or a court-appointed advisor. If the court indicates that the lawyer is to be a Best Interests Attorney, the lawyer should request that the order specify the duties that accompany this role. If the court indicates that the lawyer is a Child's Attorney, the lawyer should confirm that the child is capable of making decisions about important matters sufficient to establish the goals of the representation.[19] If the court indicates that the lawyer is a court-appointed advisor, the lawyer should consider whether a non-lawyer would better fulfill this role and, if so, make this recommendation to the court.

To assist with the clarification of the scope of the assignment and the tasks expected, the following questions should be answered at the time of appointment (the list is not exhaustive):

Identifying the Role

- Am I being appointed to provide independent legal representation to the child in a traditional client-lawyer relationship (the Child's Attorney role)?
  - or to investigate, assess, and advocate for the child's best interests (the Best Interests Attorney role)?
  - or to assist the court by investigating and reporting information to the court, or by providing the court with an opinion on some matter (the court-appointed advisor)?

Child's Attorney's Assignment and Tasks

- If appointed to be the Child's Attorney, has the child's capacity to direct the representation been established?
- If appointed to be the Child's Attorney, does the court agree
  - the child will be my client;
  - I will owe the child the professional responsibilities owed to any client including the protection of confidences from unauthorized disclosure and the preservation of the attorney-client privilege; and
  - in accordance with Rule 3.7, it would be inappropriate in most instances for me to serve as both advocate and witness?
- If appointed to be the Child's Attorney, will I be permitted/expected to do any of the following: make an opening or closing statement, introduce evidence including witnesses, examine witnesses for any party, subpoena records or witnesses, or participate on behalf of the child/client in consent agreements between the parties?

Best Interests Attorney's Assignment and Tasks

- If appointed to be the Best Interests Attorney, what duty do I have to investigate and report to the court?
- If appointed to be the Best Interests Attorney, will my communications with the child be confidential but I may use the confidential information to develop other evidence?
- If appointed to be the Best Interests Attorney, does the court agree that, in accordance with Rule 3.7, it would be inappropriate in most instances for me to serve as both advocate (for the child's best interests) and witness?
  - If the court expects me to testify, does the court understand that this may subject the child's confidences to disclosure and may

jeopardize my ability to gain the trust of the child and of witnesses necessary to my investigation?

• If appointed to be the Best Interests Attorney, will I be permitted/expected to do any of the following: make an opening or closing statement, introduce evidence including witnesses, examine witnesses for any party, subpoena records or witnesses, or participate in consent agreements between the parties?

Court Appointed Advisor's Assignment and Tasks

• If appointed to assist the court by investigating and reporting information to the court or by providing the court with an opinion on some matter, does the court agree that I will not be serving as a lawyer and I will owe no duties of representation to any party or other person involved in the proceeding?

• If appointed to be an advisor to the court, does the court agree that I may communicate with represented persons without the consent of their lawyers as would be otherwise required by Rule 4.2?

• If appointed to be an advisor to the court, what tasks will I perform?

- Will I submit an oral or a written report to the court?
- Will I limit my role to investigator and report only my factual findings, or will I provide the court with an opinion on some matter?
- Will I be a witness in the proceeding subject to testimonial examination?

Because of the potential for the roles to be confused, regardless of the specificity of the order, the judge should be reminded at the beginning of each hearing of the role of the appointed lawyer.[20]

Inquiry #6:

Should a lawyer appointed as the Child's Attorney or a Best Interests Attorney agree to investigate and present evidence? To testify or present a written or oral report or recommendation to the court?

Opinion #6:

Regardless of the role, the appointed lawyer, like any lawyer advocating a position, should conduct independent discovery and investigation of the facts.[21] At hearings, it is preferable that the lawyer have the authority to present and cross-examine witnesses and offer exhibits.[22] However, the standards of numerous organizations agree that "[n]either kind of lawyer is a witness."[23] As noted in the *ABA Standards*, "[a] court seeking expert or lay opinion testimony, written reports, or other non-traditional services should appoint an individual for that purpose, and make clear that the person is not serving as a lawyer, and is not a party."[24] The *AAML Standards* are even more adamant on this issue:

> Courts may choose to appoint someone to investigate and report information to the court. When they do so, these professionals should be called "court-appointed advisors." Courts may choose to appoint someone in an expert capacity to provide the court with an opinion about some contested matter. When they do so, these professionals should be called "experts." Courts may choose to appoint someone to protect children from the harms associated with the contested litigation. When they do so, these professionals should be called "protectors." There may be other reasons courts may choose to add a professional to the case.
>
> Language matters, however. We believe that assigning any of these tasks to someone who is called counsel is unnecessary, needlessly confusing, and misleading. Whatever these professionals are called, and whether or not they happen to be members of the bar, these professionals should never be mistaken for being counsel for the child or serving in any kind of attorney role.[25]

The potential harm from testifying as a witness is evident. If the Child's Attorney cannot assure her client that their communications are confidential and the Best Interests Attorney cannot assure the child or other witnesses of the same, the ability of a lawyer to perform in either role will be undermined.

At the time of the appointment, unless the lawyer is specifically appointed as an advisor to the court with no other role, the lawyer should recommend to the court that she not make a written or oral report to the court or testify as to her findings, particularly if the lawyer is appointed as the Child's Attorney. If the court insists that the lawyer perform these functions, the lawyer may decline the appointment.

Conclusion:

Serving as a Child's Attorney or a Best Interests Attorney in a contested custody or visitation case requires special skills, training, and experience. So much so that the AAML Standard 1.2 requires, "[t]o be eligible for appointment as counsel for a child in a custody or visitation proceeding, a person should be specially trained and designated by the local jurisdiction as competent to perform the assignment" and the comment adds, "[a]t a minimum, counsel for children must know how to communicate effectively with children and understand children's mental and emotional states at different ages and stages of their lives."[26]

This opinion does not attempt to address all of the professional responsibilities or obligations of a lawyer appointed as a Child's Attorney, a Best Interests Attorney, or a court-appointed advisor. A lawyer who is asked to serve in any of these roles should understand the requirements of each role. Familiarity with the *ABA Standards* and the *AAML Standards* is recommended.

Endnotes

1. For example, a lawyer may be appointed, pursuant to N.C. Gen. Stat. §7B-601(a), to be an attorney-guardian ad litem for a child who is alleged to be abused, neglected, or dependent; a lawyer may be appointed guardian ad litem for a minor who is a party in civil litigation pursuant to Rule 17 of the NC Rules of Civil Procedure (*see infra* note 2); or a lawyer may be appointed for a minor child in a domestic violence action pursuant to N.C. Gen. Stat. §50B-3(a1)(3)h.
2. The NC Rules of Civil Procedure authorize the appointment of a guardian ad litem (GAL) to appear on behalf of a minor plaintiff or defendant in civil litigation. N.C. R. Civ. P. 17(b)(1) and (2). The General Rules of Practice for the Superior and District Courts provide for the appointment of a lawyer to serve as GAL for a minor who is the victim or potential witness in a criminal proceeding. N.C. Gen. R. Prac. Super. & Dist. Ct. 7.1. Neither rule authorizes the appointment of a lawyer or a GAL for a child who is a non-party to a civil proceeding.
3. The increasing call for the appointment of lawyers to represent the children in custody cases is also noted in *Representing Children: Standards for Attorneys for Children in Custody or Visitation Proceedings of the American Academy of Matrimonial Lawyer*, p. 2, (2011) [hereinafter "*AAML Standards*"].
4. The terms are found in *American Bar Association, Section of Family Law Standards of Practice for Lawyers Representing Children in Custody Cases* (2003)[hereinafter "*ABA Standards*"]. However, the distinction is recognized in other writings. *See AAML Standards*; *National Association of Counsel for Children Recommendations for Representation of Children in Abuse and Neglect Cases* (2001)[hereinafter "*NACC Recommendations*"]; *New York State Bar Assn. Committee on Children and the Law: Standards for Attorneys Representing Children in Custody, Visitation and Guardianship Proceedings* (2008)[hereinafter "*NYSBA Standards*"].
5. *ABA Standards, supra* note 3, at 1.
6. *ABA Standards, supra* note 3, at 2.
7. *NACC Recommendations, supra* note 3, at 4.

8. *ABA Standards, supra* note 3, at 2.

9. *AAML Standards, supra* note 2, at 26-27.

10. *See ABA Standards, supra* note 3, at 9.

11. *ABA Standards, supra* note 3, at 15.

12. *ABA Standards, supra* note 3, at 17.

13. *Id.*

14. *Id.*

15. *Id.*

16. The lawyer should urge the court to avoid the use of the designation "guardian ad litem" which adds to the confusion about the lawyer's role because of its affiliation with Rule 17 and abuse/neglect appointments. *See ABA Standards, supra* note 3, at 2 ("The role of 'guardian ad litem' has become too muddled through different usages in different states, with varying connotations.")

17. *AAML Standards, supra* note 2, at 14.

18. *ABA Standards, supra* note 3, at 3.

19. Standard 2.1 of the *AAML Standards* states: "Court-appointed counsel must decide, on a case-by-case basis, whether their child clients possess the capacity to direct their representation. In the event that the court seeks to appoint counsel for children who lack capacity to direct their representation, the lawyer should strive to refuse the appointment." *AAML Standards, supra* note 2 at15.

20. *ABA Standards, supra* note 3, at 7.

21. *ABA Standards, supra* note 3, at 5.

22. *Id.* at 6.

23. *Id.* at 2; *see generally*, Standard 3 of the *AAML Standards, supra* note 2 at 25; *NACC Recommendations, supra* note 3 at 10.

24. *ABA Standards, supra* note 3, at 2-3.

25. *AAML Standards, supra* note 2, at 26-27.

26. *AAML Standards, supra* note 2 at 13.

Proposed 2012 Formal Ethics Opinion 10
Participation as a "Network" Lawyer for Company Providing Litigation or Administrative Support Services
October 25, 2012

Proposed opinion rules a lawyer may not participate as a network lawyer for a company providing litigation or administrative support services for clients with a particular legal/business problem unless certain conditions are satisfied.

Introduction:

This opinion explores whether a lawyer may participate as a "network" lawyer for a company, usually offering its services via the Internet, that provides litigation or administrative support services to clients with a particular type of legal/business problem.

For example, ABC Services offers to assist mortgage holders and mortgage loan servicers (ABC clients) with the nationwide management of "mortgage defaults." ABC maintains a national network of lawyers who have entered into a "network agreement" with ABC to use administrative and litigation support services provided by ABC, including default management application software, and to accept referrals from ABC. The agreement establishes the legal fees that a network lawyer may charge to an ABC client as well as the "administrative fees" the lawyer must pay to ABC for the support services provided by ABC. An ABC client is considered the mutual client of both ABC and the network lawyer with ABC functioning as the agent of the ABC client while providing litigation and administrative support services to the network lawyer. When a mortgage holder or servicer becomes an ABC client, it is provided with a list of network lawyers. The ABC client may choose to retain one of the network lawyers to provide legal services in connection with a default, or it may ask ABC to invite a lawyer or firm of the client's choosing to become a network lawyer and subsequently to provide legal services to the client. The network lawyer invoices the client for the legal services provided by the lawyer. ABC separately invoices the network lawyer for the administrative services it provided in support of the representation of the ABC client.

Another example of this business model is an Internet-based company, XYZ Company, which offers "an online eviction processing system that connects landlords and property managers with real estate attorneys." The eviction services are provided using software accessed via XYZ's website and a network of lawyers who are licensed by XYZ to use the software. A lawyer who wishes to participate in XYZ's network signs a licensing agreement for the use of the eviction software. The licensing fee is determined by the size of the market in which the lawyer will be providing eviction services. The website states that its system provides lawyers "with the technology necessary to: [e]lectronically receive information necessary to file eviction requests from clients; [c]ommunicate with clients through a message center; [p]rint county-specific forms necessary for eviction filing with the court, completed with pre-populated information from the client; [p]rovide automated updates to client on the status of the case." A landlord who signs up for the service is given the names of network lawyers who have contracted with XYZ to handle eviction cases within the relevant jurisdiction. The selected or assigned lawyer (in the case of single-lawyer jurisdictions) prosecutes the eviction through the court system. The lawyer logs actions taken into XYZ's software, which creates periodic case status reports that are automatically emailed to the landlord. The website claims that these status reports virtually eliminate the need for direct communications between the landlord and the lawyer. The legal fee for each eviction is determined by the lawyer providing the service. The fee is billed and collected by XYZ and then forwarded to the lawyer.

Inquiry #1:

May a North Carolina lawyer or law firm enter into an agreement to participate in a "network" of lawyers for a company using this business model?

Opinion #1:

No, unless the following conditions are satisfied.

