THE NORTH CAROLINA STATE BAR

JOURNAL

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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.**

Contents

DEPARTMENTS

BAR UPDATES

Volunteer Lawyers Really Do "Pay it Forward"

By Ronald L. Gibson

When I think of how so many lawyers volunteer in our profession and in our communities across the state, I am reminded of the quote by former NFL coach Bum Phillips, referring to Heisman Trophy winner and Hall of Fame player Earl Campbell:

"I don't know if he's in a class by himself, but I do know that when that class gets together, it sure don't take long to call the roll."

As individuals, not many of us can match Earl Campbell's level of professional acclaim, but as a profession, I believe that our record as volunteers puts lawyers in a class where "it don't take long to call the roll."

This point became obvious to me this past November when I attended the annual Lawyer Assistance Program (LAP) conference in Wrightsville Beach. If you are not familiar with the LAP, it is a service of the North Carolina State Bar that provides free, confidential assistance to lawyers, judges, and law students in addressing substance abuse, mental health issues, and other stressors that impair or may impair your ability to effectively practice law. LAP's mission is to:

- Protect the public from impaired lawyers and judges;
- Assist lawyers, judges, and law students with any issues that are or may be impairing;
- Support the ongoing recovery processes of lawyers and judges;
- Educate the legal community about issues of substance abuse and mental health.

The origin of the LAP dates back to 1979 when a group of lawyer volunteers—recovering alcoholics themselves—saw the need to offer assistance to other lawyers suffering from addiction and alcoholism. The group was named the Positive Action for Lawyers with Substance Abuse Issues (PALS) Committee. In 1994, the State Bar formally recognized the PALS Committee and incorporated PALS as part of the State Bar. In 1999, the State Bar formed the FRIENDS Committee, recognizing the need for additional assistance for lawyers dealing with mental health issues not related to substance abuse.

Today both programs have been merged into a single Lawyer Assistance Program, with a staff consisting of a director, three clinicians, and two office administration and special projects personnel. North Carolina's LAP also has a cadre of 200 dedicated volunteers located throughout the state who are actively involved in providing assistance to lawyers and judges whenever and wherever needed.

The annual LAP conference was on the calendar of the State Bar president. Truthfully, I approached it simply as an obligation of my new office and not much more. My attitude changed within minutes after the start of the first session. I was in a room with 150 lawyer volunteers, each giving their time to other lawyers, many with personal experience with alcohol or other addiction, dedicated to helping friends and partners, and all giving their time without pay, publicity, or the promise of enhancing their law practices. They perform volunteer service to our profession with admirable dedication. Spending time with the lawyer volunteers filled me with immense pride in being a part of a profession where "pay it forward" is not just a catchy slogan.

As I drove away from the conference Sunday morning, I had a revelation of something fairly obvious: This dedication to serve outside of the office is not unique to LAP volunteers—it exists throughout our profession. Lawyers volunteer their time in many ways, both for our profession and for our communities. Lawyers volunteer within our profession as State Bar councilors and on numerous statewide boards and committees. Lawyers volunteer within district bars, including serving on local grievance committees and as trustees to close practices of lawyers who become disabled or die without a transition plan. A long article could be written about the *pro bono* legal services provided by lawyers in any location around the state. The North Carolina Bar Association has volunteer service engrained in its culture. The list of NCBA volunteer programs and initiatives over the years would fill many pages.

In our communities, lawyers serve on every imaginable board and committee. We help raise money, we coach kids' athletic teams, and we adopt schools and mentor kids at all levels. Look closely at any local community activity and you will find that lawyers are almost always involved, frequently in leadership roles. I can look within my own small firm and see the roles my partners play in their churches, with the Boy Scouts, with the Salvation Army, with the Optimist Club sponsoring youth football and cheerleading, and with Habitat for Humanity.

Fulfilling my presidential obligation to attend the LAP conference gave me a much greater appreciation for the LAP volunteers, and caused me to think about how lawyers volunteer in many other areas with the same dedication, all in an effort to "pay it forward." My message is not that we volunteer so much that we should rest on our laurels. Quite the contrary: there is so much more to be done. If you volunteer in our profession, in your community, or both, THANK YOU for your service. If you are not experiencing the personal satisfaction of getting out of the office and volunteering in some capacity, consider joining the ranks of the thousands of lawyers across the state who volunteer. Our profession and our communities need you. ■

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

Lest We Be Misunderstood

By L. Thomas Lunsford II

The North Carolina State Bar has been around since 1933. That makes us about 82 years old. One would think that such a venerable agency would by this time in its history be fairly well understood. But one would be wrong so to think. As it happens, the State Bar is widely misperceived—and not just by the average man (or woman) on the street. I have it on good authority that a lot of fairly sophisticated people, including some licensed attorneys, think we're the North Carolina Bar Association. Many others, including some professional journalists, suppose that we're the North Carolina State Bar Association. And quite a few folks, including many aspiring attorneys, appear to believe that we're the North Carolina Board of Law Examiners.

In addition to mistaking our identity, many of our fellow citizens fail to grasp our nature and our purpose. They suppose that the North Carolina State Bar is an "occupational licensing board" as that term is commonly understood and defined in Chapter 93B of the General Statutes. In fact, the State Bar is not such an entity in that it does not issue licenses. Though it famously takes licenses for various reasons, including professional misconduct, it does not admit anyone to the legal profession. That is the exclusive province of the Board of Law Examiners. The State Bar does, of course, function in many respects like an occupational licensing board, particularly in regard to the intake, investigation, and prosecution of complaints from the public, but it is fundamentally different from the sort of agencies that regulate barbers, engineers, and dentists. Unlike the dozens of occupational licensing boards that are subject to Chapter 93B, the State Bar is an arm of the judiciary. As such, it is subject to the supervision of the Supreme Court and responsible for regulating the conduct of the Court's officers, without whom justice could not be constitutionally administered. The State Bar doesn't just protect individual members of the public, it protects the citizenry as a whole by facilitating the operation of the judicial branch of our tripartite government. It does this through a comprehensive regulatory program that is designed not only to discipline the profession, but also to make justice accessible.

Last year the General Assembly enacted a law requiring its Program Evaluation Division (PED) to evaluate the structure, organization, and operation of the state's various independent occupational licensing boards as defined by G.S. 93B-1 and to study whether any or all of the boards should be consolidated, relieved of their administrative burdens, or eliminated. The State Bar was asked to participate by responding to a detailed survey instrument, presumably because the PED staff supposed that we are or might be an occupational licensing board. We complied and cooperated fully by supplying the requested information. We also elaborated in person and by correspondence in an effort to underscore for the PED that the State Bar is fundamentally different from the other agencies being studied.

On December 17, 2014, the PED made its "Final Report to the Joint Legislative Program Evaluation Oversight Committee." The lengthy document, which can be accessed on online at ncleg.net/PED, need not be summarized here. Suffice it to say, it does not call for the State Bar's abolition or consolidation with any other agency. That's the good news. Unfortunately, it doesn't seem to recognize fully the State Bar's unique character and mission, and fails to acknowledge the extraordinary breadth and cost-effectiveness of the Bar's regulatory program. These reportorial shortcomings prompted us to file a written response to the PED's report on January 7, 2015. As I considered what I should contribute to the *Journal* this quarter, it occurred to me that my letter to the co-chairs of Joint Committee might be of interest and use to you, my faithful readers. As you will see, it attempts to explain how and why we are different from the standard occupational licensing board. Appended to it was and is a fairly complete inventory of what we do in your name and under the auspices of the Supreme Court. It's a very impressive listing, if I do say so myself.

* * * * *

January 7, 2015

Senator Fletcher L. Hartsell Jr.
North Carolina Senate
300 N. Salisbury Street, Room 300-C
Raleigh, NC 27603-5925

Representative Julia C. Howard
North Carolina House of Representatives
300 N. Salisbury Street, Room 302
Raleigh, NC 27603-5925

Dear Senator Hartsell and Representative Howard,

I write in my capacity as the executive director of the North Carolina State Bar regarding the December 17, 2014, Final Report to the Joint Legislative Program Evaluation Oversight Committee. The State Bar is the state agency responsible for regulating the legal profession post-licensure. The State Bar certainly appreciates the magnitude of the Program Evaluation Division's undertaking and its thoughtful analysis.

The State Bar is not an executive branch agency, but is an integral part of the judicial branch of government. The State Bar is not an occupational licensing agency governed by Chapter 93B of the North Carolina

General Statutes because it does not issue licenses, and therefore does not meet the definition of an OLA. Nonetheless, it was asked to respond to the survey and was happy to do so. The State Bar is totally transparent and is more than happy to provide information about all of its programs that protect the public and regulate the legal profession.

Pursuant to statute, the State Bar performs a judicial function and is responsible to and supervised by the Supreme Court. Its status as a judicial agency was first recognized by our state's attorney general in 1976. The Supreme Court's inherent power "to deal with its attorneys," all of whom are officers of the court, is acknowledged in N.C. Gen. Stat. § 84-36. The Supreme Court routinely and exclusively reviews and then approves or disapproves the State Bar's rules. N.C. Gen. Stat. § 84-21. The Supreme Court has created regulatory programs that it has directed the State Bar to administer, including the Client Security Fund, the Plan for Interest on Lawyer Trust Accounts (IOLTA), and Mandatory Continuing Legal Education program. Self-regulation under the supervision of the Supreme Court maintains a strong and independent legal profession that insures that individual rights are respected by the government in criminal matters and in civic affairs. Subjecting the State Bar to the requirements of Chapter 93B would compromise the independence of the legal profession and conflict with the doctrine of separation of powers.

Although the State Bar does not believe it is properly included as one of the agencies to which the report's recommendations would apply, it does offer three observations about the report and its recommendations.

First, the report attempted to compare the State Bar and its very comprehensive regulatory program to agencies that are much more limited in their regulatory undertakings. In contrast to most of the OLAs, the State Bar does much more than process complaints and maintain a membership database. Under the auspices of the Supreme Court, it operates a variety of programs intended to maintain the competence and integrity of practicing lawyers, to enhance the administration of justice, and to increase access to the courts. In order to meet these extraordinary responsibilities, the State Bar has implemented programs that are qualitatively and quantitatively different from those typically administered by our state's OLAs. It should not be surprising then that the State Bar has more employees and a larger budget than those other agencies. To illustrate this point, we are attaching for your information a detailed inventory of the State Bar's many programs, all of which function to protect the interests of the citizenry as a whole.

Second, the State Bar is always very happy to provide information about its work. The State Bar forwards its annual audits to the state auditor. The Office of Counsel, the State Bar's legal department, publishes quarterly and annual reports of all of its activities. Each of the boards and commissions affiliated with the State Bar publishes an annual report. Because it is not governed by Chapter 93B, the State Bar does not file these reports with the secretary of state or with the attorney general. Nonetheless, all of these reports are public records.

Third, I would like to make the point that self-regulation is good regulation. Self-regulation fosters professional pride and pervasive volunteerism. Currently, 151 lawyers donate their time and expertise to the State Bar to implement its programs. They serve on its governing council and on its numerous boards and committees, they sit on its administrative tribunal, and they intercede with large numbers of impaired lawyers who are potential threats to their clients and themselves. Hundreds, perhaps thousands, of lawyers annually respond to the profession's call to donate legal services, an obligation that is embedded in the State Bar's Rules of Professional Conduct. They believe that lawyers, as members of an independent and self-regulating bar, have a personal and collective responsibility to make justice available to persons of limited means.