Unauthorized Practice of Law

N.C. Gen. Stat. §84-5 makes it unlawful for any corporation to practice law or "hold itself out in any manner as being entitled to do [so]...." Moreover, a lawyer is prohibited by Rule 5.5(d) from assisting another person in the unauthorized practice of law. Neither a lawyer nor a law firm may become a member of a "network" for a company using this business model if the company is providing legal services or holding itself out as a provider of legal services as opposed to a provider of support services to lawyers and clients and a method for identifying lawyers who will use those services to represent the client.

Lawyer Referral Service

A lawyer may not participate in the network if payments are made to the company for referrals or if the company is a for-profit lawyer referral service. Rule 7.2(b) prohibits a lawyer from giving anything of value to a person for recommending a lawyer's services except a lawyer may pay the reasonable cost of advertising. Rule 7.2(d) prohibits participation in a lawyer referral service unless the service is not operated for profit and the service satisfies other conditions not relevant here. Comment [6] to Rule 7.2 defines a lawyer referral service as "any organization that holds itself out to the public as a lawyer referral service. Such referral services are understood by laypersons to be consumer-oriented organizations that provide unbiased referrals to lawyers with appropriate experience in the subject matter of the representation...."

Despite the prohibition on participation

in a for-profit referral service, 2004 FEO 1 holds that a lawyer may participate in an online service that is similar to both a lawyer referral service and a legal directory, provided there is no fee sharing with the service and all communications about the lawyer and the service are truthful. In 2004 FEO 1, the online service solicited lawyers to participate and then charged participating lawyers a registration fee and an annual fee for administrative, system, and advertising expenses. The amount of the annual fee varied by lawyer based upon a number of factors including the lawyer's current rates, areas of practice, geographic location, and number of years in practice. The opinion noted that the online service had aspects of both a lawyer referral service and a legal directory:

> [o]n the one hand, the online service is like a lawyer referral service because the company purports to screen lawyers before allowing them to participate and to match a prospective client with suitable lawyers. On the other hand, it is like a legal directory because it provides a prospective client with the names of lawyers who are interested in handling his matter together with information about the lawyers' qualifications. The prospective client may do further research on the lawyers who send him offer messages. Using this information, the prospective client decides which lawyer to contact about representation.

If a litigation support company provides a prospective client with the names and qualifications of the lawyers in its network who will provide representation in the jurisdiction where the client's case is located but does not specify the employment of one particular lawyer, it is not a prohibited lawyer referral service. Similarly, if at the client's request, a lawyer or law firm is invited to participate in the network, the company is not operating a for-profit lawyer referral service. As stated in 2004 FEO 1, "the potential harm to the consumer [of a for-profit referral service] is avoided because the company does not decide which lawyer is right for the client."

Independent Professional Judgment and Communication with the Client

While a client is entitled to hire an agent to manage its legal affairs, Rule 5.4(c) specifically prohibits a lawyer from permitting a person who recommends, engages, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services. *See also* Rule 1.8(f)(compensation from a third party is prohibited unless there is no interference in the client-lawyer relationship). A lawyer has a duty to communicate with the client about the objectives of the representation and to explain the law to the client to permit the client to make an informed decision about those objectives. Rules 1.2 and 1.4. There can be no interference with the lawyer's communications with the client or with the lawyer's independent professional judgment as to which legal services are required to achieve the client's objectives. *See* Rule 1.2(a)("a lawyer shall abide by a client's decisions concerning the objectives of representation and...consult with the client as to the means by which they are to be pursued"). The interference in a network lawyer's professional judgment is improper if the company dictates what legal services the lawyer is to provide to a client, the company is the sole source of information about the client and its legal needs, or access to the client is restricted by the company. A law firm or lawyer participating in a network must establish the professional relationship with the client and maintain control of the relationship through direct communications as needed to establish the objectives for the representation and to determine the means to achieve them. *See* Rule 1.2.

Competent Representation

Although a lawyer may use the company's services or software, including the forms generated by that software, the lawyer remains professionally responsible for the competent representation of the client including the appropriate determination of the legal services needed to achieve the client's objectives and the quality of any work product that is used in the representation of the client. Rule 1.1 and Rule 1.2. If the lawyer determines that a form or pleading generated by the company's software is not appropriate for a particular client, the lawyer must competently prepare the appropriate form or pleading and, if additional information from the client is required, the lawyer must communicate with the client to obtain the information.

Confidential Information

The confidentiality of the communications between the client and the lawyer, including email communications using the company's website or software, must be assured or, in the alternative, informed consent of the client to the sharing of its communications with the company must be obtained, in advance, after disclosure of the risks of such disclosure. Rule 1.6. The risk that the attorney-client privilege for those communications may be forfeited must be specifically disclosed to the client to obtain informed consent.

Fee Sharing with Nonlawyer

Independent, professional judgment is maintained, in part, by the prohibition on sharing legal fees with a nonlawyer found in Rule 5.4(a). The prohibition helps to avoid nonlawyer interference with the exercise of a lawyer's professional judgment, ensures that the total fee paid by the client is not unreasonably high, and discourages the nonlawyer from engaging in improper solicitation of business for the lawyer. *See* 2010 FEO 4. If a network lawyer must pay the company an "administrative fee" for every legal service the lawyer provides to the client regardless of the administrative or litigation support services provided by the company, the arrangement violates the rule. Any payment to the company for administrative and litigation support services, including payment for access to the company's litigation support software, must be reasonable in light of the services provided. *See* Rule 1.5(a).

Advertising and Solicitation

The information that a participating lawyer provides to the company for distribution to prospective clients must be accurate. Rule 7.1(a) (prohibiting false or misleading communications about the lawyer or the lawyer's services). If false or misleading statements about the lawyer or his services are subsequently made by the company on its website or in other advertising for the company's services, the lawyer must demand that the statements be corrected or deleted. *See* RPC 241 (lawyer who participates in a joint advertising venture or a legal directory is professionally responsible for content of the advertisement even if written or prepared by another). If this does not occur, the lawyer must withdraw from the network.

Rule 7.2(b) prohibits a lawyer from giving anything of value to a person for recommending a lawyer's services except a lawyer may pay the reasonable cost of advertising. Therefore, participation as a network lawyer is prohibited if payments are made to the company for referrals. However, if the payments are for litigation support or administrative services provided to the client or to the lawyer to assist in the rendering of the legal services to the client, and the charge for those services is reasonable

in light of the service received, the payments do not violate the rule.

Rule 7.3(a) prohibits a lawyer from engaging in in-person, telephone, or real-time electronic solicitation (collectively, in-person solicitation) for professional employment when a significant motive for such conduct is the lawyer's pecuniary gain unless the lawyer has a prior professional relationship with the potential client (there are other exceptions not relevant to this inquiry). A lawyer may not do through an agent that which he is prohibited from doing by the Rules of Professional Conduct. Rule 8.4(a). Therefore, if the company engages in in-person solicitation of potential clients that do not have a prior professional relationship with a network lawyer or law firm, and the company's motive for doing so is to solicit clients for legal services to be provided by a network lawyer or law firm, participation in the network arrangement is prohibited.

Written Agreement

Although this opinion does not require a lawyer to have a written agreement with the company, a written agreement addressing the conditions set forth above is strongly recommended. The lawyer may not rely upon a written agreement alone, however, but must monitor the practices of the company on a continuing basis and discontinue the relationship if the lawyer cannot insure compliance with the conditions set forth above.

Inquiry #2:

A participating network lawyer enters into an exclusive arrangement with the company whereby no other network lawyer will provide legal services to participating clients in a designated territory or jurisdiction. This means that a prospective client with a legal matter in this territory or jurisdiction will be automatically referred to the lawyer with the exclusive arrangement.

May a lawyer enter into such an agreement?

Opinion #2:

No, this is essentially a for-profit lawyer referral service, which is prohibited by Rule 7.2(d). *See also* Opinion #1.

Inquiry #3:

After the company enters into a network agreement with a lawyer for a particular territory or jurisdiction, all lawyers who subsequently apply to become network lawyers for the same territory or jurisdiction are charged substantially higher fees. This has the effect of discouraging other lawyers from seeking to become network lawyers for the same territory or jurisdiction and will potentially create *de facto* exclusive territories or jurisdictions.

May a lawyer enter an agreement with the company under these circumstances?

Opinion #3:

No. *See* Opinion #2.

Inquiry #4:

The network agreement specifies that any information submitted by a client using the company's website shall become the exclusive property of the company.

May a lawyer enter into an agreement with such a provision?

Opinion #4:

No. A lawyer cannot agree that his or her confidential communications with a client will become the property of a third party. Such an agreement will interfere not only with the lawyer's duty to protect confidential client communications from unauthorized disclosure, but also with other duties including, but not limited to, the duty of competent representation, the recordkeeping duty for trust account funds, and the duty to avoid future conflicts of interest. *See* Rules 1.1, 1.6, 1.9, and 1.15-3.

Inquiry #5:

The network agreement contains a provision that restricts the lawyer from soliciting any "customer" of the company for the purpose of providing services that compete with the services of the company.

May a lawyer enter into a network agreement with such a provision?

Opinion #5:

No, unless the agreement specifies that the lawyer is not agreeing to restrict his or her right to practice law in violation of Rule 5.6. Presumably, the company does not provide legal services because it is prohibited by law from doing so. *See* Opinion #1 above. The provision in the licensing agreement must specify the non-legal services provided by the company to which the non-compete would apply.

Inquiry #6:

The network agreement requires the lawyer to provide the company with his or her client list.

May a lawyer enter into a network agreement with such a provision?

Opinion #6:

No. This would only be permissible if the lawyer obtained the informed consent of every client whose name will be disclosed to the company. Rule 1.6(a). To obtain informed consent, the lawyer must inform each client of the likelihood that the disclosure would result in a business solicitation from the company.

Inquiry #7:

In the past, lack of sufficient oversight of the ABC employees responsible for preparing affidavits for use by network firms in foreclosure proceedings lead to instances of "robo-signing" in which an ABC employee signed a foreclosure affidavit without conducting a review of the client's file on the matter or possessing the knowledge to which the employee attested in the affidavit. Such affidavits were executed in a manner contrary to the notary's acknowledgement and verification of the documents.[1] The affidavits were then forwarded to the lawyer for use in the foreclosure proceedings.

What is a network lawyer's duty relative to the documents and pleadings provided by ABC?

Opinion #7:

This inquiry demonstrates the potential problems that can result from interference in the autonomy and independent professional judgment of a lawyer by a third party. A lawyer should not participate in the network or a similar service that includes support from a third party if the lawyer's ability to communicate with the client is so restricted that the lawyer cannot determine whether the documents and information he receives via the third party are reliable.

If a network lawyer obtains a document, such as an affidavit, from ABC for use in the representation of a client and the lawyer knows or reasonably should know that ABC has engaged in preparation of erroneous, false, or seemingly false documents or affidavits in similar matters in the past, the lawyer may not use the documents until he has assured himself, through review of the client's own files or direct communication with the client, that the documents are reli-

able. *See* Rule 5.4(c). Particularly with regard to sworn statements, a lawyer's duty of candor requires the lawyer to avoid offering false evidence. *See* Rule 3.3(a)(3). Nevertheless, if a client or an agent of the client is not otherwise known to be unreliable or to provide erroneous or false information, a lawyer may rely upon information provided to her to represent the client.

Endnote

1. Such conduct is the subject of the National Mortgage Settlement. nationalmortgagesettlement.com.

Proposed 2012 Formal Ethics Opinion 11
Use of Nonlawyer Field Representatives to Obtain Representation Contracts
October 25, 2012

Proposed opinion rules that, subject to conditions, a law firm may send a nonlawyer field representative to meet with a prospective personal injury client and obtain a representation contract without prior consultation by a firm lawyer with the prospective client.

Inquiry #1:

ABC law firm employs a large staff of nonlawyers, including paralegals, assistants, and others. Among the nonlawyer staff are employees called "field representatives." When a prospective client contacts ABC, the firm sends a field representative to the prospective client's home or other location chosen by the prospective client. The field representative provides information about the firm in an effort to convince the prospective client to choose firm ABC for representation. If the prospective client agrees, the field representative provides a representation contract and obtains the client's signature on the contract. The field representation also obtains information from the prospective client concerning the representation.

No lawyer with the firm consults with the prospective client before the field representative meets with the person. No lawyer with the firm reviews the information obtained by the field representative before the firm agrees to represent the person.

May the firm accept the representation of a client without a review of the client's circumstances by a firm lawyer?

Opinion #1:

No. A lawyer must use his professional judgment to determine whether to offer legal services to a prospective client after consideration of the relevant facts and circumstances. A lawyer may not delegate to a nonlawer the responsibility for establishing a lawyer-client relationship. Rule 5.3; Rule 5.5; *NC Guidelines for Use of Paralegals in Rendering Legal Services* (2010) (nccertifiedparalegal.gov/guidelines.asp).