Likewise, lawyers have imposed upon themselves the ethical obligation to report to the State Bar professional misconduct of which they become aware. This extraordinary undertaking, which is also embodied in the Rules of Professional Conduct, is fundamental to self-regulation. The legal profession is deserving of the public's trust and the privilege of self-regulation in large part because it will not tolerate unethical behavior. The lawyers of North Carolina, by and through the State Bar and the Supreme Court, have also taken it upon themselves to accept financial responsibility collectively for the conduct of dishonest lawyers. The Supreme Court has ordained, and the State Bar has implemented, a program through which every lawyer in our state is required to contribute annually to what is known as the Client Security Fund. From that fund disbursements are made by the State Bar to victims of corrupt attorneys. In most cases, these victims are made completely whole. The lawyers of North Carolina, voluntarily and out of a sense of collective professional responsibility, also undertake to wind down the practices of attorneys who suddenly become unavailable. When a lawyer dies, disappears, is disbarred, or becomes otherwise incapacitated, the State Bar steps in and helps pick up the pieces, ensuring that trust funds are properly distributed and clients are enabled to proceed with other legal counsel without undue prejudice. These professional obligations—all of which are essentially self-imposed—are largely unique to the organized, self-regulating Bar. They evince the professionalism that is essential to the functioning of an honorable attorney.

Thank you for your careful consideration of this information. If we can be of any further assistance, we would be quite happy to respond.

Sincerely,

L. Thomas Lunsford II

Executive Director

North Carolina State Bar Programs

The State Bar is responsible for the administration of numerous programs for the improvement of the legal profession, and thus the protection of the public. They are briefly described below for the purpose of providing an overview of the regulatory activities of the State Bar. The descriptions do not include all functions performed by these programs and, in the absence of more in-depth explanation, do not reflect the complexity of the endeavors of these programs.

1. **Discipline** – The primary business of the State Bar is professional discipline: the intake, investigation, and prosecution of complaints alleging lawyer misconduct for the protection of the public. Disciplinary cases are investigated by the State Bar's professional staff and reviewed by the Grievance Committee of the State Bar. Cases that cannot be resolved at Grievance Committee level are tried before the Disciplinary Hearing Commission (DHC), an independent administrative tribunal composed of lawyers and nonlawyers that is funded by the State Bar. In 2013 the State Bar received over 18,000 complaints and inquiries about the

conduct of licensees. More than 14,500 of those were addressed by the ACAP and fee dispute programs described below. The State Bar conducted more than 70 forensic audits and obtained 15 court orders preventing lawyers from handling entrusted funds. The Grievance Committee issued 26 letters of caution, 41 letters of warning, 38 admonitions, 26 reprimands, and 9 censures, and referred 81 files involving 41 lawyers for hearing before the DHC. The State Bar concluded the discipline cases of 41 lawyers involving 74 grievance files before the DHC. The DHC imposed 9 disbarments, 27 suspensions, 2 censures, and 1 reprimand, and dismissed 2 cases. The State Bar also completed 15 show cause and reinstatement cases before the DHC and handled the disbarments of 9 lawyers by the State Bar Council and the superior courts.

2. **Ethics** – The State Bar provides advice to lawyers who are faced with ethical questions through its Ethics Committee and its professional staff. The committee regularly reviews and recommends changes to the North Carolina Rules of Professional Conduct, the ethical code to which North Carolina lawyers must conform their conduct and pursuant to which a lawyer may receive professional discipline. In 2013, ethics staff lawyers provided informal advice in response to 5,271 inquiries from lawyers faced with ethical dilemmas. Also in 2013, the Ethics Committee of the State Bar Council issued 19 formal ethics opinions interpreting and applying the Rules of Professional Conduct. These opinions establish important ethical standards for lawyers and judges to promote the administration of justice.

3. **Unauthorized Practice** – The State Bar, through its Authorized Practice Committee and professional staff, investigates and obtains injunctions to prevent violations of the statutes prohibiting the unauthorized practice of law. These cases involve nonlawyers who mislead the public about their ability to provide legal services, and who often take money from members of the public without providing the offered service. In 2013, 80 files were opened in response to complaints about unauthorized practice of law; 77 such files were resolved; approximately 500 inquiries about potential unauthorized practice were resolved by informal consultation with the professional staff; and 12 civil actions to enjoin unauthorized practice were opened or under prosecution by the professional staff. In addition, staff counsel routinely work with the Consumer Protection Division of the Attorney General's Office on issues relating to unauthorized practice of law.

4. **Lawyer Assistance** – The State Bar protects the public from impaired lawyers and assists lawyers suffering from and impaired by chemical dependency and/or mental illness through its Lawyer Assistance Program. On December 31, 2013, the Lawyer Assistance Program had 872 open files on impaired lawyers who were either being investigated for possible intervention, monitored for compliance with a recovery contract or other recovery activity, or receiving ongoing support and assistance. The program maintains 20 staff-facilitated monthly lawyer support groups across the state; 350 lawyers participate in the support groups. On an annual basis, the program receives and responds to 250-400 reports of lawyer impairment.

5. **Assistance to Attorneys and Clients** – The professional staff of the State Bar's Attorney/Client Assistance Program (ACAP) annually responds to thousands of telephone calls from members of the public who need information, referrals, emotional support, and advice and assistance regarding the maintenance of productive professional relationships with their lawyers. In 2013 the program responded to 13,982 calls and 596 emails from members of the public.

6. **Fee Dispute Resolution** – The State Bar requires lawyers, as a matter of professional responsibility, to participate in a dispute resolution process before they may bring legal action to collect disputed fees. The program opened 606 files in 2013.

7. **Client Protection** – Each year all active members of the State Bar are assessed a fee by the Supreme Court to support the Client Security Fund from which victims of lawyer dishonesty are reimbursed. The State Bar administers the fund through its Client Security Fund Board. In 2013 the board resolved 137 claims for compensation and $923,045.94 was distributed by the fund to victims of lawyer financial fraud. Additionally, the board seeks to recover the sums distributed from the fund by obtaining civil judgments against the lawyers who engaged in the dishonest conduct.

8. **Law Practice Wind Down** – The State Bar petitions the superior court for the appointment of trustees for the law practices of lawyers who die, disappear, become disabled, or are disbarred. The State Bar also provides support—including advice, financial audits, and coordination of outside services such as client file storage facilities and shredding services—and compensation to trustees as they supervise the orderly discontinuation of the law practices involved. In 2013 the State Bar obtained the appointment of and provided support to 19 such trustees.

9. **Random Trust Account Audits and Trust Account Compliance Program** – A lawyer is required to deposit into a designated trust account any funds entrusted to the lawyer by or on behalf of a client. The State Bar conducts random procedural audits of trust accounts maintained by its members to verify compliance with the technical record keeping and accounting rules set forth in the Rules of Professional Conduct and to enhance the standard of accounting practice within the profession. In 2013 the State Bar staff performed 195 random audits that involved the investigation of the trust account records of 968 lawyers. A member found to be employing unsound trust accounting techniques may be offered the opportunity to participate in the State Bar's trust account compliance program, which will supervise and educate the lawyer on the management of the lawyer's trust accounts for up to two years. There were 13 lawyers participating in the trust account compliance program as of December 31, 2013; 7 lawyers completed the program in 2013; and 107 requests for advice from members of the Bar were answered in 2013.

10. **Continuing Legal Education (CLE)** – The State Bar, through its Board of Continuing Legal Education, accredits CLE courses offered by independent sponsors, and monitors the compliance of North Carolina's lawyers with the annual minimum continuing legal education requirements for continued licensure. In 2013 the CLE department processed 24,969 annual report forms on the CLE activity of all active members of the State Bar during the preceding year; approved 19,929 courses for CLE credit; and entered 352,801 hours of CLE attendance into the CLE database.

11. **Specialization** – The State Bar's Board of Legal Specialization operates a program whereby lawyers who satisfy certain criteria demonstrating special substantive knowl-

edge, skill, and proficiency can be certified as specialists in several discrete areas of the law. This program helps members of the consuming public to identify qualified practitioners in a field of law and also improves the competency of the bar. As of December 31, 2013, there are 913 lawyers certified as legal specialists in 11 specialty practice areas. In 2013, specialty examinations (each six hours long) were administered to 104 lawyers. Every five years, a specialist must apply for recertification to maintain board certification. In 2013, 115 specialists were recertified.

12. **Maintenance of State Bar Membership** – The State Bar updates and maintains a public database of all licensed lawyers in North Carolina—both active and inactive members—and regularly reviews members' applications for changes in membership status. As of December 31, 2013, there were 26,582 active members of the State Bar.

13. **Registration and Information** – Pursuant to statutory requirements and State Bar regulations, the State Bar administers registration requirements for various persons and entities involved in the practice of law, including interstate law firms, professional limited liability companies, professional corporations, prepaid legal service plans, lawyers appearing *pro hac vice*, and foreign legal consultants, and makes this information available to the public. In addition, the State Bar registers and lists on its website approved law firm trade names and issues good standing certificates to and on behalf of members of the Bar. As of December 31, 2013, the following registrations were maintained by the State Bar: 145 interstate law firms (annual renewal required); 3,727 professional limited liability companies and professional associations (annual renewal required); 69 prepaid legal service plans (annual renewal required); 749 lawyers appearing *pro hac vice*; and 2,298 law firm trade names. In 2013, 1,006 good standing certificates or letters were issued.

14. "**Third-year Practice**" – The State Bar reviews applications and, if appropriate, certifies law students as eligible for supervised clinical practice in the courts in accordance with certain statutory criteria. In excess of 1,000 such law student certificates were issued in 2013.

15. ***Pro Bono* Practice by Former and Out-of-State Licensees** – Under the auspices of the State Bar, a retired lawyer who is a former member of the State Bar or a member of the Bar of another jurisdiction may petition for a membership status that allows the lawyer to represent poor people free of charge under the supervision of a qualified legal services organization. Nineteen such petitions had been granted as of December 31, 2013.

16. **Paralegal Certification** – Through its Board of Paralegal Certification, the State Bar certifies paralegals who meet certain criteria indicative of special competence in their profession.

As of December 31, 2013, there were 4,193 certified paralegals. In 2013 the program received 423 applications for certification; administered 252 certification examinations; and certified 333 applicants. Certified paralegals must apply for recertification every

CONTINUED ON PAGE 23

Anatomy of a Supreme Court Decision

By Richard T. Rice

Some cases seem destined for the United States Supreme Court from the very beginning. They involve issues of grave national importance such as capital punishment, human rights, constitutional issues (freedom of speech, gun control, voting rights, etc.), or presidential elections. Ours involved none of those. However, from a seemingly innocuous beginning, our case evolved into one that was indeed reviewed by the Court, resulting in a 5-4 decision in our client's favor. Let me start at the beginning.

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The Dispute

Home Concrete is a small business in Salisbury, North Carolina, selling home heating oil and ready mix concrete. In 1999 the owners decided to retire and sell the business. Having never done such a transaction, they turn to local bankers, who refer them to nationally recognized accountants and lawyers to help them organize the sale in a way that would minimize taxes. They are advised to engage in a series of transactions that will significantly increase the company's basis in its assets in order to avoid large capital gain taxes. Unbeknownst to our clients, these transactions later come to be known as Son-of-Boss, a tax shelter that the IRS labels as a sham, lacking economic substance. The firm[1] that recommends and implements this shelter does the same for dozens of other businesses across the country.

With the sale of Home Concrete taking place in 1999, the transaction is reported on the company's tax returns that are duly filed in 2000. The company reports the sale of its assets for approximately $10 million, and it also reports the original basis in those assets (approximately $4.5 million) as well as its election to adjust the basis and the stepped-up basis, which was about $100,000 less than the sale price.

For unknown reasons, the IRS does not audit Home Concrete's 1999 return for almost six years. In a letter dated February

23, 2006, the IRS notifies Home Concrete that its return has "been selected for examination" because of a Son-of-Boss transaction. On September 7, 2006, the IRS issues a Notice of Final Partnership Administrative Adjustment (FPAA), in which the IRS asserts that Home Concrete's claimed basis in the sale of its assets was grossly overstated and that a much larger tax was being assessed. The IRS does not allege that the 1999 returns were fraudulent. *Id.*

This is where our firm comes in. Home Concrete's owners ask us whether to pay the assessment. We advise that the additional tax is not owed because the IRS failed to make the assessment within the normal three year statute of limitations. The IRS takes the position that an exception to the three year statute extends the statue to six years for its assessment. The relevant exception extends the three year period to six years when a taxpayer:

> Omits from gross income an amount properly includable therein which is in excess of 25% of the amount of gross income stated in the return.[2]

We respond that this exception does not apply because the taxpayers did not "omit" the pertinent information from their returns. In support of this position, we cite a United States Supreme Court decision that was more than 50 years old, called *Colony v. Commissioner*, 357 US 28 (1958), which held that an overstatement of basis by a taxpayer on its return does not constitute an omission for purposes of the extended statute of limitations. The IRS counters that *Colony* does not apply to our situation because the Court was construing a prior version of the statute, which has since been amended, and that, in any event, the holding in *Colony* should be limited to types of transactions other than ours.

The Lawsuit

There are no decisions directly on point, but we are aware that other taxpayers around the country are challenging the IRS' position on the six-year statute. On our advice, our client pays the majority of the tax in dispute and files suit on December 5, 2006 in federal court in the Eastern District of North Carolina.[3]

After limited discovery, the case is ripe for a decision on cross motions for summary judgment. We argue that the outcome is governed by *Colony*, and the IRS does its best to explain *Colony* away. *Colony* involved a situation where the taxpayer allegedly "understated the gross profits on the sales of certain lots of land for residential purposes as a result of having overstated the 'basis' of such lots by erroneously including in their costs certain unallowable items of development expense." 357 US at 30.

After granting *certiorari*, the Supreme Court began its review by saying the "critical statutory language, 'omits from gross income an amount properly includable therein.'" *Id.* at 32. The Court agreed with the taxpayer's argument that "omit" is to be given the standard dictionary definition: "to leave out or unmention; not to insert, include or name." Relying on this definition, the taxpayer argued that the statute should be limited to situations in which specific receipts or accruals of income are *left out* of the computation of gross income. The Supreme Court agreed with this position. *Id.* at 33. Thus, the Court construed the phrase "omits from income" to mean failure to include specific receipts or accrual of income in the return, and not where the income and receipts are all stated but then reduced by an overly large basis as disclosed on a return.

The Court in *Colony* also noted that, while it was construing former Section 275(c) of the 1939 Tax Code, "we observe that the conclusion that we reach is in harmony with the unambiguous language of § 6501(e)(1)(A) of the Internal Revenue Code of 1954." *Id.* at 38.

We think the Court in *Colony* got it right and that the lower courts are bound by *Colony* in any event. Since our taxpayers did not leave any income or receipts off their returns but instead merely (allegedly) overstated their basis in assets, the six year statute does not apply to our case. The IRS strongly disagrees. It offers a number of reasons *Colony* does not apply to cases like ours, primarily having to do with the fact that *Colony* involved a prior version of the statute and that subsequent amendments change the outcome. In particular, the IRS points to a subsection that was added after the returns were filed in *Colony* but before the Court's decision, which reads:

> For purposes of this subparagraph -
> (i) in the case of a trade or business, the term "gross income" means the total of the amounts received or accrued from the sale of goods or services (if such amounts are required to be shown on the return) prior to diminution by the cost of such sales or services;...

The IRS argues that the Supreme Court's reference to its decision being "in harmony" with the language of the new statute actually meant that its decision should be limited to situations involving the sale of goods or services by a trade or business,[4] and that all other overstatements of basis fall within the six-year statute.

To our surprise, the district court agrees with the IRS, concluding that *Colony* does not apply and that the "new" statute dictates that the IRS had six years—not three—to assess additional tax. Naturally, we appeal this illogical conclusion to the Fourth Circuit.

COURTHOUSE RESEARCHER:
This is a part time position with great potential. Perfect for a paralegal or anyone who visits one or more county courthouses in North Carolina on a regular basis. We need information from probate files. Should take about fifteen minutes if done once a week. Monthly fee plus possible commissions. Reply to info.probateresearch@gmail.com

The Gathering Storm

During the pendency of our appeal, the tide starts to turn against the IRS. The Ninth and Federal Circuit Courts of Appeal take our view, holding that *Colony* controls and that the statute is three years, not six. *Bakersfield Energy Partners, LP v. Commissioner*, 568 F.3d 767 (9th Cir. 2009); *Salman Ranch, Ltd. v. United States*, 573 F.3d 1362 (Fed. Cir. 2009). Not happy with these results, the IRS publishes new regulations which seek to trump *Colony*, as well as *Bakersfield* and *Salman Ranch*. The IRS then argues that these regulations apply retroactively to all pending litigation, including our case.

We argue in the Fourth Circuit that *Colony* controls the outcome and that the IRS cannot change the outcome with regulations that purport to apply retroactively to our case. On February 7, 2011, The Fourth Circuit agrees with our position. *Home Concrete and Supply, LLC v. US*, 634 F.3d 249, 255 (4th Cir. 2011). Judge Wilkinson joins the court's opinion in full but writes separately to stress that the IRS' attempt to limit the holding in *Colony* "pass[es] the point where the beneficial application of agency expertise gives way to a lack of accountability and risk of arbitrariness." *Id.* at 259.

The Fourth Circuit's opinion in *Home Concrete* is in accord with decisions from the Fifth and Ninth Circuits. *See Bakersfield Energy Partners, LP v. Commissioner*, 568 F.3d 767 (9th Cir. 2009); *Burks v. United States*, 633 F.3d 1347 (5th Cir. 2011). By contrast, the Seventh, Tenth, and DC Circuits adopt the IRS' view and/or follow the new regulations, thus declining to follow *Colony*. See *Beard v. Commissioner*, 633 F.3d 616 (7th Cir. 2011); *Salman Ranch, Ltd. v. Commissioner*, 647 F.3d 929 (10th Cir. 2011); *Intermountain Insurance Services of Vail, LLC v. Commissioner*, 650 F.3d 619 (D.C. Cir. 2011).

Now we have the makings of an issue that is ripe for Supreme Court review: a clear circuit court split as well as a budding argument over separation of powers between the executive (IRS) and judicial (Supreme Court) branches of government.

Certiorari

Sure enough, the IRS asks the Court to take the issue—only not in our case. It files a petition in our case but asks the Court to hold the petition pending the outcome of a petition filed a few weeks earlier in another Son-of-Boss case called *Beard v. Commissioner*, 633 F.3d 616 (7th Cir. 2011). In fact, it looks like the IRS will get its way because the *Beard* petition is scheduled to be considered by the Court before the response to the petition in our case is due. However, we pull even with the IRS by filing the response to the petition in our case a week or so before it is due, thus putting it in the same group for consideration as the *Beard* petition.

In our response to the petition, we argue that *Home Concrete* is better suited for review than *Beard* because the Seventh Circuit did not consider the effect of the new IRS regulations on the outcome, whereas the Fourth Circuit did in our case. Low and behold, the Supreme Court agrees, granting the petition for *certiorari* in our case and putting all the others on hold pending the outcome of *Home Concrete*.

The Case Before the Nine

Unless you have been there, you cannot believe how popular you become when the Supreme Court grants review in one of your cases! This is especially true in cases such as ours where the outcome will effectively decide dozens of other cases involving hundreds of millions of dollars. I start getting phone calls and emails from law firms all over the country offering to help with *amici* briefs, our brief, and even oral argument for our client. In the end, we wind up with not only ten *amici* briefs on our side, but our clients get the benefit of briefing and oral argument from a well-respected Washington firm, including a former solicitor general who has argued over 40 cases in the Court (our firm remains as counsel of record).

The case is argued January 17, 2012. As mentioned, neither my tax partner, Mark Wiley, nor I get to speak, but we are seated at counsel table literally under the noses of the justices who are perched above us on the bench less than ten feet away. They are all engaged, even Justice Thomas who is the only one that does not pepper counsel for either side with questions, but appears to me to be whispering comments to his next door neighbor, Justice Breyer, who eventually wrote the majority opinion. Afterwards, we agree amongst ourselves (and the commentators agree as well) that the outcome is too close to call based on the questions during oral argument. So we return to Winston-Salem full of anticipation and eagerly awaiting the opinion.

The Decision

Finally, on April 25, 2012, the Supreme Court affirms the Fourth Circuit's ruling in our client's favor. *United States of America v. Home Concrete and Supply, LLC*,__US_, 132 S.Ct. 1836, 182 L.Ed.2d 746 (2012). The decision is five to four, with Justice Scalia filing a separate concurring opinion, and Justice Kennedy writing the dissent. Through Justice Breyer's opinion, the majority agrees with us that *Colony* determines the outcome of this case. Essentially, the Court accepts our argument that the same statutory language construed by *Colony* applies to our case and that the subsequent amendments cited by the IRS do not change the outcome. As for the new regulation, Justice Breyer points out that the statute, as construed by *Colony*, leaves no room for the IRS to reach the opposite conclusion:

> Given principles of s*tare decisis*, we must follow [*Colony's*] interpretation. And there being no gap to fill, the government's gap-filling regulation cannot change *Colony's* interpretation of the statute. We agree with the taxpayer that overstatements of basis, and not the resulting understatement of gross income, do not trigger the extended limitations period of § 6501(e)(1)(A). 132 S.Ct. at 1844.

Justice Scalia concurs in part and concurs in the judgment. In his view, *Colony* determines the outcome in this case because of "justifiable taxpayer reliance" on that decision. Because his analysis starts and ends with *Colony*, he does not endorse Justice Breyer's views on the IRS' gap-filling authority by way of regulation.

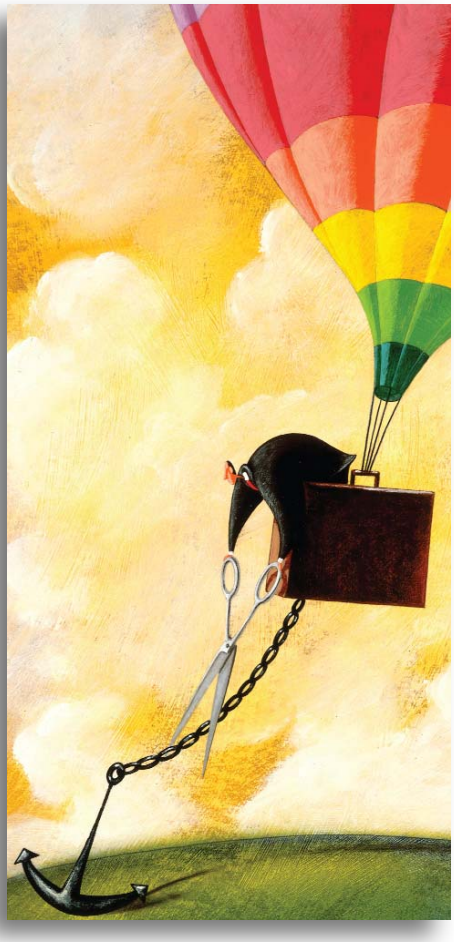
Justice Kennedy writes the dissent, joined

CONTINUED ON PAGE 18

How to Launch a Mentoring Program in Your District

By Fran Muse and Gary Poole

In the summer of 2010, Orange County lawyer Jay Bryan had a vision for his local bar. With the rise of recent law school graduates hanging their own shingles—many out of necessity rather than desire—Bryan's vision was to launch a voluntary mentoring program that would pair these new lawyers with more seasoned lawyers from the local bar to help with skills, professionalism, and understanding ethics, and allow experienced lawyers the opportunity to give back to the community of lawyers that helped to guide and support them during their years of practice.



Bruno Budrovic/Illustration Source

In addition, the program could assist as mentees a smaller number of lawyers who were not new to the practice of law, but who have been transitioning to a new practice area. The program could also improve relationships between lawyers in the district, permit the continuity of professionalism, and promote the public's faith in the competency of lawyers. He sent an email on the 15B listserv asking if others were interested. In response to his email, 15 or 20 local lawyers gathered at the Chapel Hill library and formed a steering committee.

Attorney Edie Salmony was part of that steering committee. Salmony said that she responded because so many lawyers in the district helped her when she hung out a shingle in 1986. Salmony states, "Our bar was much smaller then, and one could comfortably call people out of the blue to ask for help. However, I often did not know what the issues were or what questions to ask, so sometimes an off-the-cuff answer after a three-minute conversation led me astray. A structured relationship would have allowed time for a more thorough exploration of the issues."