Inquiry #2:

If a lawyer at the firm has reviewed sufficient information from the prospective client to determine that an offer of representation is appropriate, may a firm employ a field representative to meet with the prospective client and obtain a representation contract prior to any consultation between the person and a firm lawyer?

Opinion #2:

The Ethics Committee has previously determined that a lawyer may delegate certain tasks to nonlawyer assistants. *See, e.g.*, RPC 70, RPC 216, 99 FEO 6, 2002 FEO 9. Pursuant to RPC 216, when a lawyer delegates a task to a nonlawyer, the lawyer has a duty under the Rules of Professional Conduct to take reasonable steps to ascertain that the nonlawyer assistant is competent; to provide the nonlawyer assistant with appropriate supervision and instruction; and to continue to use the lawyer's own independent professional judgment, competence, and personal knowledge in the representation of the client. *See also* Rule 1.1, Rule 5.3, Rule 5.5.

In 2002 FEO 9, the Ethics Committee specifically determined that a nonlawyer may oversee the execution of real estate closing documents and the disbursement of the proceeds even though the lawyer is not physically present at the closing. 2002 FEO 9 states that, in any situation where a lawyer delegates a task to a nonlawyer assistant, the lawyer must determine that delegation is appropriate after having evaluated the complexity of the transaction, the degree of difficulty of the task, the training and ability of the nonlawyer, the client's sophistication and expectations, and the course of dealing with the client. The opinion holds that the lawyer is still responsible for providing competent representation and adequate supervision of the nonlawyer.

Similarly, under certain circumstances, a nonlawyer field representative may oversee the execution of a representation contract. The firm lawyer must consider the factors set out in 2002 FEO 9 and determine whether such delegation is appropriate.

The lawyer must also take precautions to avoid assisting in the unauthorized practice of law. *See* Rule 5.5(d). The lawyer must instruct the field representative to disclose to the prospective client that he is not a lawyer and that he cannot answer any legal question. The lawyer must also admonish the field representative not to provide legal advice and to contact the lawyer should a legal question arise. Likewise, the lawyer must be available by some means to consult with and answer any legal questions the prospective client may have.

Proposed 2012 Formal Ethics Opinion 12
Agreement for Division of Fees Entered Upon Lawyer's Departure from Firm
October 25, 2012

Proposed opinion rules that an agreement for a departing lawyer to pay his former firm a percentage of any legal fee subsequently recovered from the continued representation of a contingent fee client by the departing lawyer does not violate Rule 5.6 if the agreement was negotiated by the departing lawyer and the firm after the departing lawyer announced his departure from the firm and the specific percentage is a reasonable resolution of the dispute over the division of future fees.

Inquiry:

Attorney B, an associate in Attorney A's firm, resigned from the firm effective February 28, 2005. At the time of his resignation, Attorney B signed an agreement with the firm. The agreement provided that Attorney B would take all of the active client files for which the clients had indicated a desire for Attorney B to continue to represent them. The agreement also contained the following provision:

> With respect to those files in which the client chooses Attorney B to conclude his or her active claim, upon recovery made by Attorney B on each such file, Attorney B shall forward to Attorney A, at the time of disbursement, 50% of the attorney's fee collected on each settlement. This will include medical payments fees as well. Attorney B will also pay to Attorney A upon recovery the total amount of expenses due to Attorney A in accordance with [a computer expense printout provided by Attorney A]. Finally, Attorney B will forward to Attorney A a copy of the settle-

ment sheet signed by the client reflecting the disbursements on each such file. All settlements negotiated by Attorney B through February 28, 2005, will be handled through Attorney A's trust account.

Client entered into an agreement for representation on a personal injury claim with Attorney A's firm on December 16, 2004, while Attorney B was still with the firm. When Attorney B left the firm in February 2005, Client chose to continue to be represented by Attorney B. The case was concluded in May 2010, with a deputy commissioner's award to Client.

There is currently an "attorney-attorney" fee arbitration between Attorney A's firm and Attorney B pending before the fee dispute committee of the local judicial district bar. The distribution of the legal fee from the resolution of Client's worker's compensation case is in dispute. The judicial district bar's bylaws relating to the arbitration of such disputes provides: "The committee shall neither have nor exercise jurisdiction regarding disputes…which involve services that may constitute a violation of The North Carolina State Bar Rules of Professional Conduct, as now in effect or may be hereafter amended." The presiding arbitrator has requested an opinion from the North Carolina State Bar on the following issue: Does the provision of the agreement quoted above comply with the Rules of Professional Conduct?

Opinion:

Rule 5.6(a) prohibits a lawyer from participating in offering or making a partnership, shareholders, operating, employment, or similar type of agreement that restricts the right of a lawyer to practice after termination of the relationship except an agreement concerning benefits upon retirement. This prohibition on restrictive covenants protects the freedom of clients to choose a lawyer and promotes lawyer mobility and professional autonomy. Rule 5.6, cmt. [1].

2008 FEO 8 examined provisions in three employment agreements to determine whether the agreements complied with Rule 5.6. Although the opinion ruled that all three agreements violated Rule 5.6, the opinion, nevertheless, encouraged lawyers to enter into agreements that will help to resolve potential disputes about the division of fees. While cautioning that "such agreements may not be so financially onerous or punitive as to deter a withdrawing lawyer from continuing to represent a client if the client chooses to be represented by the lawyer after the lawyer's departure from the firm," the opinion held that a lawyer may participate in the offering or making of an agreement that includes a provision for dividing legal fees received after a lawyer's departure from a firm.

> ...provided the formula or procedure for dividing fees is, at the time the agreement is made, reasonably calculated to compensate the firm for the resources expended by the firm on the representation as of the date of the lawyer's departure and will not discourage a departing lawyer from taking a case and thereby deny the client access to the lawyer of his choice.

Thus, the circumstances and timing of the execution of an agreement are important to the analysis of whether the agreement runs afoul of Rule 5.6.

In the current inquiry, the agreement was negotiated and entered into after Attorney B announced that he was leaving Attorney A's firm. The agreement was, apparently, part of a global settlement of all issues relative to Attorney B's departure. It was not entered into as a condition of continued employment, as were the agreements analyzed in 2008 FEO 8. It did not deter Attorney B from leaving the firm or from continuing to represent clients who chose to follow him to his new firm. In fact, the agreement specifically contemplated that Attorney B would continue to represent those clients. In light of the various stages of his cases at the time of his departure, a 50% split of the contingent fees to be earned on the cases cannot be viewed as "onerous" or "punitive." Such a division of fees would favor Attorney B in some cases and disfavor him in others.

A division of fees based upon a fixed percentage that fairly allocates, over the range of cases, the value of the time and work expended before and after a lawyer leaves a firm is a reasonable means of achieving an efficient, equitable resolution of the fee division issues between a departing lawyer and the firm. Provided the lawyers deal fairly and honestly with each other without intimidation, threats, or misrepresentation, this type of agreement should be encouraged.

The provision of the agreement addressing costs advanced is consistent with 2008 FEO 8, which provides that the agreement "may require the departing lawyer to protect the firm's interest in receiving reimbursement for costs advanced from any final settlement or judgment received by the client."

Rule 1.5(e) requires a client's written consent to the division of a fee between lawyers who are not in the same firm. This rule, however, does not apply to the current situation because the fee agreement with the client preceded Attorney B's departure from the firm. Rule 1.5, cmt. [9].

Proposed 2012 Formal Ethics Opinion 13
Duty to Safekeep Client Files Upon Suspension, Disbarment, Disappearance, or Death of Firm Lawyer
October 25, 2012

Proposed opinion rules that the partners and managerial lawyers remaining in a firm are responsible for the safekeeping and proper disposition of both the active and closed files of a suspended, disbarred, missing, or deceased member of the firm.

Inquiry #1:

The law firm A & B, PA, was formed as a professional corporation in 1992. Lawyer A and Lawyer B were the initial shareholders in the firm. In 1993, Lawyer C joined the firm and became a shareholder. The professional corporation's articles of incorporation were amended to change the professional corporation's name to A, B & C, PA.

In 1998, Lawyer C closed a real estate transaction for a client of the firm. The file was placed among the firm's inventory of client files.

In 2008, Lawyer A and Lawyer B learned that Lawyer C had committed numerous embezzlements from the firm's trust account in a cumulative amount exceeding $1,000,000. Lawyer C (hereinafter, "C") was ousted from the firm and was subsequently disbarred. The firm's articles of incorporation were amended to change the professional corporation's name back to A & B, PA. When C was ousted from the firm, Lawyer A and Lawyer B reviewed the files for the clients of the firm whose legal services had been provided by C. When their review was completed, Lawyer A and Lawyer B instructed or allowed C to take possession of those client files. Since 2008, the client files have been in a storage facility to which C's lawyer has the key.

The client whose transaction was closed by C in 1998 is now seeking her file, which is believed to be in the storage facility. C is in prison. C's lawyer cannot access the storage

facility due to physical infirmity. However, C's lawyer is willing to give Lawyer A and Lawyer B the key to the storage facility and to authorize them to access and retrieve the client files. Lawyer A and Lawyer B assert that they are not obligated to help the client obtain her file.

When a lawyer leaves a firm and is subsequently disbarred, what is the professional responsibility of the lawyers remaining with the firm relative to the safekeeping and proper disposition of the files of the clients of the disbarred lawyer?

Opinion #1:

The remaining lawyers in the firm are responsible for the safekeeping and proper disposition of both the active and closed files of the disbarred lawyer in their custody. Because of the risk of loss, closed files may not be relinquished to a disbarred lawyer who is no longer subject to the regulation of the North Carolina State Bar and no longer required to comply with the Rules of Professional Conduct.

Rule 1.15 requires a lawyer to preserve client property, including information in a client's file such as client documents and lawyer work product, from risk of loss due to destruction, degradation, or loss. *See also* RPC 209 (noting the "general fiduciary duty to safeguard the property of a client"); RPC 234 (requiring the storage of a client's original documents with legal significance in a safe place or their return to the client); 98 FEO 15 (requiring exercise of lawyer's "due care" when selecting depository bank for trust account); and 2011 FEO 6 (allowing law firm to use "cloud computing" if reasonable care is taken to protect the security of client files).

If a lawyer practices in a law firm with other lawyers, the responsibility to preserve a client's property, including the client's file, is not solely the responsibility of the lawyer providing the legal services to the client. Rule 5.1(a) of the Rules of Professional Conduct requires the partners in a law firm and all lawyers with comparable managerial authority to make "reasonable efforts to ensure that the firm…has in effect measures giving reasonable assurance that all lawyers in the firm…conform to the Rules of Professional Conduct."

The professional responsibilities of the partners and the lawyers with managerial authority relative to the files of the firm are the same regardless of whether the lawyer has departed the firm because of suspension, disbarment, disappearance, or death.[1] The lawyers are responsible for (1) ensuring that any open client matter is promptly and properly transitioned to the lawyer of the client's choice, and (2) retaining possession of and safekeeping closed client files of the departed lawyer until the requirements for disposition of closed files set forth in RPC 209 can be fulfilled. *See, e.g.*, RPC 48 (explaining duties upon firm dissolution including continuity of service to clients and right of clients to counsel of their choice).

Inquiry #2:

Do Lawyer A and Lawyer B have a duty to help a former client of the firm obtain the file relating to the legal services provided to her by C when C was a member of the firm?

Opinion #2:

Yes, when the location of a file is known, the lawyers have a duty to take reasonable measures to assist a client to obtain the file. *See* Opinion #1 and RPC 209.

Endnote

1. This opinion does not address the professional responsibilities of the firm lawyers when a lawyer leaves the firm to practice elsewhere.

Proposed 2012 Formal Ethics Opinion 14 Advertising Content on Gift or Promotional Items October 25, 2012

Proposed opinion rules that the advertising content displayed on certain gift or promotional items does not have to include an office address.

Inquiry:

Lawyer would like to put her firm name on a non-state issued license plate to be placed on the front of her automobile. The graphics on the license plate would consist only of the firm name. No other content would appear on the plate. Is Lawyer required to include an office address on the license plate?

Opinion:

No. Rule 7.2(c) provides that any advertisement for legal services must include the "name and office address of at least one lawyer or law firm responsible for [the advertisement's] content." The purpose of the rule is to facilitate the identification and location of a responsible lawyer or firm in order to hold that lawyer or firm accountable for the content of the advertisement. However, we conclude that where a gift/promotional item displays only the name or logo of the lawyer or law firm, and the items are used/disseminated by the lawyer or law firm in a manner otherwise permissible under the Rules of Professional Conduct, the gift/promotion item does not have to display an office address.

Examples of such items would include pens, pencils, hats, or coffee mugs bearing the name or logo of a law firm or lawyer. A non-state issued license plate displaying a law firm's name is also exempt from the address requirement.

Proposed 2012 Formal Ethics Opinion 15 Lawyer as Witness October 25, 2012

Proposed opinion rules that whether a lawyer is a "necessary witness" and thereby disqualified from acting as a client's advocate at a trial is an issue left up to the discretion of the tribunal.

Inquiry:

Based on allegations by A, Defendant B was arrested and charged with cruelty to animals. B's lawyer wrote to A and asked him to withdraw the charges. B's lawyer advised A that B had not harmed the animals and advised A that he could be sued civilly for maliciously instituting charges against B without probable cause. Eventually, B's motion for a directed verdict was granted in the matter.

Lawyer, on behalf of B, filed a malicious prosecution suit against A. The pleadings contained an allegation that Lawyer had contacted A, assured A that B had not harmed his animals, asked A to withdraw the charges, and advised A that "persons who maliciously institute charges without probable cause could be held liable for damages." The pleading then alleges that A "maliciously refused to contact the relevant law enforcement authorities to inform them of the true facts."

The trial court questions whether Lawyer had made himself a witness by virtue of his inclusion of the above-referenced factual allegations.

Opinion:

Rule 3.7(a) provides that a lawyer shall not act as advocate at a trial in which "the lawyer is likely to be a necessary witness" unless: (1)

CONTINUED ON PAGE 65

Amendments Approved by the Supreme Court

At a conference on August 23, 2012, the North Carolina Supreme Court approved the following amendments to the rules of the North Carolina State Bar (for the complete text see the Spring 2012 and Summer 2012 editions of the *Journal* or visit the State Bar website):

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 amendments permit judicial district bars to adopt procedures for online voting for State Bar councilors.

Amendments to the Discipline and Disability Rules

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

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

Amendments to the Procedures for Fee Dispute Resolution

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

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

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 amendments will facilitate the service of notices to show cause (NSC) and suspension orders for failure to fulfill a membership or CLE requirement and clarify that a written response to a NSC must "show cause" rather than merely provide an explanation for the failure to fulfill an obligation of membership.

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 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.

Amendments to the CLE Rules

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

The amendments authorize the granting of 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.

Amendments to the Legal Specialization Rules

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

The 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.

Amendments to the Rules for Paralegal Certification

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

A new rule creates an inactive status for certified paralegals who are experiencing financial hardship, illness or disability, on active military duty, or following a military spouse to another state or country.

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 amendments clarify that the bank directive requirement is limited to trust and fiduciary accounts with demand deposit.

Amendments Pending Approval of the Supreme Court

At its meeting on October 26, 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 Fall 2012 edition of the *Journal* or visit the State Bar website):

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. The lawyer may only return to active status pursuant to a court order.

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 proposed amendments to the rule on reinstatement from inactive and suspended status will cap 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. 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.

Proposed Amendments to The Plan for Legal Specialization

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

A new section of the Plan for Legal Specialization will establish the standards for a new specialty in trademark law.

Proposed Amendments to the Rules for Certifying Paralegals

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

The proposed rule amendment limits 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.

Proposed Amendments to the Continuing Paralegal Education Rules

27 N.C.A.C. 1G, Section .0200, Rules Governing Continuing Paralegal Education

The proposed rule amendments clarify that law school courses are approved activities for the purpose of satisfying the continuing paralegal education requirements.

Proposed Amendments

At its meeting on October 25, 2012, the Council voted to publish the following proposed rule amendments for comment from the members of the bar:

Proposed Amendments to the Discipline and Disability Rules

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

Extensive amendments to the disability rule are proposed. In addition to rearranging the provisions of the existing rule to improve clarity, the proposed amendments eliminate ambiguity, add a new provision allowing the Office of Counsel to initiate a disability proceeding while a disciplinary proceeding is pending, and explain the procedure to be followed when a hearing panel finds probable cause to believe the defendant in a disciplinary proceeding is disabled. Because the proposed amendments are extensive, existing Rule .0118 will be revoked and replaced with the proposed rule that appears below. Therefore, bold, underlined print is not used to show the new provisions of the rule. For the text of the existing rule, visit the "Rules" section of the State Bar website:

.0118 Disability

(a) Transfer by Secretary where Member Judicially Declared Incompetent - Where a member of the North Carolina State Bar has been judicially declared incapacitated, incompetent, or mentally ill by a North Carolina court or by a court of any other jurisdiction, the secretary, upon proper proof of such declaration, will enter an order transferring the member to disability inactive status effective immediately and for an indefinite period until further order of the Disciplinary Hearing Commission. A copy of the order transferring the member to disability inactive status will be served upon the member, the member's guardian, or the director of any institution to which the member is committed.

(b) Transfer to Disability Inactive Status by Consent – The chairperson of the Grievance Committee may transfer a member to disability inactive status upon consent of the member and the counsel.

(c) Initiation of Disability Proceeding

(1) Disability Proceeding Initiated by the North Carolina State Bar

(A) Evidence a Member has Become Disabled - When the North Carolina State Bar obtains evidence that a member has become disabled, the Grievance Committee will conduct an inquiry which substantially complies with the procedures set forth in Rule .0113 (a)-(h) of this subchapter. The Grievance Committee will determine whether there is probable cause to believe that the member is disabled within the meaning of Rule .0103(19) of this subchapter. If the Grievance Committee finds probable cause, the counsel will file with the commission a complaint in the name of the North Carolina State Bar, signed by the chairperson of the Grievance Committee, alleging disability. The chairperson of the commission shall appoint a hearing panel to determine whether the member is disabled.

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.

(B) Disability Proceeding Initiated While Disciplinary Proceeding is Pending - If, during the pendency of a disciplinary proceeding, the counsel receives evidence constituting probable cause to believe the defendant is disabled within the meaning of Rule .0103(19) of this subchapter, the chairperson of the Grievance Committee may authorize the counsel to file a motion seeking a determination that the defendant is disabled and seeking the defendant's transfer to disability inactive status. The hearing panel appointed to hear the disciplinary proceeding will hear the disability proceeding.

(C) Pleading in the Alternative – When the Grievance Committee has found probable cause to believe a member has committed professional misconduct and the Grievance Committee or the chairperson of the Grievance Committee has found probable cause to believe the member is disabled, the State Bar may file a complaint seeking, in the alternative, the imposition of professional discipline for professional misconduct or a determination that the defendant is disabled.

(2) Initiated by Hearing Panel During Disciplinary Proceeding - If, during the pendency of a disciplinary proceeding, a majority of the members of the hearing panel find probable cause to believe that the defendant is disabled, the panel will, on its own motion, enter an order staying the disciplinary proceeding until the question of disability can be determined. The hearing panel will instruct the Office of Counsel of the State Bar to file a complaint alleging disability. The chairperson of the commission will appoint a new hearing panel to hear the disability proceeding. If the new panel does not find the defendant disabled, the disciplinary proceeding will resume before the original hearing panel.

(3) Disability Proceeding where Defendant Alleges Disability in Disciplinary Proceeding - If, during the course of a disciplinary proceeding, the defendant contends that he or she is disabled within the meaning of Rule .0103(19) of this subchapter, the defendant will be immediately transferred to disability inactive status pending conclusion of a disability hearing. The disciplinary proceeding will be stayed pending conclusion of the disability hearing. The hearing panel appointed to hear the disciplinary proceeding will hear the disability proceeding.

(d) Disability Hearings

(1) Burden of Proof

(A) In any disability proceeding initiated by the State Bar or by the commission, the State Bar bears the burden of proving the defendant's disability by clear, cogent, and convincing evidence.

(B) In any disability proceeding initiated by the defendant, the defendant bears the burden of proving the defendant's disability by clear, cogent, and convincing evidence.

(2) Procedure - The disability hearing will be conducted in the same manner as a disciplinary proceeding under Rule .0114 of this subchapter. The North Carolina Rules of Civil Procedure and the North Carolina Rules of Evidence apply, unless a different or more specific procedure is specified in these rules. The hearing will be open to the public.

(3) Medical Examination - The hearing panel may require the member to undergo psychiatric, physical, or other medical examination or testing by qualified medical experts selected or approved by the hearing panel.

(4) Appointment of Counsel - The hearing panel may appoint a lawyer to represent the defendant in a disability proceeding if the hearing panel concludes that justice so requires.

(5) Order

(A) When Disability is Proven - If the hearing panel finds that the defendant is disabled, the panel will enter an order continuing the defendant's disability inactive status or transferring the defendant to disability inactive status. An order transferring the defendant to disability inactive status is effective when it is entered. A copy of the order shall be served upon the defendant or the defendant's guardian or lawyer of record.

(B)When Disability is Not Proven - When the hearing panel finds that it has not been proven by clear, cogent, and convincing evidence that the defendant is disabled, the hearing panel shall enter an order so finding. If the defendant had been transferred to disability inactive status pursuant to paragraph (c)(3) of this rule, the order shall also terminate the defendant's disability inactive status.

(e) Stay/Resumption of Pending Disciplinary Matters

(1) Stay or Abatement - When a member is transferred to disability inactive status, any proceeding then pending before the Grievance Committee or the commission against the member shall be stayed or abated unless and until the member's disability inactive status is terminated.

(2) Preservation of Evidence - When a disciplinary proceeding against a member has been stayed because the member has been transferred to disability inactive status, the counsel may continue to investigate allegations of misconduct. The counsel may seek orders from the chairperson of the commission, or the chairperson of a hearing panel if one has been appointed, to preserve evidence of any alleged professional misconduct by the member, including orders which permit the taking of depositions. The chairperson of the commission, or the chairperson of a hearing panel if one has been appointed, may appoint counsel to represent the member when necessary to protect the interests of the member during the preservation of evidence.

(3) Termination of Disability Inactive Status - Upon termination of disability inactive status, all disciplinary proceedings pending against the member shall resume. The State Bar may immediately pursue any disciplinary proceedings that were pending when the member was transferred to disability inactive status and any allegations of professional misconduct that came to the State Bar's attention while the member was in disability inactive status. Any disciplinary proceeding pending before the commission that had been stayed shall be set for hearing by the chairperson of the commission.

(f) Fees and Costs - The hearing panel may direct the member to pay the costs of the disability proceeding, including the cost of any medical examination and the fees of any lawyer appointed to represent the member.

Proposed Amendments to the Standards for the Criminal Law Specialty

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

The proposed amendments specify that jury trial experience is a component of the substantial involvement standard for certification in the criminal law specialty.

.2505 Standards for Certification as a Specialist

(a)….

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

(1) Substantial involvement shall mean during the five years immediately preceding the application, the applicant devoted an average of at least 500 hours a year to the practice of criminal law, but not less than 400 hours in any one year. "Practice" shall mean substantive legal work, specifically including representation in criminal **jury** trials, done primarily for the purpose of providing legal advice or representation, or a practice equivalent.

(2) ….

(3) For the specialty of criminal law and the subspecialty of state criminal law, the board shall require an applicant to show substantial involvement by providing information that demonstrates the applicant's significant criminal trial experience such as:

(A) representation during the applicant's entire legal career in criminal trials concluded by **jury** verdict;

(B) representation as principal counsel of record in federal felony cases or state felony cases (Class G or higher);

(C) court appearances in other substantive criminal proceedings in criminal courts of any jurisdiction; and

(D) representation in appeals of decisions to the North Carolina Court of Appeals, the North Carolina Supreme Court, or any federal appellate court. ■

Legal Ethics (cont.)

the information is probably considered "generally known" [emphasis added].

The *Restatement (Third) of The Law Governing Lawyers* adopts an access approach to the question. If the information is easily accessible to the public, it is "generally known." If special knowledge or skills are required to obtain the information, or if acquiring it would be expensive, then it is not. *See Restatement (Third) of The Law Governing Lawyers* § 59(d).

Exsqueeze Me?

Rule 1.6 provides that a lawyer may never reveal information acquired during the professional relationship with a client (with the noted exceptions), and Rule 1.9(c)(2) prohibits disclosure of a former client's information, regardless of whether the information has become generally known. At first blush, this prohibition may seem overly broad and impractical.

For this reason, there is some support for the proposition that the rules should specifically state that information in the public domain should not be deemed protected information. *See* Laws. Man. on Prof. Conduct (ABA/BNA) 55:310. For example, the *Restatement* provides that a lawyer may not use or disclose *confidential* client information and defines confidential client information as "information relating to the representation of a client, other than information that is generally known." *Restatement (Third) of the Law Governing Lawyers* §59, 60. Similarly, Massachusetts and Wyoming provide in their respective Rules of Professional Conduct that a lawyer "shall not reveal ***confidential*** information relating to representation of a client" (emphasis added). Mass. Rules of Prof'l Conduct, R. 1.6(a); Wyo. Rules of Prof'l Conduct R. 1.6(a).