That structured relationship was exactly what Bryan and his initial steering committee sought to establish. The committee, as a whole and in small groups, studied existing programs in other states. They consulted with law school administrations and the Chief Justice's Committee on Professionalism. Mel Wright, executive director of the commission, provided an important list of 15 steps for establishing a mentoring program, attended many of the steering committee's meetings, and provided crucial guidance and support. The committee also reviewed extensive materials for mentoring programs in Georgia (where it is mandatory), Tennessee, South Carolina, and Ohio.

The need to address generational differences in communication emerged as a cru-

cial theme among the various programs studied. The challenges inherent in different generations successfully communicating with one another and establishing productive mentoring relationships are well documented. Committee member Brian Ferrell notes that, "The 12 mentors in the first year of our pilot program had a collective 237 years of legal experience to draw upon, while the 12 mentees in the first year program had a collective 28 years of experience between them." While most of the mentees have had less than a year of experience, about a fourth have practiced in other jurisdictions.

The committee decided early on that effective and regular communication between mentors and mentees was vital to the successful transfer of professionalism, legal knowledge, and practical skills from mentors to their mentees. While some 15B program participants have been closer in age, the program has included mentoring pairs with an age differential of more than 40 years. Mentorship pairs spanning multiple generations yield widely different life experiences and communication preferences. The committee began to address this challenge by offering trainings to local Bar members on awareness of generational differences, suggestions for effective communication across the generations, and an appreciation for the benefits of breaking down some of the barriers that may impede effective communication with those raised and educated many years apart.

The program encourages young lawyers to interact with their mentors face-to-face and to spend time getting out in the community and benefiting from personal introductions by their mentor to others in the legal community. At the same time, mentors are made aware that brief but recurring text messages and emails can be effective ways to maintain and enhance the mentoring relationship with a young lawyer in between in-person meetings. Mentors are encouraged to view the relationship as a two-way street and seek opportunities to learn from their mentees by branching out into social media or other electronic communications that may not be familiar to them. There is also a recognition that despite the best intentions of mentors and mentees, there may be times when a mutually beneficial relationship is simply not in the offing for one reason or another. The committee has designated an ombudsman who is available to step in if the match is unable to establish a productive relationship due to lack of effective and regular communication or other impediments.

Other aspects of a program that were considered by the Steering Committee included the following: 1) creating an initial, modest-sized pilot program to function as long as possible without paid administrative help; 2) targeting transitioning and beginning lawyers; 3) establishing a formal committee of lawyers with staggered terms to oversee the program; 4) developing specific training for mentors that could qualify for CLE credit; 5) creating guidelines of expectations for the mentoring agreement between mentors and mentees as to how their relationship would be conducted; and 6) working with and developing presentations to the District 15B members and leadership to get approval for the mentoring program and establishing the Mentoring Committee as a standing committee of the district bar.

The resulting program developed by the committee was presented to and approved by the 15B Judicial District Bar at the annual meeting in May 2011.

Training and Ethical Considerations

According to Salmony, "Our hope was that we could establish a program with a flexible structure that provided for regular meetings of the paired mentor and mentee, but allowed them to develop an individualized plan for how they spent their time together according to their needs." The committee developed a training program and pamphlet that includes suggestions for the individualized plan each mentor-mentee pair was encouraged to discuss. The training session encouraged mentors to consider and discuss what his or her particular mentee might find most useful. This would vary depending on the mentee's area(s) of practice, and on how much familiarity the mentee already had with governmental agencies, local attorneys, and resources helpful to attorneys in the area. The training session included a handout with a wide-ranging list of possibilities, from introductions to courthouse staff, to observing a real estate closing, to taking the mentee to a local civic club or bar association event, to discussing how to maintain a good quality of life while balancing work and personal lives. Committee Member Kim Steffan observed, "The objective was to make the best use of mentor and mentee time by tailoring each relationship to the needs of the mentee."

The training also addressed ethical considerations that might emerge during the mentoring relationship. One important ethical consideration in the mentor/mentee relationship that was stressed was Rule 1.6 of the Rules of Professional Conduct, *Confidentiality of Information*. Co-chair Gary Poole noted that in fact confidentiality in connection with the mentor/mentee relationship is so important that in January 2014 the State Bar Council published for comment Proposed 2014 Formal Ethics Opinion 1, *Protecting Confidential Client When Mentoring*. The State Bar Council has set out four inquiries/opinions in connection with what actions are necessary to protect confidential information when a lawyer is mentoring a law student or another lawyer. We do not yet have any specific guidance on the issue from the State Bar Council because in April 2014 the council decided that proposed 2014 FEO 1 should continue to be studied by subcommittee.

The Members

The initial Mentoring Committee appointed in August 2011 by the bar officers included Chairperson Jay Bryan; Superior Court Judge Allen Baddour; and attorneys Brian Ferrell, Josh Lee, Fran Muse, Gary Poole, Edie Salmony, Kim Steffan, and Dani Toth. Bryan stepped down when he was appointed to the district court bench in 2012, and Brian Ferrell served as chair until April 2014. Fran Muse and Gary Poole are the current co-chairs, and new members include attorneys Sheila Benninger, James Rainsford, and Andrew Slawter.

As to why he joined the committee, Judge Baddour stated, "As a superior court judge, I often see new lawyers in court. When I do, I recall my own beginnings, when a law school classmate and I opened our own small practice in Chapel Hill. We were fortunate to have some very good informal mentors, in the form of former employers and law professors who also practiced law. Even so, I wish I could have had the structure and frequent contact from a formal mentoring program."

Baddour has served on the committee since its inception in 2010. Four years later, he is very pleased with the progress of the program. Baddour states, "Now, new lawyers are matched with more seasoned lawyers to provide mentoring over the course of a year. It is a great way to get advice, seek guidance on the norms and culture of the practice of law in our local bar, and gain insight into how to best try cases, interact with clients, and advocate and negotiate with opposing counsel. I firmly believe our program makes for better lawyers—both the mentor and the mentee have an opportunity to learn. Another benefit to the program is that well-mentored new lawyers better grasp the unspoken rules of trial procedure, which improves efficiency in the courtroom. It helps the entire system function better."

Goals and Outcomes

Now in its third year, the program has matched 33 mentees with mentors; in 2012 it had 12 mentor-mentee pairings. In 2013, it had another 12 mentor-mentee pairings. This year, the program has nine mentor-mentee pairings and 13 mentor volunteers. Several of the mentors have served multiple years. In order to keep the program viable, committee members are focused on expanding the mentee recruitment efforts and continuing to bring in new members to serve on the mentoring committee.

Salmony is responsible for monitoring feedback from the mentees and mentors. She states that, overall she is very pleased with the progress made in just three years. According to Salmony, "The mentees and mentors with whom I have spoken are appreciative of the opportunity, and have found the experience rewarding. I am hopeful others will continue to join the effort." ■

Fran Lewis Muse graduated from Campbell Law School in 1990. She started her career in 15B as an assistant public defender, where she was mentored by her public defender colleagues and informally mentored on a regular basis by members of the local criminal defense bar. In addition to the Orange/Chatham Co. Public Defenders' Office, Fran has worked at NCSU Student Legal Services, was in private practice for 14 years, and is currently the director of Carolina Student Legal Services at UNC-CH.

Gary Poole graduated from UNC Law School in 1985. For the last 18 years he has been a solo practitioner in Chapel Hill, and he devotes his practice to representing individuals seriously injured in motor vehicle accidents. Gary is thankful for the mentoring he received as a young associate during his first few years of practice.

For more information on how to start a mentoring committee in your local bar, please contact Fran (muselaw@msn.com) or Gary (garypoole@mindspring.com).

The authors would like to thank Judge Allen Baddour, Judge Jay Bryan, and attorneys Brian Ferrell, Edith Salmony, and Kim Steffan for their assistance in preparing this piece.

North Carolina 2014 Tax Law Updates

By Matthew McGonagle

The North Carolina General Assembly, during this year's short session, passed Session Law 2014-3 titled, "An Act to Amend the Revenue Laws, as Recommended by the Revenue Law Study Committee" (the "2014 Act"). Formerly House Bill 1050: Omnibus Tax Law Changes, the 2014 Act contains numerous updates and refinements to the sweeping tax law changes passed in the long session in 2013. In addition, and perhaps most substantively, the 2014 Act provides a dramatic change to the corporate loss provisions.

The substantive changes contained in this year's tax act are summarized below.

Deduction for State Net Loss

Effective for tax years beginning on or after January 1, 2015, the corporate net economic loss deduction is replaced with a State Net Loss ("SNL") deduction. The 2014 Act repeals N.C. Gen. Stat. § 105-130.8 and enacts N.C. Gen. Stat. § 105-130.8A, which brings North Carolina closer to the federal net operating loss provisions under Internal Revenue Code § 172. The SNL for a taxable year is the amount by which North Carolina allowable deductions for a year, other than prior year losses, exceed federal gross income for the year, as modified by N.C. Gen. Stat. § 105-130.5. The SNL must be allocated and apportioned in the year of the loss. As with the former net economic loss, any unused portion of the SNL can be carried forward for 15 years.

The new provisions also instruct the secretary to apply the standards contained under the regulations adopted under sections 381 and 382 of the Internal Revenue Code when determining the extent to which a loss survives a merger or an acquisition. It is also important to note that any unused net economic loss computed prior to January 1, 2014, as computed under the old rules, will still have a 15 year carryforward period. Additionally, the net economic loss rules under N.C. Gen. Stat. § 105-130.8 will continue to apply to the unused loss carryforward through its expiration for tax years beginning on or after January 1, 2030.

Arguably the biggest change moving from the net economic loss to the SNL is in the calculation. Under the previous calculations, the net economic loss was based on the amount by which the allowable deductions exceed all income sources, including income not subject to tax. The new calculations have been simplified, which should prove to benefit taxpayers moving forward in terms of compliance costs.

Section 179 Expense

The 2014 Act also provides revisions to the N.C. Gen. Stat. § 105-130.5B. The investment limitation for 2013 was corrected to $200,000, instead of the $125,000 previously included. Also, an explanation of the tax basis adjustments was included as a new subsection, providing that federal taxable income must be adjusted to account for any difference in the amount of depreciation, amortization, or gains or losses applicable to the property that has been depreciated or amortized by use of a different basis or rate for state income tax purposes than used for federal income tax purposes. This provision attempts to clarify the adjustments that must be made as a result of the state's decoupling from the federal section 179 enhanced expense deductions.

Clarification to Standard Deduction

The 2014 Act provides clarification regarding the standard deduction amount, providing that a person not eligible for a standard deduction under section 63 of the Internal Revenue Code has a North Carolina standard deduction of zero. Clarification is

also provided regarding the $20,000 limitation for real estate mortgage interest paid during the year and deductible as an itemized deduction for state purposes.

Agricultural Exemption Certificate

The 2014 Act provides additional clarification and explanation regarding the income threshold previously adopted under S.L. 2013-316. The application of the $10,000 gross income limitation is further explained, and the threshold is also allowed to be met through a three-year averaging to address volatility in farming operations.

Admissions

S.L. 2013-316 changed the taxation of admissions to live events from a privilege tax to a state and local sales tax. The 2014 Act provides a new N.C. Gen. Stat. § 105-164.4G, which provides further clarification on the application of the new tax and the exemptions thereto.

Service Contracts

Effective as of October 1, 2014, the 2014 Act provided clarification to the application of the sales tax to certain service contracts as expanded in S.L. 2013-316. Specifically, the definition of service contract was expanded to include contracts where the obligor under the contract agrees to maintain or repair tangible personal property (including a motor vehicle), including a warranty other than a manufacturer's warranty or dealer's warranty provided at no charge to the purchaser. The general rate of tax of 4.75% is applied to the sales price or the gross receipts derived from the service contract.

The 2014 Act also adds a new N.C. Gen. Stat. § 105-164.4I, which provides a detailed explanation of who is a retailer or facilitator of a service contract, and when that person must collect and remit the tax. A number of exemptions are provided, including an exception for the sales price or gross receipts derived from a service contract for tangible personal property sold at retail that is or will become part of real property. The basis of reporting for a retailer who sells or derives gross receipts from a service contract will be the accrual basis of accounting, notwithstanding that the retailer reports tax on the cash basis of accounting.