Take a Chill Pill

I don't believe that such a rule amendment is necessary. The Rules of Professional Conduct are "rules of reason" and should be applied with a common sense approach. Rule 0.2, Scope, cmt. [1]. To reveal is to make something that is secret or hidden publicly or generally known. Merriam-Webster Online Dictionary, 2012, merriam-webster.com/dictionary/reveal (1 Nov. 2012). Rule 1.6 and Rule 1.9 prohibit a lawyer from "revealing" information. Common sense would dictate that information that has been widely disseminated is no longer capable of being "revealed." *See* SC Bar Ethics Advisory Comm., Op. 10-4 (2004).

In conclusion, lawyers need to familiarize themselves with the various rules pertaining to the protection of client information as well as the nuances particular to each rule. Lawyers should then take a conservative, yet common sense approach, to the application of these rules in their legal practice. ■

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

State Bar Swears in New Officers


Kapp


Baker


Gibson

Kapp Installed as President

Raleigh attorney M. Keith Kapp was sworn in as president of the North Carolina State Bar. He was sworn in by Chief Justice Sarah Parker of the North Carolina Supreme Court at the State Bar's Annual Dinner on Thursday, October 25, 2012.

Kapp earned an AB degree with honors from UNC and a JD, also with honors, from UNC School of Law.

Kapp is a partner, vice-president, and vice-chair of the Board of Directors at his firm, Williams Mullen. He represents businesses ranging from multi-national to private or family-owned enterprises in connection with their commercial litigation and regulatory needs. He advises clients on the laws of contract, shareholder rights, antitrust, franchise relations, warranty, consumer protection, unfair trade practices, and various regulatory statutes. As a member of the Commercial Arbitration Panel of the American Arbitration Association, Kapp also provides arbitration services.

Kapp has had substantial involvement in local and state bar organizations. He served as president of the Wake County Bar Association and served on the Board of Governors of the North Carolina Bar Association. As a State Bar councilor, Kapp chaired the Ethics Committee, Facilities Committee, and Administrative Committee. He has also served on the Grievance Committee, Emerging Issues Committee, Issues Committee, Paperless Banking Committee, Executive Committee, Disciplinary Review Committee, and Program Evaluation Committee.

Mr. Kapp is active in numerous civic organizations including the Moravian Ministries Foundation, the Raleigh Kiwanis Club, and the Raleigh Little Theatre.

Baker Elected as President-Elect

Ahoskie attorney Ronald G. Baker Sr. was sworn in as president-elect of the North Carolina State Bar. He was sworn in by Chief Justice Sarah Parker at the State Bar's Annual Dinner on Thursday, October 25, 2012.

As an undergraduate Baker attended the University of North Carolina as a Morehead Scholar, and he earned his JD with honors from the University of North Carolina School of Law.

Baker practiced with Henson, Donahue & Elrod in Greensboro from 1975-1978, then moved to Ahoskie and has since practiced with what is now Baker, Jones, Daly & Carter, PA.

Baker has substantial involvement in bar organizations. He is a member of the North Carolina Bar Association and the American Bar Association. He has served on the board and is past-president of the North Carolina Association of Defense Attorneys, and has been a North Carolina representative to the Defense Research Institute. As a State Bar Councilor, Baker has chaired the Grievance Committee and Issues Committee. He has also served on the Client Assistance Committee, Authorized Practice Committee, Legislative Committee, Administrative Committee, Disciplinary Advisory Committee, Executive Committee, Program Evaluation Committee, and the Special Committee to Study Disciplinary Guidelines, Appointments Committee.

Mr. Baker is active in numerous civic organizations. He is a past-president and life member of the Ahoskie Jaycees, is a US Jaycees ambassador, is a former Hertford County commissioner, and is past-chair of the Hertford County Board of Education and the Hertford County Committee of 100.

Gibson Elected as Vice-President

Charlotte attorney Ronald L. Gibson was sworn in as president-elect of the North Carolina State Bar. He was sworn in by Chief Justice Sarah Parker at the State Bar's Annual Dinner on Thursday, October 25, 2012.

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

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

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

Resolution of Appreciation of
James R. Fox

WHEREAS, James R. Fox was elected by his fellow lawyers from the 21st Judicial District in January 2002 to serve as their representative in this body. Thereafter, he was elected for three successive three-year terms as councilor; and

WHEREAS, in October 2009 Mr. Fox was elected vice-president, and in October 2010 he was elected president-elect. On October 21, 2011, he was sworn in as president of the North Carolina State Bar; and

WHEREAS, during his service to the North Carolina State Bar, Mr. Fox has served on the following committees: Grievance, Authorized Practice, Special Committee on Real Property Closings, Emerging Issues, Executive, Disciplinary Review, Disciplinary Advisory, Special Committee to Study Disciplinary Guidelines, Issues, Statute of Limitations Study, Program Evaluation, Program Evaluation LAP/Grievance Subcommittee, Finance & Audit, and Appointments; and

WHEREAS, every individual who is called upon to serve as the president of the North Carolina State Bar must do at least four things well. He or she must defend the core values of the legal profession, continue and build upon the undertakings of his or her predecessors, explain for the edification of the membership and the benefit of the public how and why the State Bar is regulating the profession, and lead the agency in a manner that is consonant with its statutory purposes and the public's interest. Jim Fox has, as set forth below, faithfully and diligently discharged all of these duties, and

WHEREAS, he has defended the profession and its essential precepts honorably and effectively in the legislature, in the courtroom, and in the bureaucracy. On his watch, legislation that would have compromised professional independence and loyalty to clients was challenged and defeated in the General Assembly, unauthorized practice by means of the internet was steadfastly resisted in litigation, and the illicit practices of nonlawyers in real estate closings were clearly defined and proscribed in a definitive opinion that found favor with all concerned, including the federal government, and

WHEREAS, Jim Fox has continued the mighty work of those who have previously served, superintending and sustaining the State Bar's ongoing programs while earnestly prosecuting the agency's most ambitious undertaking in several generations, the construction of its new headquarters. Building upon the foundation that was laid, literally, at the beginning of his term, Jim Fox has overseen the raising of an edifice that will well bespeak his stewardship into the 22nd century, and

WHEREAS, Jim Fox has explained the mission and the work of the organized Bar with singular eloquence, elegance, and economy through his skillful use of the president's message in the State Bar *Journal*. While his predecessors have all been great communicators, none has surpassed Mr. Fox as an exponent and expounder of self-regulation, and

WHEREAS, Jim Fox has led the North Carolina State Bar with a remarkably sure and even hand, bringing to bear in every instance the finely-honed talents of a lawyer's lawyer. Though widely appreciated as a serious man well suited to the disposition of business of great importance, Jim Fox has never taken himself too seriously. Those who have had the pleasure of working with and for him have invariably and inevitably been impressed by his modesty, his sense of perspective and proportion, and his good humor, qualities that have made him a great man to follow.

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

BE IT FURTHER RESOLVED that a copy of this resolution be made a part of the minutes of the annual meeting of the North Carolina State Bar and that a copy be delivered to James R. Fox.

Fifty-Year Lawyers Honored

As is traditional, members of the North Carolina State Bar who are celebrating the 50th anniversary of their admission to practice were honored during the State Bar's Annual Meeting at the 50-Year Lawyers Luncheon. One of the honorees, Jules E. Banzet III, addressed the gathering, and each honoree was presented a certificate by the president of the State Bar, James R. Fox, in recognition of his service. After the ceremonies were concluded, the honorees in attendance sat for the photograph below. ■

First row (left to right): Charles M. Hensey, Peter L. Roda, H. Morrison Johnston, Calvin W. Chesson, William G. Pfefferkorn, Richard C. Pattisall, Joe O. Brewer, Samuel H. Poole Second row (left to right): Reginald S. Hamel, James L. Swisher, C. Thomas Biggs, H. Dolph Berry, Gerald L. Bass, Robert M. Burroughs, Warren A. Winthrop, Jacob (Jack) L. Safron, Murray C. Greason Jr. Third row (standing, left to right): Julius E. Banzet III, Richard N. Randleman, Thomas E. Wagg III, David L. Ward Jr., W. Harrell Everett Jr., John D. Warlick, Samuel J. Crow, Robert L. Cecil, George Roundtree III

Proposed Ethics (cont.)

the testimony relates to an uncontested issue; (2) the testimony relates to the nature and value of legal services rendered in the case; or (3) disqualification of the lawyer would work substantial hardship on the client.

A lawyer should be disqualified under Rule 3.7 only upon a showing of "compelling circumstances." *State v. Schmitt*, 102 P.3d 856, 859 (Wash. Ct. App. 2004). Disqualification is limited to situations where the lawyer's testimony is "necessary." It is generally agreed that when the anticipated testimony is relevant, material, and unobtainable by other means, the lawyer's testimony is "necessary." *See* Ann. Model Rules of Prof'l. Conduct (6th ed. 2007), p. 361 (citing cases).

The issue of whether a lawyer is a "necessary witness" and thereby disqualified from acting as a client's advocate at a trial is an issue best left to the discretion of the tribunal. Determining whether a lawyer is likely to be a necessary witness "involves a consideration of the nature of the case, with emphasis on the subject of the lawyer's testimony, the weight the testimony might have in resolving disputed issues, and the availability of other witnesses or documentary evidence which might independently establish the relevant issues." *Fognani v. Young*, 115 P.3d 1268 (Colo. 2005). ■

Client Security Fund Reimburses Victims

At its October 25, 2012, meeting, the North Carolina State Bar Client Security Fund Board of Trustees approved payments of $349,284.29 to 17 applicants who suffered financial losses due to the misconduct of North Carolina lawyers.

The new payments authorized were:

1. An award of $250 to an applicant who suffered a loss because of Tonya Ford of Raleigh. The board found that Ford was retained to handle a client's traffic ticket. Ford failed to appear and provided no valuable legal service for the fee paid. Ford was disbarred on April 15, 2011.

2. An award of $15,000 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 retained funds to satisfy an IRS lien, but failed to disburse the funds to the IRS or the client. 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 seven other Green-Lee clients a total of $218,223.43.

3. An award of $4,635 to applicants who suffered losses because of Willis Harper Jr. of Whiteville. The board found that Harper was retained to handle a client's real estate closing. From the closing proceeds, Harper should have disbursed funds to a law firm and an asset management company, but failed to do so. Due to misappropriation, Harper's trust account balance is insufficient to pay all of his clients' obligations. Harper was disbarred on February 26, 2012.

4. An award of $100 to a former client of Willis Harper. The board found that Harper was retained to handle a client's traffic ticket. Harper failed to provide any valuable legal service for the fee paid.

5. An award of $1,500 to a former client of W. Rickert Hinnant of Winston-Salem. The board found that Hinnant was retained to appeal a civil arbitration award. Hinnant failed to provide any valuable legal services for the fee paid. Hinnant was disbarred on June 15, 2011. The board previously reimbursed three other Hinnant clients a total of $11,500.

6. An award of $6,000 to a former client of Mark Jenkins of Waynesville. The board found that Jenkins was retained to handle a civil dispute over a property boundary. Jenkins failed to provide any valuable legal services for the fee paid. Jenkins was disbarred on March 31, 2011, and died on April 5, 2011. The board previously reimbursed 11 other Jenkins clients a total of $35,475.

7. An award of $100,000 to a former client of Albert Neal of Candler. The board found that Neal served as power of attorney and fiduciary for a client. Neal appropriated the client's funds for his own personal use.

8. An award of $500 to an applicant who suffered a loss because 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 three other Smith clients a total of $13,400.

9. An award of $5,000 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 received med pay for the client and held it in trust to pay a possible VA medical lien. There was no VA lien, and Stratas abandoned his practice prior to paying the funds to the client. Stratas' trust account balance was insufficient to cover all of his clients' obligations due to misappropriation. The board previously reimbursed seven other Stratas clients a total of $127,215.78.

10. An award of $10,000 to a former client of Nicholas Stratas Jr. The board found that Stratas was retained to handle a client's property settlement in a domestic matter and a possible medical malpractice claim. Stratas failed to provide any valuable legal service for the fee paid.

11. An award of $20,000 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 settled the matter without the client's knowledge or consent, and failed to disburse any of the settlement proceeds to the client. Due to misappropriation, Whitley's trust account balance is insufficient to pay all of his clients' obligations. Whitley died on December 6, 2011. The board previously reimbursed five other Whitley clients a total of $103,665.29.

12. An award of $18,060 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 $53,050 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 failed to disburse the funds to the client prior to his death.

14. An award of $16,333.33 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 failed to disburse the funds to pay the client's medical liens prior to his death.

15. An award of $90,000 to a former client of W. Darrell Whitley. The board found that Whitley was retained to handle a client's wrongful death claim. Whitley settled the matter, but failed to disburse the settlement proceeds prior to his death.

16. An award of $4,355.96 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 failed to pay the client's medical liens from the settlement proceeds prior to his death.

17. An award of $4,500 to a former client of Nancy Wooten of Winston-Salem. The board found that Wooten was retained to handle a client's custody matter. Wooten failed to provide any valuable legal service for the fee paid prior to her death. Due to misappropriation, Wooten's trust account balance is insufficient to pay all of her clients' obligations. Wooten died on April 19, 2012. ■

Law School Briefs

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

Campbell University School of Law

Campbell Law Produces Top Bar Passage Rate on July Bar Exam—Campbell Law stands at the top of the list on the North Carolina Bar Exam for July 2012. Boasting a 94.53% bar passage rate, Campbell Law Class of 2012 graduates outperformed all other North Carolina law schools, leading the state in both first time bar passage and overall bar passage. Campbell Law's overall record of success on the North Carolina Bar Exam has been unsurpassed by any other North Carolina law school for the past 26 years.

2012 Alums Attend Swearing-In Ceremony—Fifty-eight graduates from the Campbell Law Class of 2012 participated in a swearing-in ceremony at the law school on September 14. The Honorable Paul Gessner and The Honorable Paul Ridgeway, both Wake County Superior Court judges and Campbell Law graduates, administered the oath of office and led the swearing-in of Campbell Law alums who recently passed the July 2012 North Carolina Bar Examination.

Professor Flanary-Smith Elected to NC Society of Health Care Attorneys Board of Directors—Campbell Law Assistant Professor Amy Flanary-Smith has been elected to the North Carolina Society of Health Care Attorneys (NCSHCA) Board of Directors. Flanary-Smith was elected to a three-year term during the NCSHCA annual meeting on September 28. An expert in legal discourse and advocacy, Flanary-Smith serves as the director of Campbell Law's Legal Research & Writing Program.

Campbell Law Hosts US Senator Burr—United States Senator Richard Burr paid a visit to Campbell Law School on October 10. Senator Burr toured the law school with field representative Betty Jo Shepheard, Campbell Law Interim Dean Keith Faulkner, and Campbell Law Director of Development Trudi Brown, before holding a discussion and question-and-answer session with more than 130 law school students, faculty, and staff members.

Charlotte School of Law

Charlotte School of Law Students Compete and Contribute in South Africa—Chris Harden and Nicole Trautman, both members of the CSL Moot Court Honor Board, recently competed in the Kovsie First Year Moot Court Competition hosted by the University of the Free State in Bloemfontein, South Africa, winning their first round. They also participated in a community service project, raising $1,050 for the Kidz Care Trust, a non-profit organization that takes in young boys from the streets of South Africa and gives them a place to sleep, eat, play, study, and learn fundamental life skills.

Charlotte School of Law Student Wins NCAWA Scholarship—Brandy Hagler is Charlotte School of Law's 2012-2013 North Carolina Association of Women Attorneys scholarship recipient. She is an officer in the Women in Law group; volunteers for the Susan G. Komen Breast Cancer Foundation, the Daughters of Charity, and the Harahan Guest House for the Elderly; and is a leader in numerous other areas.

Fearless Leadership: Maintaining Ethics No Matter How High the Risk—Karen A. Popp visited CSL to discuss the attorney's duty to maintain the highest ethics in the face of difficult decision-making. As a former federal prosecutor, she litigated several high-profile cases, and served as associate White House counsel to President Clinton.

Charlotte School of Law Civic Engagement Activities—The Democratic National Convention brought exciting opportunities for our students to explore legal, political, social, and ethical issues surrounding the presidential election. Students represented arrested protesters through the Clinics program. CSL also hosted a number of events: Dr. Michael Bitzer spoke about Predicting the Unpredictable: Looking at the 2012 Elections; and a panel on Unique Challenges of Representing Public Servants was held, along with a Civic Engagement Forum. A Republican National Convention watch party was also held on campus.

Duke Law School

Faculty news—Three interdisciplinary scholars, Matthew D. Adler, Rachel Brewster, and Nita A. Farahany, have joined Duke Law's faculty. Adler studies policy analysis, risk regulation, and constitutional theory. Brewster studies international trade, international relations theory, and global economic integration. Farahany studies the intersections of criminal law, biosciences, and philosophy.

W. H. "Kip" Johnson III, a founding member of the Morningstar Law Group in Raleigh, also has joined the faculty as director of the Start-Up Ventures Clinic.

Professor Scott Silliman, director emeritus of the Duke Center on Law, Ethics, and National Security, was sworn in on September 12 as an appellate judge on the United States Court of Military Commission Review, after receiving Senate confirmation.

For the fourth consecutive year, Supreme Court Justice Samuel A. Alito spent a week at Duke Law in September, teaching a seminar to upper-year students titled Current Issues in Constitutional Interpretation.

The Legal Services Corporation held a daylong forum on civil legal aid at Duke University on October 1. At a subsequent reception at Duke Law School, five attorneys were honored for their volunteer service with Legal Aid of North Carolina (LANC). Senior Lecturing Fellow Charles R. Holton '73, a partner with Womble Carlyle Sandridge & Rice in Research Triangle Park and the chair elect of the LANC Board of Directors, was recognized as a *pro bono* leader in the area of fair housing for low-income clients in central North Carolina.

Duke's Master of Laws in Judicial Studies Welcomes its First Class—Eighteen judges from federal, state, and foreign courts com-

prised the inaugural class of the Duke Master of Laws in Judicial Studies Program. The intensive four-week summer session represented the first of two in the LLM program for judges, the only one of its kind offered by a US law school.

Elon University School of Law

National Recognition for Innovation and Small Class Sizes—*The National Jurist* ranked Elon this summer as one of America's 20 Most Innovative Law Schools. Elon's preceptor program was the basis for the school's selection. The program provides students with a mentoring relationship with attorneys. Students receive guidance about career planning and the profession from the moment they enter law school.

In October, *The National Jurist* ranked Elon #1 in the nation for small class sizes for first-year students. "Practitioners and employers tell us that our students display a kind of confidence and readiness to enter the world of work," said Dean George R. Johnson Jr. "We think a lot of it has to do with the opportunities that our students have with these small class sizes. It translates nicely into internships and the world of work."

Fred Lind Receives Leadership in the Law Award—In September, Dean Johnson presented Guilford County Public Defender Frederick G. Lind with Elon's 2012 Leadership in the Law Award recognizing outstanding contributions to the profession and to society.

"Fred is the kind of lawyer who by dint of his personality and his unimpeachable integrity inspires public confidence in our legal system," Johnson said. "For showing us what true dedication to building and sustaining a fair judicial system looks like, for showing so much care in mentoring emerging lawyers in our community, for exemplifying the determination, consistency, and professionalism that defines great public defenders, and for modeling for us the life of a lawyer-leader, I am honored to present Frederick G. Lind with Elon University School of Law's 2012 Leadership in the Law Award."

Lind served as assistant public defender for 36 years prior to his appointment as public defender in 2011. He has tried more than 325 jury trials.

North Carolina Central University School of Law

Phyliss Craig-Taylor Welcomed as Dean of NCCU Law—Attorney Phyliss Craig-Taylor became dean of the North Carolina Central University School of Law in July. Assuming the dean's office marks a return to NCCU for Craig-Taylor, who served as a law professor from 2000 to 2006. Craig-Taylor most recently served in the positions of director for teaching excellence, associate dean for faculty, and associate dean for academics at Charlotte School of Law in Charlotte.

Craig-Taylor has more than 22 years of experience in legal education and administration. She has been an active faculty member at the University of Tennessee, the University of Florida College of Law, the University of San Francisco School of Law, and the University of Warsaw College of Law in Poland. She is certified as a Six Sigma Green Belt in Process Management from Villanova University (2010).

As an executive-in-residence at InfiLaw Systems, Inc. in Naples, FL, Craig-Taylor provided leadership and oversight to academic affairs and academic outcomes for the Charlotte School of Law, Phoenix School of Law, and Florida Coastal School of Law. Through her involvement with the ABA, Craig-Taylor has held several leadership positions in the Section of Litigation, including serving on council, as a member of the Task Force for Civil Practice Rules, and as a division director for the Administrative and Substantive Law Divisions. She has served on the NC State Bar Ethics Advisory Committee and the NC Bar Association Minorities in the Profession Committee.

A graduate of the University of Alabama Tuscaloosa, where she earned both her undergraduate degree and law degree, she later served as a partner in the law firm of England & Bivens and as a judicial clerk for the Alabama Supreme Court. She earned a Master of Laws degree at Columbia University in New York.

University of North Carolina School of Law

CLE Program—The annual Dan K. Moore Program in Ethics was held October 26. The continuing legal education program addressed a variety of ethical issues of interest to corporate lawyers—both in-house counsel and attorneys in private practice. The topic was "Adjusting to the 'New Normal': Ethical Challenges for In-House and Outside Counsel." Visit law.unc.edu/cle/dankmoore.

Law Alumni Awards—The school presented three alumni with the Distinguished Alumni Award at the annual Leadership Awards Dinner on September 27: James E. Delany '73, commissioner of the Big Ten Conference; DeWitt F. (Mac) McCarley '77, partner with Parker Poe Adams & Bernstein; and Vasiliki Alis (Celia) Pistolis '82, assistant director of advocacy and compliance with Legal Aid of North Carolina, Inc. The Outstanding Recent Graduate Award was presented to Wilson L. White '06, associate litigation counsel at Google Inc.

Fisher v. Texas Supreme Court Case—The law school hosted the university-wide Constitution Day celebration September 17 with a panel discussion on the US Supreme Court affirmative action case *Fisher v. University of Texas*. The panel included Dean John Charles "Jack" Boger '74; Charles Edward Daye, Henry Brandis Professor of Law and deputy director of the UNC Center for Civil Rights; and center attorneys Mark Dorosin '94 and Elizabeth M. Haddix '98. Boger, Dorosin, and Haddix are co-authors of an amicus brief that UNC filed on the case on August 9, and Daye is the lead researcher of the ten year diversity study that is referenced in the brief.

PreLaw Rankings—UNC School of Law was named one of America's 20 Most Innovative Law Schools, according to *The National Jurists' preLaw* magazine, released August 23. UNC was also ranked number 9 in *National Jurist* magazine's list of the nation's Best Value Law Schools, published in the September 2012 issue.

Wake Forest University School of Law

VALOR Earns Public Interest Award from ABA Law Student Division—The American Bar Association Law Student Division has announced that Wake Forest University School of Law's Veteran Advocacy Law Organization is the recipient of the 2012 Judy M. Weightman Memorial Public Interest Award. "The division commends VALOR for its dedication to addressing the legal needs of veterans seeking benefits from the US Department of Veteran Affairs, providing legal assistance in civilian legal matters, and promoting awareness of issues facing veterans and service members," wrote Tremaine Reese, 2011-12 chair of the ABA Law Student Division, in a letter to WFU Law School Dean Blake D. Morant. "The ABA Law Student Division appreciates the contributions of your stu-

dents and school to improve the legal profession."

Italian, Austrian, and Wake Forest Law Students Have Opportunity to Study with US Supreme Court Justice—For 30 years, Wake Forest's Study Abroad program has offered law students iconic sights, stimulating discussions, and lifetime memories. For many of the students who attended the 2012 summer program, the highlight of the program did not lie in the canals of Venice or along the strasses of Vienna, but in their daily contacts with Associate Supreme Court Justice Ruth Bader Ginsburg. During the week of July 9, Ginsburg visited the law school's Venice program, where she gave a public lecture, served as a guest lecturer in several classes, ate dinner with students, and took in the sights with Dean Blake Morant, his wife Paulette, Professors Joel Newman and Ralph Peeples, and their wives Jane and Faith. Then Ginsburg hopped a plane to the law school's Vienna program, where she repeated her agenda for the students, faculty, International Programs Dean Richard Schneider, and Professor Tanya Marsh. ■

2013 Appointments to Boards and Commissions

January Council Meeting

Lawyer Assistance Program Board (3-year terms) – There are three appointments to be made. Mark W. Merritt, Burley B. Mitchell Jr., and Fred J. Williams are not eligible for reappointment.

April Council Meeting

NC Courts Commission (4-year terms) – There is one appointment to be made. Thomas R. West is eligible for reappointment.

Disciplinary Hearing Commission (3-year terms) – There are three appointments to be made. William M. Claytor and Fred M. Morelock are eligible for reappointment, M.H. Hood Ellis is not eligible for reappointment.

Grievance Resolution Board (4-year terms) – The council must make one recommendation to the governor for appointment to this board. Roger Smith Jr. is eligible for reappointment.

July Council Meeting

Board of Legal Specialization (3-year terms) – There are three appointments to be made. Laura D. Burton is eligible for reappointment, J. Matthew Martin and Dr. David A. Hayes (public member) are not eligible for reappointment.

IOLTA Board of Trustees (3-year terms) – There are three appointments to be made. James G. Exum Jr., Charles E. Burgin, and Janice M. Cole are eligible for reappointment.

October Council Meeting

Client Security Fund Board of Trustees (5-year terms) – There is one appointment to be made. M. Ann Reed is not eligible for reappointment.