Retailer-Contractors

The 2014 Act provides additional definitions of real property contractor and retailer-contractor to the sales and use tax definitions found in N.C. Gen. Stat. § 105-164.3. The amended law also adds a new section that applies the use tax to tangible personal property purchased by real property contractors, who are considered the end consumer of such products. This section applies to the purchase of tangible personal property that is installed or applied for others and that becomes a part of real property. The property may be paid for with a certificate for exemption under Gen. Stat. § 105-164.28, provided the contractor also purchases inventory from the seller for resale, but once the items are withdrawn from inventory and affixed to real property, use tax must be accrued and paid by the contractor.

Other Sales Tax Changes

The gross receipts derived from the rental of an accommodation, including a private residence, cottage, or a similar lodging facility listed with a real estate broker or agent, are subject to the general sales tax rate of 4.75%. The rental agent is considered a retailer under the new provisions and is liable for the tax imposed thereunder. This provision applies to gross receipts received derived from the rental of an accommodation that a person occupies or has the right to occupy on or after June 1, 2014.

The 2014 Act disallows a sales tax refund for sales tax paid on video programming and piped natural gas.

The 2014 Act also applies a privilege tax to prepaid meal plans, effective for a prepaid meal plan sold or billed on or after July 1, 2014. The tax applies to a plan offered by an institution of higher learning that entitles a person to food or prepared food that is billed or paid in advance, and provides for predetermined units or unlimited access to food or prepared food. The plan is subject to the general rate of sales tax of 4.75%, and is reported by the institution of higher learning unless an option is selected to have a food service contractor, with whom the institution contracts to provide the food, to report and pay the tax due. If the prepaid meal plan is part of a bundle including tuition and other costs, the tax only applies to the allocated price of the meals, which is to be determined by the institution of higher learning.

Privilege License Tax Changes

Beginning in the 2014-2015 fiscal year, the 2014 Act amends the current privilege license tax statute by limiting a municipality's ability to tax only those businesses physically located within a city's limits. It also limits the municipality to the current privilege license tax rate schedule present in the statute. Further, effective for all tax years beginning on or after July 1, 2015, the privilege license tax is repealed, and cities and counties will be no longer able to impose the privilege license tax on businesses. The League of Municipalities, which is comprised of more than 540 cities, towns, and villages, has expressed its frustration with what it reports to be a $62 million "fiscal cliff" as a result of the repeal. (Ronnie Wall, "NC Towns and the Toll Repeal of the Business Privilege Tax Will Take," *News & Observer*, November 13, 2014.) The Senate Finance Committee indicated that it expected the loss of revenue from the repeal to be overcome by the revenue the municipalities receive from the expansion of the sales tax base under S.L. 2013-316.

Tax on Vapor Products

The 2014 Act amends the definition of a tobacco product to include a vapor product. A vapor product is defined to include "any nonlighted, noncombustible product that employs a mechanical heating element, battery, or electronic circuit regardless of shape or size and that can be used to produce vapor from nicotine in a solution." Effective June 1, 2015, the bill provides for an excise tax on vapor products of five cents per fluid milliliter of consumable product. The 2014 Act also includes a ban on vapor products in state correctional facilities effective July 1, 2014, and provides that possession of vapor products by an inmate is a Class 1 misdemeanor.

The 2014 Act contains numerous other provisions clarifying or amending tax law compliance statutes and other smaller changes that are not covered in this article. Careful attention should be paid to the various effective dates included in the bill, and the effect of the changes on businesses within the state. ■

Matthew McGonagle practices with Narron, O'Hale and Whittington, PA in Smithfield, North Carolina.

Anatomy of a Supreme Court Decision (cont.)

by Justices Ginsburg, Sotomayor, and Kagan. Essentially, these justices agree with the IRS that the amendments to the statute "may not compel the opposite conclusion under the new statute, but they strongly favor it. As a result, there was room for the Treasury Department to interpret the new provision in that manner." *Id.* at 1851.

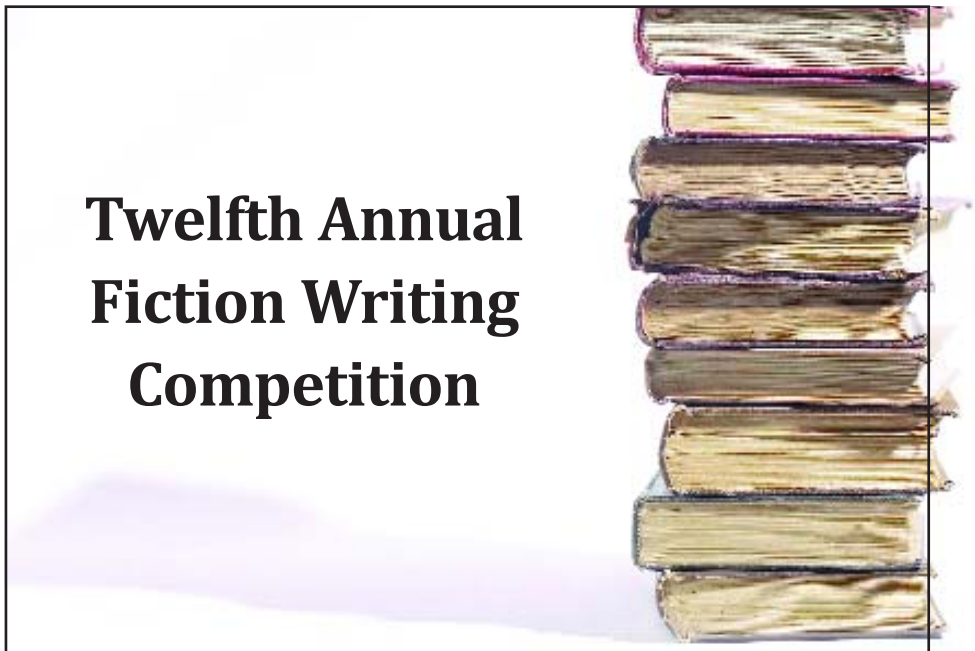
Conclusion

Thus, from humble and somewhat mundane beginnings, *Home Concrete* evolved into a case worthy of review by the Supreme Court. It was extremely gratifying to have five of the nine justices agree with our position and to rein in the seemingly endless regulatory authority of the IRS. This being the last case of my career with Womble Carlyle Sandridge and Rice, I could not have asked for a better finale. ■

Richard T. (Rick) Rice is a newly retired member of Womble Carlyle Sandridge & Rice, LLP, where he practiced for 35 years. Rick earned his JD from Wake Forest University. He practiced in the firm's Business Litigation and Insurance Governmental and Tort Litigation practice groups, having served as practice group leader of the latter group for over a decade.

Endnotes

1. The firm was Jenkins & Gilchrist, which is now defunct after the IRS prosecuted several of its partners for devising and selling the Son-of-Boss shelter.
2. 26 U.S.C. $ 6501(e)(1)(A)(2000 ed.).
3. The Eastern District is selected because Home Concrete's lead partner has retired and moved to Wilmington.
4. Nevermind that *Colony* involved the sale of real estate, not goods or services.



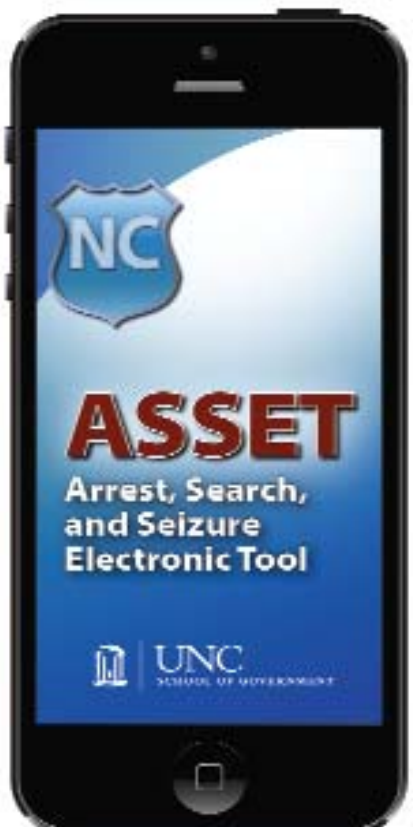
Twelfth Annual Fiction Writing Competition

The deadline for the 2015 competition is **May 29, 2015**. For a complete list of rules and information on how submit your story, please see page 31 of the Winter 2014 edition of the *Journal*.

School of Government Assists Law Enforcement and Justice System with Innovative Technology

By Gini Hamilton

Late one night, Edmond Caldwell Jr., executive vice president and general counsel for the North Carolina Sheriffs' Association, received a call from a sheriff who was in the middle of a hostage situation. He had a question around jurisdiction in the hostage location. Caldwell quickly consulted a mobile app—ASSET (Arrest, Search, and Seizure Electronic Tool)—to confirm his initial legal assessment. The phone exchange took only a few minutes, and the sheriff was able to resolve the situation.



The ASSET app was created by UNC School of Government faculty member Jeff Welty to provide law enforcement officers and others fast access to vital information about the legal issues they confront daily—from search warrants to Terry stops to GPS tracking and jurisdiction.

"The ASSET app is a great mobile resource for law enforcement officers," said Caldwell. "It's available anywhere, anytime, as long as an officer has a smartphone. I used it myself when I needed an immediate legal reference during a critical situation. That's exactly why the Sheriffs' Association helped support the development of the app."

The mobile app is a companion to *Arrest, Search, and Investigation in North Carolina*. The hefty volume, published regularly by the school since 1986, is a required textbook for basic law enforcement training and is also used as a reference by judges, prosecutors, public defenders, appellate defenders, and magistrates.

The School of Government began working with law enforcement officials in the late 1920s, when founder Albert Coates created schools for police officers and sheriffs. Although that training is now offered by other organizations, faculty members still conduct research and develop practical tools for law enforcement, judicial, and other public officials, including producing up to 50 publications each year on a range of topics. And the school's faculty members are working with the latest technology to find innovative ways of getting information to the people who need it in the field at the moment it will be most useful. Mobile apps and online tools are proving to be effective options.

Online Tool: Collateral Consequences

Collateral consequences of a criminal conviction can affect a person's future even after serving his or her sentence, affecting employment, benefits, and other opportunities.

Blogs and Webinars

The **NC Criminal Law Blog** was created by faculty member Jeffrey B. Welty, who specializes in criminal law and procedure. James M. Markham is a regular contributor on the topics of sentencing and corrections, as is faculty member Shea R. Denning, who specializes in motor vehicle law. The blog serves as a forum for the discussion of North Carolina criminal law and procedure and related topics.

Coates' Canons Local Government Law Blog includes posts by more than 20 School of Government faculty members whose expertise covers a broad range of legal issues affecting local governments and other public agencies in North Carolina. Posts cover topics such as animal control, elections, ethics, land use, and purchasing, among others.

The school hosts other faculty blogs on community and economic development, environmental finance, and human resources.

The school also offers educational content via webinars—most of which are available on-demand for CLE credit—on topics including ethics, mental health, substance abuse, and annual summer and winter criminal law case and legislative updates. In addition, scores of programs are offered as "virtual CLEs" on civil law, criminal and juvenile delinquency issues, ethics, substance abuse, and more general topics.

Faculty member John Rubin created the Collateral Consequences Assessment Tool (C-CAT) with Whitney Fairbanks, now assistant legal counsel with the North Carolina Administrative Office of the Courts, and Daryl Atkinson, staff attorney with the Southern Coalition for Social Justice.

C-CAT fills a gap in resources for those who regularly work with people involved in the criminal justice system, both before and after disposition. The online tool centralizes the collateral consequences imposed under North Carolina law for a criminal conviction and helps attorneys and other professionals advise people more accurately and completely about the impact of a conviction.

Mobile App: Structured Sentencing

Historically in North Carolina, once a case was ready for sentencing, prosecutors and judges referred to laminated paper sentencing grids. From 1995 to 2009, North Carolina had two grids—one for felonies and one for misdemeanors. But because sentencing needs to be calculated on the grid that was in place at the time a defendant committed a crime, lawyers, judges, and others needed to have multiple grids handy at any one time in order to determine the proper sentence.