Board of Law Examiners (3-year terms) – There are five appointments to be made. Kimberly A. Herrick, Randel E. Phillips, Reid L. Phillips, Elizabeth C. Bunting, and Beth R. Fleishman are eligible for reappointment.

Board of Continuing Legal Education (3-year terms) – There are three appointments to be made. James A. Davis, Amy H. Hunt, and Judge Margaret P. Eagles are eligible for reappointment.

NC LEAF (1-year terms) – There is one appointment to be made. William R. Purcell is eligible for reappointment.

Board of Paralegal Certification (3-year terms) – There are three appointments to be made. Lisa Duncan (paralegal), Belinda Thomas (paralegal), and G. Gray Wilson are eligible for reappointment. ■

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' districts, 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. Please direct questions to Peter Bolac at the State Bar office in Raleigh, (919) 828-4620. ■

Annual Reports of State Bar Boards

Board of Legal Specialization

Submitted by Alice Neece Mine, Executive Director

2012 started on a high note for the specialization program with the celebration of the 25th anniversary of the first class of certified specialists. In 1987, the Board of Legal Specialization certified 92 specialists in the brand new specialty areas of real property, bankruptcy, and estate planning and probate law. Of those 92 inaugural specialists, 59 have maintained their certification for 25 years. This is an incredible achievement requiring the specialist to demonstrate, every five years during the recertification process, that he or she has remained substantially involved in practice of the specialty, has taken an extraordinary number of CLE courses in the specialty, and continues to have the approbation of his or her peers. In honor of their achievement, these specialists were recognized in an interview article in the *Journal* and at the annual specialization luncheon where they were awarded 25 year anniversary pins.

Last November the board certified 55 new specialists in ten specialty areas, including 16 lawyers who were certified as the first class of appellate practice specialists. There are currently 826 board certified specialists in the ten specialty areas of appellate practice, bankruptcy law, criminal law, elder law, estate planning and probate law, family law, immigration law, real property law, social security disability law, and workers' compensation law.

In the spring we received just shy of a record number of applications from lawyers seeking certification—98 applications. This includes eight applications for the new juvenile delinquency law subspecialty. Juvenile defense lawyers often receive little compensation or recognition for their dedication to the young clients who so desperately rely upon their skilled advocacy and good counsel. Providing these lawyers with an opportunity to demonstrate their knowledge and skill will not only bring personal satisfaction, but will also help to enhance their status in the bar at large.

Eric Zogry, North Carolina juvenile defender, chaired the specialty committee appointed to write the standards for the new criminal law subspecialty in juvenile delinquency. His committee spent countless hours working with psychometrician Dr. Terry Ackerman, associate dean of the University of North Carolina at Greensboro, to develop the specialty examination. The first part of the exam will test the applicants' knowledge of general criminal law. Juvenile delinquency law will be the focus of the second part of the exam. The board is grateful to Mr. Zogry and the members of his committee for their exceptional dedication to writing an exemplary exam.

Changes in the administration of the specialization exams this year are a sign of the growth and the success of the specialization program. For the past 24 years all of the exams have been offered on one date. With the addition of four new specialties or subspecialties over the past six years, offering 14 different exams on the same date is no longer administratively possible. The staff of the specilization program describes its effort to proctor the exams last year as not unlike those of the proverbial one-armed paper hanger. This year the specialization exams will be offered on different dates at the McKimmon Center, State Bar offices, and in Charlotte according to specialty. The board hopes that by offering the exams in this way we can improve efficiency in both the administration and the grading of the exams.

The proposed standards for a new specialty in trademark law considered by the council at its October meeting are another sign of the continuing growth of the specialization program. This proposed specialty was requested and supported by the Intellectual Property Section of the Bar Association, and will help to identify trademark law as a unique practice area. After adoption by the council, the standards must be approved by the Supreme Court. We look forward to offering this new specialty for the first time in 2013.

At the annual luncheon honoring 25 year and newly certified specialists on April 26 in Raleigh, the board's three special recognition awards named in honor of past chairs of the board were presented by Board Chair Jeri Whitfield. The Howard L. Gum Excellence in Committee Service Award was given to Elizabeth Scherer from Raleigh, a board certified specialist in appellate practice, for the devotion of her time and exemplary organization skills to the writing of the first appellate practice exam as a member of the appellate practice specialty committee. The James E. Cross Leadership Award was presented to Justice Robert H. Edmunds from Raleigh for his active leadership role in the field of appellate practice. The Sara H. Davis Excellence Award was presented to Nancy S. Ferguson, a certified real property specialist from Greensboro, for excellence in her daily work as a lawyer and for serving as a model for other real property lawyers.

We were saddened this year by the tragic death in a bicycle accident of a former public member of the board, Steve Jordan, who served on the board from 2003 to 2011. Although not a lawyer, Steve was a good friend to and advocate for the specialization program. Since his death we have learned that service to others was central to Steve's character. We are grateful that the specialization program was one of the many programs that benefited from his selfless volunteer service.

Unfortunately, the term of public board member Carl W. Davis Jr. ended this year. While serving as board member from 2006 to 2012, Carl used his experience from his career in public television to bring a fresh and insightful perspective to the board's deliberations. Carl made invaluable contributions to the specialization program and he will be missed.

Although we will miss Carl, we are exceptionally pleased with the new board member appointed by the council in July. Public member Delores S. Todd from Raleigh brings a wealth of experience and wisdom to the board from her former work as an Atlantic Coast Conference assistant commissioner among many other achievements. Ms. Todd hit the ground running at her first board meeting in September. I extend the board's appreciation to the Council for this excellent appointment.

In closing, on behalf of the board I am

pleased to report that the specialization program is prospering and continues to fulfill its two key objectives: assisting the public by identifying qualified practitioners who are proficient in specialty areas and improving the competency of the bar. With your support, the board will continue to establish specialties in areas appropriate for certification and to apply reasonable, objective standards for certification that protect the interests of the public.

Board of Continuing Legal Education

Submitted by Marcia Armstrong, Board Member

Despite tough economic times, lawyers continue to meet and exceed their mandatory CLE requirements. By mid-March 2012 the CLE department processed and filed over 23,500 annual report forms for the 2011 compliance year. I am pleased to report that 99% of the active members of the North Carolina State Bar complied with the mandatory CLE requirements for 2011. The report forms show that North Carolina lawyers took a total of 341,013 hours of CLE in 2011, or 13 CLE hours on average per lawyer. This is one hour above the mandated 12 CLE hours per year.

The board continues to operate on a sound financial footing, supporting the administration of the CLE program from revenue from the attendee and non-compliance fees that it collects. The funds collected by the CLE program also help financially to support three programs that are fundamental to the administration of justice and the promotion of the professional conduct of lawyers in North Carolina. In 2011 the board used its surplus to contribute $257,655 to the operation of the Lawyers Assistance Program (LAP). Another contribution to LAP will be made at the end of 2012. To date in 2012 the board has also collected and distributed $124,492 to support the work of the Equal Access to Justice Commission and $242,608 to support the work of the Chief Justice's Commission on Professionalism.

The board supports the 12 hour professionalism requirement for lawyers licensed on or after January 1, 2011, and wants this program—which is often a new lawyer's first interaction with the North Carolina State Bar—to be the best it can be. The board is investigating, with the providers of the program, ways to improve both its content and format. The requirement is intended to help new lawyers start the practice of law with a solid understanding of their professional and ethical obligations. However, mandatory evaluations from the attendees reveal a lukewarm reception for the program. In the spring, the board met with the key CLE providers to get their feedback on the costs to both attend and to produce the program, the content and organization of the program, and the format for the program including the use of alternative delivery systems such as video replays. No changes to the program are currently proposed with one exception—the board is transitioning to a new name to avoid the acronym that has plagued the "New Admittee Professionalism Program." Unfortunately, the acronym has encouraged young lawyers to compare the program to their secured transactions course in law school—the NAPP. The new name for the program is Professionalism for New Admittees—PNA.

The chair of the board, Heather C. Baker of Cullowhee, and the vice-chair, Michael K. Pratt of Brevard, end their terms on the board this year. Heather and Mike joined the board in 2006, and they have provided invaluable service to the CLE program for six years. The board greatly appreciates their service. They will be missed.

The board will continue to strive to improve the program of mandatory continuing legal education for North Carolina lawyers. We welcome any recommendations or suggestions that councilors may have in this regard. On behalf of the other members of the board, I would like to thank you for the opportunity to contribute to the protection of the public by advancing the competency of North Carolina lawyers.

Board of Paralegal Certification

Submitted by G. Gray Wilson, Board Member

The Board of Paralegal Certification accepted the first application for certification on July 1, 2005. Since that date, over 6,170 applications have been received by the board and I am proud to report that there are currently 4,297 North Carolina State Bar certified paralegals. During the past 12 months, the board has:

- administered the exam to 398 applicants for certification,
- certified 286 paralegals by exam, and
- recertified 3,630 paralegals.

These figures demonstrate the success of the program, but also reveal that 30% of applicants did not become or are no longer certified. Some of the applicants were denied certification because they did not meet the certification requirements, some did not pass the certification exam, but many paralegals who were certified have allowed their certifications to lapse.

This year the board explored and sought to address the reasons why paralegals are letting their certifications lapse. We found that the expense of taking the required continuing paralegal education (CPE) hours is one of the key reasons. A certified paralegal must earn six hours of CPE credit, including one hour of ethics, every 12 months to maintain his or her certification. Fulfilling these requirements can be difficult for a paralegal who is unemployed or who is not reimbursed by an employer for the costs of CPE courses.

In response to this problem, the board made grants to two paralegal organizations to be used to provide low-cost or free CPE courses to all paralegals in North Carolina. A grant of $10,000 was made to the Paralegal Division of the North Carolina Bar Association (NCBA) to fund a new series of monthly one-hour webcasts that are free to members of the Paralegal Division and only $25 for non-members. The first webcast was presented by the NCBA on July 10, 2012, and it exceeded attendance expectations with 239 attendees. The response was so enthusiastic, in fact, that the Paralegal Division may extend the webcast series to 18 months instead of the initial 12-month term.

The board also made a grant of $5,000 to the North Carolina Paralegal Association (NCPA) to be used towards providing free CPE programs to paralegals during a lunchtime series via webcast. An additional $5,000 has been set aside for the NCPA for further free and reduced-price CPE.

Another reason that certifications are lapsing is the inability of paralegals to pay the costs or attend CPE courses or to pay the annual renewal fee during a medical or financial crisis. The rule establishing an inactive status for certified paralegals was approved by the Supreme Court this summer and is now in full effect. Under this rule, paralegals who cannot fulfill the requirements of recertification based on financial hardship, illness, disability, or active military duty for the paralegal or his/her spouse, can petition to be placed on inactive status. The inactive status will last for one year and can be renewed for up to five years. The board anticipates that the rule will enable qualified paralegals to

return to fully certified status when their hardship situation ends.

The paralegal certification program continues to support programs that assist North Carolina paralegals and lawyers to deliver legal services to clients. This year the board agreed to fund and to staff the new Interpreter Reimbursement Program of the State Bar. The board's grant of $5,000 will provide funds to reimburse lawyers for the out-of-pocket expenses associated with hiring a licensed interpreter for a deaf client.

Eight years have passed since the first Board of Paralegal Certification was appointed in October 2004. Four paralegals were appointed to work with four lawyers and a paralegal educator to design and administer the first state bar paralegal certification program in the country. It has been an unequivocal success. Today is a turning point for the program because it is the last day of service for the last three members of that founding board: Tammy Moldovan, John M. Harris, and Renny W. Deese.

Paralegal board member Tammy Moldovan played a key role in the formation of the grassroots organization called the Alliance for Paralegal Professional Standards (APPS) in 2001. APPS initiated the effort to advance the paralegal profession by pursuing the formalized regulation of paralegals. She served as a paralegal member of the State Bar's Legislative Study Committee on Paralegal Regulation from 2003-2004. Tammy's belief in the importance of certification for paralegals helped to shepherd the program from idea to reality. Her straightforward manner and enthusiasm for the certification program will be missed.

John M. Harris, a partner with the Harris Law Firm in Morehead City, served as the chair of the appeals panel since 2008 and as the vice-chair of the board since 2011. During his time on the board, John helped to create the procedures for administering the certification program, and brought a compassionate approach to the many difficult decisions that the appeals panel and the board had to make relative to the certification or continuing certification of some applicants. We will miss John's good humor, steady hand, and dedication to the certification program.

Renny W. Deese, former councilor and a partner with the Fayetteville firm of Lewis, Deese & Nance, originally served on the State Bar's Legislative Study Committee on Paralegal Regulation from 2003-2004. He served as the vice-chair of the board from 2004 to 2007, and has served as chair of the board since 2008. For ten years he has contributed his belief in the value of certification for paralegals, his pragmatism, and his efficient and fair leadership to the oversight of the paralegal certification program. Renny's forthright, positive approach and allegiance to the certification program will be missed.