So faculty member Jamie Markham created the North Carolina Structured Sentencing mobile app—an interactive version of the statutory sentencing grids that apply to most felonies and misdemeanors in the state. In 2012, Markham won UNC-Chapel Hill's C. Felix Harvey Award, which recognizes faculty scholarship that reflects the university's commitment to innovation. The award came with a grant of $75,000 to fund the winning project. The app guides users through a step-by-step process for each sentence with help screens that provide relevant case law, statutory citations, and answers to frequently asked questions. It can be accessed via tablet, computer, or smartphone.

Markham also published the 2014–2015 printed update of the handbook *North Carolina Sentencing Handbook with Felony and Misdemeanor Sentencing Grids*, which includes all felony and misdemeanor sentencing grids from 1994 through 2014 as well as DWI sentencing grids from 1997 through 2014.

Mobile App: Justice Reinvestment

After the Justice Reinvestment Act of 2011 made major changes to the law of sentencing and corrections in the state, North Carolina's Community Corrections Division commissioned Markham to write a new book: *The North Carolina Justice Reinvestment Act.* Justice reinvestment is a national-level project to reduce state spending on corrections and to reinvest the savings in community programs that decrease crime and strengthen neighborhoods. To meet the needs of probation officers working with the new law, Markham, with school colleague and attorney Christopher Tyner, developed the NC Justice Reinvestment mobile app. "The app was designed primarily for probation officers," said Markham, "but it includes information useful to anyone in the criminal justice system." The content of the app was largely derived from Markham's book, but the mobile technology provides fast answers to frequently asked questions, and the portability makes this a convenient tool for use in a variety of locations.

Online Tool: North Carolina Crimes

NC Crimes: A Guidebook on the Elements of Crime has been considered the essential reference book for professionals in every area of North Carolina criminal law for more than 30 years. Police officers, defense attorneys, district attorneys, magistrates, and sheriffs across the state carry their often bookmarked, post-it-tabbed, and taped-together copies of the book into courtrooms, legal offices, and prisons.

To make the book's content even more accessible and less subject to wear and tear, author and faculty member Jessie Smith created NC Crimes Online, a searchable web-based version of the book that is accessible from any electronic device with an Internet connection.

The Charlotte-Mecklenburg Police Department recently purchased subscriptions to NC Crimes Online for its nearly 2,000 officers. Though all new officers receive a copy of the *NC Crimes* book on graduation from basic law enforcement training, it is a big job to replace any books that are lost, and to update them with new supplements. Captain Dominick Pellicone said the department decided to move to the online subscription "to ensure our officers have the most up-to-date case decisions and elements when needed—whether that's before making an arrest or taking a case in front of a magistrate or district attorney."

Investing in Innovative Solutions

In 2012 the School of Government hired Kelley O'Brien as director for strategy and innovation to work closely with faculty members and others to create new ways to assist public officials. "Mobile applications and electronic resources are just a few examples of the School of Government's effort to provide North Carolina public officials accurate and timely information in a format that best meets their needs," said O'Brien. "We look forward to working on more initiatives that help those on the front lines improve state and local government."

For a complete list of School of Government resources for law enforcement and court officials, visit sog.unc.edu. ■

Gini Hamilton is senior marketing and communications specialist for the School of Government at UNC-Chapel Hill.

National High School Mock Trial Championship Comes to North Carolina, And We Need Your Help

By M. Gordon Widenhouse Jr.

For nearly a quarter century, North Carolina high school students have benefitted from the opportunity to learn about the justice system and to grow as citizens by participating in mock trials. This rich tradition reaches another milestone in May 2015, when North Carolina again hosts the National High School Mock Trial Championship (NHSMTC).

This exciting and ambitious undertaking happens May 14-16 in Raleigh. The Carolina Center for Civic Education (CCCE), a small nonprofit group that administers the North Carolina High School Mock Trial Program, is hosting the 2015 NHSMTC.

Chief Justice Mark Martin extols the virtue of mock trials generally and the NHSMTC specifically. "Programs like the National High School Mock Trial Championship are so important because they promote civic education and enhance public understanding of the role of courts and their status as a co-equal branch of government," Martin said. "They also provide valuable opportunities for members of the bench and bar to interact with young people and help foster their interest in the legal system and the rule of law."

The chief justice's comment about "opportunities for the bench and bar" was tastefully understated. The competition includes four preliminary rounds of trials on Friday and Saturday, followed by a final trial on Saturday to determine the national champion. Each trial requires a presiding judge along with three lawyers to score the participants, as well as a courtroom monitor. Since as many as 48 teams will likely participate, and each round will involve at least 96 judges and lawyers, as well as 24 courtroom monitors and other volunteer staff.

North Carolina's Mock Trial Tradition

The North Carolina high school mock trial program has been growing for many years. It began as a small experiment in civic education, with a one-day event at which only six high schools from across the state competed. It has now morphed into a year-long program with more than 80 high school teams competing at eight regional competition sites in February, with the regional champions advancing to the state finals in March.

The state finals include an afternoon event at the North Carolina Supreme Court where various justices regale the students, coaches, and parents about the history and function of the state's highest court. It is a chance for these civic-minded students to get a first-hand look at the judicial system at its highest level. Many of the appellate court judges then preside over the trials on Saturday.

The North Carolina mock trial program was initially administered by the North Carolina Advocates for Justice. Several years ago, CCCE, which has been initially created as the host for the 2005 NHSMTC, was reconstituted to run the state mock trial activities. In additional to the regional and state competitions, CCCE now sponsors summer camps for high school students interested in mock trials.

The North Carolina Advocates for Justice (NCAJ), the North Carolina Bar Association, and Lawyers Mutual Insurance Company are the principle financial backers of the national event in May. Dozens of legal professionals have been working for more than two years to make this event a success. The steering committee for this effort includes Adrienne S. Blocker, Rebecca J. Britton (CCCE vice-president), Lindsey D. Granados, Susan H. Johnson (CCCE program coordinator), Carlos Mahoney,

Richard Manger (CCCE secretary), Elizabeth Nichols, Christopher Nichols (NCAJ president-elect), Katherine L. Parker, and Christine S. Scheef.

The Importance of Mock Trials to Civic Education

For those who believe in a strong civic education program such as North Carolina enjoys, including the high school mock trial program that has evolved over the past 24 years, there exists a duty to step up and take on this enormous challenge.

Blocker, who is with the Law offices of John M. McCabe, PA, expressed that she is "very excited and proud that CCCE is hosting this competition." She describes these competitors as "the best of the best" and found her own experience as an evaluative juror in 2005 "most rewarding."

Blocker is leading the effort to recruit judges and lawyers to serve in May. "We need our best lawyers and judges to help evaluate and judge these students," she explained, and she urges people to volunteer. "You will be amazed at how intense but fulfilling the competition is." To volunteer, contact her at adrienne@mccabelawoffices.com.

As anyone who, like Blocker, has attended the national finals will attest, and anyone intimately associated with North Carolina's excellent hosting of the finals in Charlotte in 2005 knows, this undertaking is quite significant. But it is also an important moment for lawyers and others to give something back.

Melvin F. Wright Jr., executive director of the Chief Justice's Committee on Professionalism, commented about it. "When asked, 'Why did you decide to be a lawyer?,' many attorneys recall participating in a mock trial program as a high school student. Young people in mock trial programs are also introduced to the concept of professionalism and the importance of such things as civility, respect, and humility," Wright observed.

Wright is serving on the National Advisory Committee for the event in Raleigh. As he noted, "The North Carolina Chief Justice's Commission on Professionalism greatly appreciates the efforts of the Carolina Center for Civic Education for bringing more than 450 young people to Raleigh in May 2015 for this mock trial program."

Others who are serving on the National Advisory Committee include Justices Robert H. Edmunds Jr. and Paul M. Newby; retired Justice Patricia Timmons-Goodson; Cumberland County Superior Court Judge Mary Ann Tally; newly elected Wake County District Attorney N. Lorrin Freeman; Representative Richard B. Glazier; Richard N. Taylor, CEO of the NCAJ; Campbell Law Dean J. Rich Leonard; Janet Ward Black; Rebecca J. Britton; and Hampton Y. Dellinger.

North Carolina's state finals have been held at Campbell Law School for the past five years, and some of the activities associated with the NHSMTC will take place at Campbell. Dean Leonard noted the appropriateness of Campbell Law School partnering with CCCE in hosting the NHSMTC. "We look forward to hosting the state finals of the North Carolina High School Mock Trial Competition each year," he said. "We are especially pleased to play a role in helping as North Carolina hosts the 2015 National High School Mock Trial Championships in Raleigh this May. Advocacy is a large part of the student experience at Campbell. Our advocacy program has been historically successful, and we know that our students benefit from participating in our program. It makes perfect sense for leading high school advocates to compete at an institution that puts so much emphasis on advocacy."

Opportunities to Participate Abound for Everyone

The process of organizing various committees to work on the many facets of the competition has been in progress for more than two years. But more work remains in the final months. There are many ways in which members of the legal profession can help. Those who will roll up their sleeves and pitch in can contact anyone associated with the process.

Britton, who is also a member of the NHSMTC Board of Directors, has been involved with high school mock trials for many years, both as a coach and as an organizer. She was a leader of North Carolina's effort to host the NHSMTC in Charlotte in 2005.

Britton echoes the value in everyone becoming involved. "Our judges and scoring jurors are so impressed with our participants at the regional and state final levels of competition from year to year. The level of competition at nationals is awe-inspiring because each team is a state champion. Having coached a team that competed at nationals, I can tell you the impact on their lives going forward from this experience is profound and immeasurable."

There are also several significant activities aside from the trials themselves including the "pin exchange" on Thursday evening, at which the students meet each other and trade souvenirs representative of their home state. A scavenger hunt for the students is planned for downtown Raleigh on Friday evening. Students will take photographs of themselves and their teammates at more than 25 locations, including several historical places, favorite Raleigh haunts,

and structures mentioned in the historically-based problem on which the trials are based.

A formal reception will be held for participating judges and lawyers at the North Carolina State Bar building in downtown Raleigh on Friday evening. The National Board met in Raleigh in October for its site inspection and enjoyed a small reception at the State Bar.

The event ends with an awards ceremony at the Raleigh Convention Center on Saturday evening, where numerous attorney and witness awards are presented along with the crowning of the 2015 National Champion. CCCE is proud that Creative Visions (CV), an award-winning production company, will produce the awards ceremony. CV has developed exciting and memorable productions for many groups over the past 25 years and will insure a memorable finale for the experience this year.

Time to Step Up

From time to time legal professionals are called upon to give time, energy, and resources for those things that are important. This is one of those instances.

Please participate and support the NHSMTC this May. Everyone associated with CCCE and mock trials in North Carolina hopes to see you in Raleigh. ■

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State Bar Outlook (cont.)

year. In 2013, 3,361 recertification applications were processed by the paralegal certification program.

17. **District Bar Support** – The State Bar provides guidance and support for the 45 local district bars in regard to their regulatory responsibilities, which include the election of State Bar representatives and local officers, as well as the nomination of candidates for appointments to the district court. Regulatory responsibility of a district bar may further include the operation of local disciplinary and fee dispute committees. The State Bar also subsidizes the North Carolina Conference of Bar Presidents, the organization through which district bar presidents are trained and enabled to lead the organized bar at the local level. In 2013 the State Bar professional staff responded to over 150 requests for assistance and advice from district bar officers.

18. **Legal Assistance for Military Personnel** – The State Bar, through its award-winning LAMP (Legal Assistance for Military Personnel) Committee, provides training for military and civilian lawyers to enable them to better serve the legal needs of members of the armed services and their dependents in North Carolina. The LAMP Committee is made up of 26 volunteer lawyers who are present or past members of the military.

19. **Access to Justice** – The State Bar's IOLTA program collects interest on lawyers' general trust accounts and disburses it under the direction of its Board of Trustees to deserving grantees, primarily to support the provision of free legal services to North Carolina's indigent citizens. To perform this function in 2013, the IOLTA program monitored 10,047 attorney trust accounts with 91 banks. In 2013 the program made 18 grants and administered $2,371,255 in grant money. In addition, $3,523,673 in state funding for civil legal aid was distributed by the IOLTA program in 2013.

20. **Financial Account Management for the Chief Justice's Commission on Professionalism and the Equal Access to Justice Commission** – The State Bar collects funds to support two initiatives of the chief justice of the North Carolina Supreme Court: the Chief Justice's Commission on Professionalism (CJCP) and the Equal Access to Justice Commission (EAJC). In addition, the State Bar manages all accounting functions for the CJCP. For the calendar year 2013, $327,143.02 was collected and disbursed to support the operation of the CJCP, and $175,524.44 was collected and disbursed to support the operation of the EAJC.

21. **Publications** – To keep the profession and the public apprised of the State Bar's activities and lawyers' professional obligations, the State Bar publishes a well-regarded quarterly magazine, the North Carolina State Bar *Journal*, and maintains an interactive website, ncbar.gov. Annually it publishes *The Lawyer's Handbook*, a print and online compilation of the State Bar's regulations, annotated Rules of Professional Conduct, and formal ethics opinions. ■

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

Living Lives of Leadership and Service—Remarks of UNC President Thomas W. Ross

The following remarks were made on October 23, 2014, at the installation of Ronald L. Gibson as president of the North Carolina State Bar.

Good evening. Thank you for the very nice introduction. It has been more than 15 years since I presided over my last lawsuit, and most of you are probably too young to remember when I was a judge. But when I say it is a real pleasure to be with you tonight and to see so many good friends and former colleagues, I mean it, particularly given recent events.

During my professional career I have worked in various roles, including as a congressional chief of staff, a superior court judge, director of the Administrative Office of the Courts, director of one of the state's largest private foundations, president of my alma mater, Davidson College, and now as president of one the nation's best public universities, The University of North Carolina. This leads to an often asked question—"Why can't this guy keep a job?"

Seriously, despite all the different jobs I have held over the years, when someone asks me about myself, I always start by saying, "I am a lawyer." I describe myself in that way because I am very proud to be part of the legal profession.

With that in mind, I can say it is a great honor and a true privilege to have been asked to say a few words tonight as Ron Gibson is sworn in as president of the State Bar. I have known Ron since college at Davidson, so I know him quite well. As anyone who knows Ron well can attest, he is the consummate professional and has lived both his personal life and his years as a lawyer with impeccable integrity. With Ron Gibson at the helm, the North Carolina State Bar will have a president who is a leader not only in our profession, but also in his community. You have chosen a remarkable role model who will serve with distinction and dedication, and I commend you on his selection.

Because I have been privileged to hold leadership positions in several different organizations, I am often asked to talk about what makes a leader. It is on this topic that I would like to share some thoughts with you tonight. Let me say up front that being at the top of an organizational chart does not, in and of itself, make one a leader. On this point I suspect we can all agree. So I want to be clear that I am not necessarily more qualified to discuss this topic than are many of you. The difference between us is I have the podium and you don't.

I am privileged to serve as president of our public university system, and at times find it hard to believe I am approaching the end of my fourth year on the job. Granted, there have been and are times—and this week has certainly been one of them—when the four years feels much more like 40.

Before I turn to my thoughts on leadership, I thought it might be helpful to give you a quick sense of the challenges I face in my current role in hopes that I can demonstrate some level of qualification to speak on my topic.

I lead a public university system with 16 campuses that offer undergraduate degrees, with most also offering graduate and professional programs. Across the system, we operate three engineering schools, two medical schools, a vet school, two law schools, two dental schools, a pharmacy school with a satellite location, 11 nursing programs, 13 busi-

ness schools, and 15 schools of education. Also under the university umbrella are two specialty high schools, a large health care system that owns or operates eight hospitals and numerous physician practices, a statewide public television network, and the North Carolina Arboretum.

The University of North Carolina enrolls more than 220,000 students. We employ more people—now approaching 70,000—than any private enterprise in our state, even edging out WalMart. Our annual budget exceeds $9.2 billion, with more than $1.8 billion coming to us through competitive research grants and contracts.

I am charged with leading this large, highly complex organization within the confines of a very expansive public records law and public meeting statute. I interact with the Board of Governors and our local Boards of Trustees, with the governor, legislators, members of Congress, and many other local, state, and federal policy makers. And every morning when I wake up I can be certain of one fact—one or more of our employees or students have either messed up, are about to mess up, or have suffered the consequences of someone else messing up.

Since I took office I have dealt with one budget cut after another, including the largest in UNC's long history—more than $400 million in 2011. I've recommended the election of nine new chancellors, including five in the last seven months. I have just launched a search for number ten, and earlier this week a letter announcing an intention to retire arrived from another one. I have managed through an unsolicited attempt to purchase one of our hospitals. I have established system-wide task forces on issues ranging from athletics and academics to campus security. And I've dealt with a host of campus issues and crises on a near daily basis. None has been more disturbing or dragged on as long as the series of investigations and reviews related to past athletic and academic improprieties at UNC-Chapel Hill. With this week's release of the report of the in-depth, independent investigation by former federal prosecutor Ken Wainstein, we finally know all that can be known and can begin to bring this extremely painful chapter in our history to a close.

To say the least, the job keeps me busy. In fact, I'm often asked why I left my former job as president of Davidson— a private, well-endowed, small liberal arts college in an idyllic college town—to tackle challenges of this scope. And, most often, the question is carefully phrased in this way: "What the hell were you thinking?"

Kidding aside, I do feel I have learned a great deal during my career about what it takes to be a leader. So please bear with me as I share some thoughts on the topic.

Some say leaders are born, not developed—that leadership is natural for those destined to lead. I beg to differ. I truly believe ANY of us can become strong, effective leaders. Most fortunately for us, Ron Gibson has clearly done what it takes to do just that.

So, you might fairly ask where the path to leadership begins. I have come to believe that there are seven key principles that, if adopted and followed, can help equip and prepare a person to be a successful leader. I suggest that each of us can, in our own distinctive ways, walk the path of leadership and become important contributors to our profession and the communities in which we live and work.

Here is the first principle—**know yourself.** I'm convinced that to be an effective leader,

one must first understand who he or she is and what one brings to the table. Individually, we must evaluate our own strengths and weaknesses; identify our personal skills, abilities, and interests; discern our passions; reflect on our own behavior; seek feedback from others; accept guidance and supervision; and learn from experiences. Self-evaluation must be constant and ongoing, and we must be open to changing and improving ourselves as a result of what we discover. Even in the sometimes fragile environment within which I operate, I appreciate receiving feedback and learning how I can better know myself and improve my ways of operating.

Second—**communicate effectively**. Our legal training and experience have taught us to analyze the facts, to write logically and forcefully, and to articulate our views clearly and persuasively. These communications skills are part of who we are as lawyers. But I believe we must also strive to listen constantly, intently, and respectfully, for the art of listening is critical to the ability to communicate effectively. Being a truly effective leader requires intentional and constant effort to enhance one's communication skills and abilities and to listen to what others have to offer.

Third—**care for yourself**. Effective leaders understand the need for balance in their lives. They know that physical exercise and good health enhance mental agility and alertness; that serving others improves emotional health; that learning and leisure are both vital to success; and that effectively managing their time is perhaps the most important and challenging lifestyle issue they will face. We hear often about the need to feed our souls. There are books and more books on how to create balance in our lives and maximize effectiveness—not *efficiency*, mind you, but *effectiveness*. Strong, successful leaders not only pay attention to the importance of a life in balance, they also work to achieve it. They understand they must be able to manage themselves before they can manage others. Needless to say, we all struggle with this one. In fact, the folks with whom I work will tell you I encourage this behavior often, while personally failing miserably to follow my own advice.

Fourth—**clarify your values**. The most effective leaders I know have a personal belief system that requires them to care about more than just themselves. They have clearly defined values that require honest and straightforward dealings on each and every occasion; they understand the relationship between individual action and its intended and unintended effects on society. They also are willing to challenge the unfair, unjust, and uncivil behavior of others. To be an effective leader, I am convinced we must clarify our own values, which I believe should include caring deeply and passionately about other people and the common good.

Fifth—**earn and build trust**. Great leaders have an unwavering commitment to integrity and honor. People simply will not follow someone they don't respect. A person cannot command the respect necessary to lead unless he or she builds and maintains credibility, and nothing is more important to credibility than trust. People must believe in what we say and in how we conduct ourselves. They must trust both the person attempting to lead, as well as his or her motives. Otherwise, they cannot be expected to follow the direction proposed. Earning the trust of others by leading with integrity is an absolutely necessary trait of every successful leader.

Sixth—**appreciate and embrace differences**. The best leaders are those who not only understand and respect differences, but also cherish and celebrate the diversity that exists among those they lead. In today's global world and diverse workplace environments, understanding difference is a must if we are to be successful as an employee or manager. And in order to effectively guide diverse groups of people toward common goals and directions, the person attempting to lead them must make it clear that he or she genuinely understands, appreciates, and respects them for who they are.

Finally—**involve others**. The best leaders I have known intentionally and consciously spend time with a variety of people who work on a variety of endeavors. They seek out talented people with an enormous range of abilities and bring them into the leader's work and onto the team. Strong leaders consult with as many talented people as possible, seek their ideas and input, and invite them to challenge the leader's thinking. In my view, including those we lead in the formulation of strategies, directions, and goals will invite shared responsibility for the direction we develop together. Confident leaders are inclusive and happy to share power and credit, so long as the best result is achieved. In fact, the best leaders are even willing and able, in the right situations, to follow those they lead.

So, these are the seven principles I offer as keys to effective leadership. There is no magic or rocket science involved here, just common-sense principles that I hope you will find helpful.

In a famous book it says that, "To whomsoever much is given, much is required." Because we are lawyers, because of our advanced education, and because of the positions we hold, we are not only in a position to do well in life, we are also in a position to do GOOD and to lead others to accomplish good things. But it is up to each of us to decide how and when to pay it forward. Deep down, we all have what it takes to make a difference—in the workplace, in the profession, in our houses of worship, in local nonprofit organizations, or elsewhere in our communities. The challenge is to use what we have to matter in the lives of others and in our communities.

Ron Gibson is exactly the kind of leader I have tried to describe tonight. He knows himself—his strengths and weaknesses. He can communicate effectively. He has balance in his life and takes care of himself a whole lot better than I take care of myself. He knows his own strong values and lives by them. He has earned our collective trust by living and leading with integrity. He appreciates the contributions of others—including those who are different from him. And he involves those around him in critical decision-making and in his efforts to lead. As a lawyer, I am extremely pleased that my State Bar has recognized Ron's proven leadership abilities and that it has tapped him to serve in this new role as president. I know that Ron will serve the State Bar, the people of North Carolina, and each of us with distinction and dedication.

Please remember that every one of us here tonight is privileged, compared to most people in this world. We have opportunities open to us that others can only imagine. But with that privilege comes a responsibility to live lives of leadership and service—to do all we can to make life better for others and to improve the communities in which we live. Each of us is in a position to make a difference, and if we follow the example Ron Gibson has set for us, our lives and our actions will indeed matter.

Thank you, Ron, for being a leader. Thank you for being OUR leader. And thank you for setting a powerful example of professionalism and leadership to which each of us can aspire. Best wishes, Mr. President!

Thank you! ■

Infilaw and Student Debt

Jerry Hartzell

On August 13, 2014, the *Atlantic* published an article by University of Colorado law professor Paul Campos titled "The Law-School Scam."[1] The focus of the article was Florida Coastal School of Law, a for-profit law school owned and operated by Infilaw. Infilaw is the company that also owns and operates the Charlotte School of Law, a for-profit law school in Charlotte.[2] Charlotte School of Law is the largest law school in North Carolina; most of its graduates seek licensure in North Carolina.

The thesis of the *Atlantic* article was that Infilaw's three law schools, "among the largest law schools in the country," have achieved their size "by taking large numbers of students that almost no other ABA-accredited law school would consider admitting," and that students attending the Infilaw schools are taking on large law school debt which many of them will have little prospect of being able to repay.