The dedication and enthusiasm of all of the founding board members fostered the growth of this program from its conception through its infancy to the mature program it is today—an integral and important program of the North Carolina State Bar.

Client Security Fund

Submitted by M. Ann Reed, Chair

Pursuant to the Rules of Administration and Governance of the Client Security Fund of The North Carolina State Bar (the "Fund"), the Board of Trustees submits this annual report covering the period October 1, 2011, through September 30, 2012.

The Fund was established by order of the Supreme Court dated October 10, 1984, and commenced operations January 1, 1985. As stated by the Supreme Court, the purpose of the Fund is "...to reimburse, in whole or in part in appropriate cases and subject to the provisions and limitations of the Supreme Court and [the] Rules, clients who have suffered financial loss as a result of dishonest conduct of lawyers engaged in the private practice of law in North Carolina..."

Claims Procedures

The Fund reimburses clients of North Carolina attorneys where there was wrongful taking of the clients' money or property in the nature of embezzlement or conversion, which money or property was entrusted to the attorney by the client by reason of an attorney/client relationship or a fiduciary relationship customary in the practice of law. Applicants are required to show that they have exhausted all viable means to collect those losses from sources other than the Fund as a condition to reimbursement by the Fund. Specific provisions in the Rules declare that certain types of losses are non-reimbursable.

All reimbursements are a matter of grace in the sole discretion of the board and not a matter of right. Reimbursement may not exceed $100,000 to any one applicant based on the dishonest conduct of an attorney.

The Board of Trustees

The board is composed of five trustees appointed by the council of the State Bar. A trustee may serve only one full five-year term. Four of the trustees must be attorneys admitted to practice law in North Carolina and one must be a person who is not a licensed attorney. Current members of the board are:

M. Ann Reed, chair, a former president of the North Carolina State Bar, retired senior deputy in the Administrative Division of the Attorney General's Office.

Michael Schenck, the public member of the board, is a former CFO of Penick Village in Southern Pines, NC, and is retired and living in Asheboro, NC.

William O. King, a former president of the North Carolina State Bar, is a partner with the firm of Moore & Van Allen, PLLC in Durham.

LeAnn Nease Brown is an attorney with the firm of Brown & Bunch, PLLC in Chapel Hill.

Charles M. Davis, a former president of the North Carolina State Bar, is an attorney mediator in Louisburg.

Subrogation Recoveries

It is standard procedure to send a demand letter to each attorney or former attorney whose misconduct results in any payment, making demand that the attorney either reimburse the Fund in full or confess judgment and agree to a reasonable payment schedule. If the attorney fails or refuses to do either, suit is filed seeking double damages pursuant to N.C.G.S. §84-13 unless the investigative file clearly establishes that it would be useless to do so.

In cases in which the defrauded client has already obtained a judgment against the attorney, the Fund requires that the judgment be assigned to it prior to any reimbursement. In North Carolina criminal cases involving embezzlement of client funds by attorneys, our counsel, working with the district attorney, is sometimes able to have restitution ordered as part of the criminal judgment.

Another method of recovering amounts the Fund pays to clients of a dishonest attorney is by being subrogated to the rights of clients whose funds have been "frozen" in the attorney's trust account during the State Bar's disciplinary investigation. When the court disburses the funds from the trust account, the Fund gets a pro-rata share.

During the year covered by this report, the Fund recovered $125,378.64 as a result of these efforts. Hopefully our efforts to recover under our subrogation rights will continue to show positive results.

Claims Decided

During the period October 1, 2011 - September 30, 2012, the board decided 89 claims, compared to 76 claims decided the previous reporting year. For various reasons under its rules, the board denied 39 of the 89 claims in their entirety. Of the 50 remaining claims, some were paid in part and some in full. Reimbursements authorized and paid totaled $597,300.72. The most common basis for denying a claim in its entirety is that the claim is a "fee dispute" or "performance dispute." That is, there is no allegation or evidence that the attorney embezzled or misappropriated any money or property of the client. Rather, the client feels that the attorney did not earn all or some part of the fee paid or mishandled or neglected the client's legal matter. However meritorious the client's contentions may be, the Fund's rules do not authorize reimbursement under those circumstances.

Funding

The 1984 order of the Supreme Court that created the Fund contained provisions for an assessment of $50 to provide initial funding for the program. In subsequent years, upon being advised of the financial condition of the Fund, the Court in certain years waived the assessment and in other years set the assessment in varying amounts to provide for the anticipated needs of the Fund.

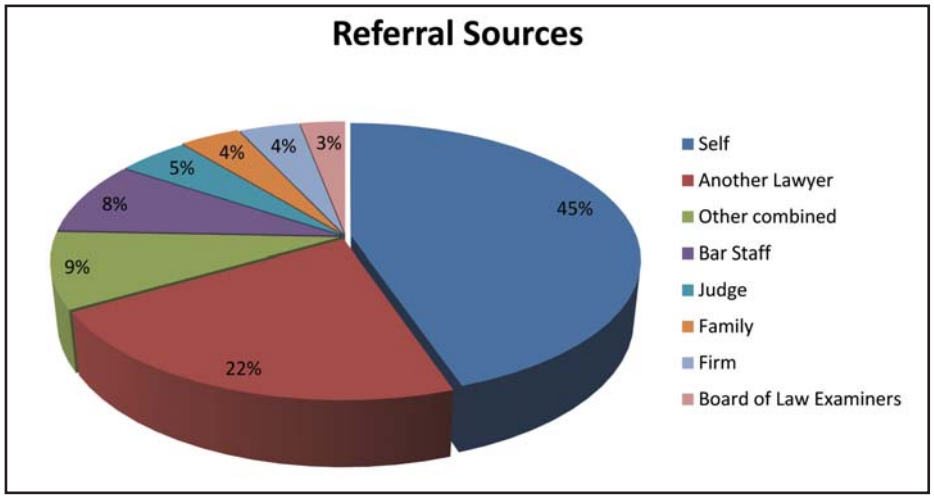
In 2006 the Supreme Court approved a $25 assessment per active lawyer that will continue from year-to-year until circumstances require a modification. There is no need for a change in the assessment for calendar year 2013.

Financial Statements

A copy of the audited financial statement of the Fund as of September 30, 2010 has previously been furnished to each member of the council.

Conclusion

The Board of Trustees wishes to convey to the council our sincere appreciation to the staff personnel who have assisted us so effectively and generously during the past year. Without the continuous support of these people, our tasks would be much more difficult. We also express our appreciation to the Bar of North Carolina for their continued support of the Client Security Fund and their efforts in reducing the incidents of defalcation on the part of a few members of our profession.



Lawyer Assistance Program

Submitted by Mark Merritt, Chair

Operations and Clients

It continues to be busy and productive for the North Carolina Lawyer Assistance Program ("LAP"). In its 33rd year of operation, NC LAP fielded over 600 telephone calls from impaired attorneys, judges, law students, family members, managing partners, and colleagues. Of these calls, 143 resulted in newly opened files in 2012, bringing the total number of current open cases to 631.

In 2012 the LAP conducted an extensive audit of all files, an audit which is on-going and is a labor-intensive process, and began closing files for clients who had successfully completed the program, converted to volunteer status, or who had no meaningful activity for more than two years. By closing inactive files, greater program resources can be dedicated to currently active cases, leading to greater efficiency. The LAP closed 314 files in 2012.

Because the rate of new files being opened far outpaces the rate at which a file is or can be closed, our annual case load has increased by an average of 100 cases a year.

A graph representing referral sources to the LAP can be found above.

The following sources each represent 1% or less of all referrals ("other combined"):

Physician	Local Bar
Grievance	Non-Lawyer
DHC	DA
Bar Examiner	EAP
Investigators/SCA	Another LAP
Law School	Therapist
Unknown	Other

Issues

Here is the list of issues that the LAP assists lawyers with (and has begun tracking in detail with the goal of providing meaningful statistics next year):

Addiction (Drugs)
Al-Anon (Family Member w/ Alcoholism)
Alcoholism
Anger Management
Anxiety Disorder
Attention Deficit Disorder (ADD/ADHD)
Axis II/Confirmed (Personality Disorders)
Axis II/Tendencies
Bipolar
Bipolar Tendencies
Burn Out/Stress
Career Counseling
Codependency
Cognitive Impairment/Related to Aging
Cognitive Impairment/Unrelated to Aging
Compassion Fatigue
Depression
Food Addiction
Gambling Addiction
Grief and Loss
Obsessive Compulsive Disorder (OCD)
Physical Impairment or Disability
Schizophrenia
Secondary Trauma
Sex Addiction
Suicidal Ideation and/or Prior Attempt

Trauma: PTSD (Child Abuse, Rape, or Other)
Trauma: PTSD from Combat
Traumatic Brain Injury
Workaholism

Education and Outreach

The best intervention always begins with education. In addition to our four quarterly articles appearing in the State Bar *Journal*, the LAP continues to provide presentations at law schools, ethics CLE workshops, and local and specialty bar association meetings. The LAP completed 61 CLE programs this year.

Volunteer Development

We currently have 234 LAP volunteers. The LAP network of volunteers and lawyer support groups provide a major part of the assistance given by the LAP to lawyers around the state. Without the extended volunteer network, it would be impossible for the LAP to be as effective as it has been during the past year. Staff and volunteer efforts have prevented or limited possible harm to the public in numerous instances.

Training

• The 32nd Annual PALS Meeting and Workshop was held November 4-6, 2011, at the Crowne Plaza Resort, Asheville, North Carolina. Chief Justice Sarah Parker was in attendance.

• FRIENDS 13th Annual Conference was held at Pine Needles Lodge & Conference Center, Southern Pines, North Carolina, on February 25, 2012. This conference was in conjunction with BarCares and the NC Bar Association Quality of Life Committee.

• The 33rd Annual PALS Conference and Workshop will be held November 2-4, 2012, at the Holiday Inn Resort, Wrightsville Beach, North Carolina.

• ABA Annual CoLAP Conference was held in Grand Rapids, Michigan October 8-11, 2012.

Local Volunteer Meetings

The LAP continues the development of local volunteer meetings to provide greater continuity and support in meeting the needs of lawyers new in recovery and allowing volunteers the chance to grow in their own recoveries. Details on meeting locations are available on the LAP website, nclap.org.

Staff

Don Carroll retired as LAP emeritus director at the end of 2011. Cathy Killian, based in Charlotte, was hired as the western clinical coordinator effective September 13, 2012. There were no other changes in the LAP staff: Robynn Moraites, executive director; Ed Ward, assistant director; Towanda Garner, Piedmont clinical coordinator; Joan Renken, Raleigh office coordinator; and Buffy Holt, Charlotte office coordinator.

LAP Board

Mark W. Merritt, chair
Fred J. Williams, vice-chair
Joseph Jordan
Kathy Klotzberger
Nena Lekwauwua, MD
David W. Long
Margaret J. McCreary
Burley B. Mitchell Jr.
Bert Nunley

LAP Board Meetings Scheduled For 2013

LAP Board meetings are usually scheduled for lunchtime on Wednesday of the week the Bar Council meets except in October, when the LAP Board meets at the Annual LAP Meeting and Conference held the first weekend in November. The 2012-2013 schedule is:

January 22-25, 2013 – Raleigh Marriott City Center, Raleigh

April 16-19, 2013 – Raleigh Marriott City Center, Raleigh

July16-19, 2013 – Chetola Resort, Blowing Rock

November 1-3, 2013 – Crown Plaza Resort, Asheville ■

In Memoriam

Brandon James Crouse
Mooresville

David Watson Daniel
Wilson

Robert Burns Druar
Cheektowaga, NY

Larry Lee Eubanks Sr.
Bermuda Run

William H. Gammon
Raleigh

David M. Ganly
Redlands, CA

Weston Poole Hatfield
Winston-Salem

Joseph Allie Hayes III
Charlotte

Charles Franklin Lambeth Jr.
Thomasville

Thomas Michael Lassiter
Statesville

William Bulgin McGuire Jr.
Denver

Joseph Martin Parker Jr.
Winston-Salem

John Rainey Parker Jr.
Clinton

Jimmy Dean Reeves
West Jefferson

Charles G. Rose III
Albertville, AL

William Dale Talbert
Cary

Jeffrey Paul Trent
Charlotte

Walter Wayne Vatcher
Jacksonville

Archibald Colin Walker
Winston-Salem

Richard Beverly Raney Webb
Edenton

Randi Beth Weiss
Winston-Salem

Lon Hugh West Jr.
Statesville

Rosbon D. B. Whedbee
Winston-Salem

Clawson Lee Williams Jr.
West End

William Rudolph Winders
Durham

The North Carolina State Bar
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Winter 2012