I forwarded a copy of the *Atlantic* article to Catharine Arrowood, president of the North Carolina Bar Association, and received a responsive email that attached a document that Charlotte School of Law's dean, Jay Conison, "prepared and gave [the Bar Association] permission to freely distribute." This document, which stated that it "outlines the errors and mischaracterizations" of the *Atlantic* article, included the following assertions:

- "[Infilaw's priorities] are to respond to the long overdue need for change and to open up legal education and the profession to groups who historically have had limited access."
- "The student bodies at Infilaw schools are among the most diverse of any law schools in the country." Charlotte School of Law is "ranked among top schools for diversity..."
- "[A]n entire body of research...has concluded that law school provides a strong return on investment."

In an effort to understand the issues, I attempted to dig into data concerning Charlotte School of Law, as well as the six other law schools in North Carolina. That data is summarized below.

Enrollment—The following data is compiled from information contained on law schools' American Bar Association Standard 509 Information Reports ("ABA") for 2012-14.[3]

Law School	2012	2013	2014
Campbell	453	422	442
Charlotte	**1,392**	**1,410**	**1,267**
Duke	660	647	666
Elon	327	291	281
NC Central	583	611	595
UNC	741	720	667
Wake Forest	476	506	501

Degrees Awarded—Charlotte School of Law awards more *juris doctor* degrees than any other North Carolina law school. In the 2013-14 academic year, Charlotte granted 415 JDs; the North Carolina law school with the second highest number of JDs during 2014 was UNC with 242. Source: ABA 2014.

Attrition—Charlotte School of Law had the highest attrition of any North Carolina law school: 172 dropouts (32.1%) from the first-year class:

Law School	Number	%
Campbell	8	7
Charlotte	**172**	**32**
Duke	1	1
Elon	21	20
NC Central	70	29
UNC	8	3
Wake Forest	3	2

Source: ABA 2014. Dropouts from second-year and third-year classes were substantially lower than from the first-year class. At Charlotte, 30 students (7%) and seven students (2%) dropped from the second- and third-year classes, respectively. At NC Central, 11 students (6%) and one student (1%) dropped from the second- and third-year classes. No other law school had more than ten upper-class dropouts. *Id.*

LSAT Scores of 2014 Entering Students—The average and 25th percentile LSAT scores of students entering in 2014 show that Charlotte School of Law's entering students had the lowest LSAT scores among the North Carolina law schools. Source: ABA 2014.

Law School	Median LSAT	25th Percentile
Campbell	152	149
Charlotte	**142**	**138**
Duke	169	166
Elon	148	145
NCCU	144	141
UNC	161	157
Wake Forest	161	157

Tuition—Charlotte's tuition is near the average charged by North Carolina law schools. Source: ABA.

Law School	2014-15 Tuition
Campbell	$38,645
Charlotte	**$41,348**
Duke	$55,588
Elon	$37,924
NCCU	$11,708
UNC	$22,560
Wake Forest	$42,526

Pass Rate on Bar Exam—The pass rates on the North Carolina bar exams for first-time takers, obtained from the North Carolina Board of Law Examiners, show Charlotte School of Law to have a lower pass rate than other North Carolina law schools. Source: calculations from data supplied by NC Board of Law Examiners.

Law School	2012	2013	2014
Campbell	94%	83%	86%
Charlotte	**65%**	**60%**	**57%**
Duke	81%	94%	84%
Elon	74%	63%	67%
NC Central	59%	63%	75%
UNC	88%	80%	86%
Wake Forest	87%	75%	78%
Out-of-state law schools	70%	66%	58%
Overall average	75%	69%	69%

Student Loan Debt—The ABA Reports do not include information about student loan indebtedness. However, *US News and World Report* publishes data on law schools that includes "average indebtedness of 2013 graduates who incurred law school debt" and "percent of grads with debt."[4]

Law School	*US News* Average Debt	*US News* % with Debt
Campbell	N/A	N/A
Charlotte	**$135,466**	**95**
Duke	$125,549	60
Elon	$108,290	89
NCCU	$81,944	96
UNC	$92,726	81
Wake Forest	$112,457	90

By multiplying the *US News* figure for average debt times its percentage of graduates with debt, and in turn multiplying this times the number of members of the 2012-13 graduating class size, it is possible to estimate the debt load that North Carolina law schools generated with their 2012-13 graduating classes.

Law School	2012-13 Number of Graduates	Aggregate Debt of 2013 Graduates ($ million)
Campbell	136	N/A
Charlotte	**354**	**$46**
Duke	241	$18
Elon	122	$12
NCCU	170	$13
UNC	248	$19
Wake Forest	158	$16

If we assume Campbell's graduating students had an aggregate student debt load of $14 million, the *US News*-based total law school student debt load for the 2012-13 graduating class from the seven North Carolina law schools would come to $138 million.

However, there are two reasons this estimate, at least as applied to Charlotte School of Law, seems to understate aggregate student debt load.

First, the aggregate figure is calculated by reference to the number of *graduates*, not to the number of *students*. As noted in "Attrition" above, some law schools, particularly Charlotte, have substantial numbers of dropouts, particularly from the first-year class. Dropouts would incur less student debt than graduates, but some substantial number of students who drop out doubtless incurred some amount of law school debt.

Second, the Charlotte School of Law's website contains student debt information that I did not note in the websites of any of the other North Carolina law schools. CSL's website states: "The median amount of debt for program graduates is...$164,724."[5] During the early fall of 2014 the CSL website stated, "The median cumulative program debt for Charlotte School of Law graduates between July 1, 2012, and June 30, 2013, is as follows: federal student loan debt: $155,697 [and] private student loan debt: $20,018..."

These "median" figures are roughly $30,000 to $40,000 higher than the *US News* "average" numbers set out above. In response to my inquiry, Charlotte's Dean Conison indicated he could not offer any explanation for the difference between the CSL website figure and the *US News* figure, as he was not familiar with the manner in which *US News* compiled its number.[6] The difference may simply be that the *US News* reference to "average" may refer to a number that is calculated as the "mean," which is a different calculation than a "median" figure.

In considering the "median" figures CSL supplies, however, it is important to note that these numbers do not include interest accrued while attending law school.[7] Student loans accrue interest during the time a student attends law school, even though repayment does not typically commence until after graduation.[8] A graduating law student will have accrued almost three years' interest on the first semester loan disbursement, will have accrued approximately two and a half years of interest on the second semester loan, and so forth.

Using 7% as the interest rate,[9] the interest that would have accrued during a student's attendance at Charlotte School of Law from September 1, 2010, through June 1, 2013, would bring median law school debt for the 2013 Charlotte School of Law graduates to

$197,240. Using the more recent Charlotte figure for median debt ($164,724), the interest that would accrue during attendance at CSL would bring median debt for 2014 Charlotte School of Law graduates to $184,903.[10]

Repaying Law School Debt—According to the Federal Student Aid Repayment Estimator,[11] the 2013 median Charlotte student program debt of $197,240, accruing interest at 7% and repaid over the standard ten year student loan repayment term, would require monthly payments of $2,290. The 2014 median CSL debt of $184,903, accruing interest at 7% and repaid over the standard ten year term, would require monthly payments of $2,147.

These would, of course, be in addition to any other student loan repayment obligations, such as for undergraduate education.

There are other options for repaying student indebtedness by stretching the loan over a longer period of time or graduating repayments. These options are simply means of deferring repayment, and interest on unpaid balances continues to accrue at around 7% for recent graduates. There is also a 25-year student loan forgiveness program, but this program has not yet been implemented by tax legislation that is necessary to make it workable.[12]

Finally, loan forgiveness is available under the Public Service Loan Forgiveness Program after a borrower has made 120 monthly payments while working full-time "with a federal, state, or local government agency, entity, or organization or a not-for-profit organization that has been designated as tax-exempt by the Internal Revenue Service (IRS) under Section 501(c)(3) of the Internal Revenue Code (IRC)."[13]

Value of Legal Education—Dean Conison asserted that a body of research "has concluded that law school provides a strong return on investment." The sole cite in support of this assertion is titled "The Economic Value of a Law Degree, PowerPoint Presentation," dated May 18, 2013.[14] While "The Economic Value of a Law Degree" has been the subject of a great deal of commentary,[15] apparently the article has not been published except in draft form on the Internet.

To make a longer discussion short, it appears that no research shows, one way or the other, whether (or for how many students) education at a school such as Charlotte School of Law would have a positive economic value. Nor does any research address the issue of how many Charlotte School of Law attendees, particularly attendees with the lower qualifications of the school's recent entering classes, will be able to repay the large amount of student debt they incur to attend the school.

Some Comments

I have no knowledge or opinion as to the quality of the education being provided at Charlotte School of Law. I have been advised of multiple lawyers who have had experience with graduates or interns from Charlotte School of Law who have been quite capable. Charlotte is fully accredited by the American Bar Association; indeed, Dean Conison acted as the reporter for an ABA task force on the future of legal education.[16]

But Charlotte School of Law is unusual in that it has so many students, so many dropouts, and so many failures on the bar exam, even as such a large portion of its student body incurs so much student loan debt. CSL appears to be acting as a rational profit-maximizer, selling its for-profit product to as many customers as it can.

Charlotte's students are buying Infilaw's education product on credit issued by the United States government. Those Charlotte Law students who remain through graduation will go into debt at a median level of $197,240 (2013 figure) or $184,903 (2014 figure) for their legal education. The debt is not dischargeable in bankruptcy.[17] To repay that debt would require payments of over $25,000 per year for ten years, or reliance on the ten-year Public Service Loan Forgiveness, or reliance on 25-year forgiveness program that has not yet been finalized.

Law school debt is substantial and widespread. Among North Carolina law schools, Charlotte School of Law is, by a substantial margin, the largest source of this debt. ■

Jerry Hartzell has practiced law in Raleigh since 1977. He received his law degree from UNC School of Law.

Endnotes

1. theatlantic.com/features/archive/2014/08/the-law-school-scam/375069.
2. infilaw.com/our-schools.
3. The Standard 509 Reports for all schools for the years 2011-2-14 are at abarequireddisclosures.org.
4. grad-schools.usnews.rankingsandreviews.com/best-graduate-schools/top-law-schools/grad-debt-rankings. This data comes from voluntary reports to *US News* by substantially all law schools. Data for Campbell was not available. The methodology used in gathering data and reporting information is not disclosed.
5. charlottelaw.edu/admissions/gainful-employment-aba-required-disclosures (last visited January 19, 2015).
6. Email from Dean Conison to the author, October 2, 2014.
7. *Id.*
8. While some undergraduate education loans ("Direct Subsidized Loans") do not accrue interest during a student's attendance in school, loans for graduate school are typically "Direct Unsubsidized Loans" or "Direct PLUS Loans," each of which accrues interest from the time loan funds are disbursed. studentaid.ed.gov/types/loans. *Also see* tuition.io/blog/2014/03/student-loan-interest-explained-accrues-capitalizes-drives-debt/ (general explanation); studentaid.ed.gov/types/loans/interest-rates (rates and fees for federal loans).
9. The 7% figure is intended to represent a blend of the pre- and post-6/30/13 rates for Direct Unsubsidized Loans for graduate school (6.8% and 6.21%) and Direct PLUS Loans (7.9% and 7.21%). *See* studentaid.ed.gov/types/loans/interest-rates (rates and fees for federal loans).
10. The 2013 calculation assumes six equal disbursements of loan proceeds totaling $175,715, with disbursements occurring on August 1 and January 31 of each academic year, and with simple interest accruing at 7% from the date of disbursement through August 31 of the year of graduation. The 2014 calculation assumed six equal disbursements of loan proceeds aggregating $164,724, with the same method and interest rate.
11. studentloans.gov/myDirectLoan/mobile/repayment/repaymentEstimator.action.
12. studentaid.ed.gov/repay-loans/understand/plans. As to the tax consequences of forgiveness of unpaid balances after 25 years, see irs.gov/publications/p970/ch05.html (IRS publication summarizing taxability of student loan discharges for other than public service). Also see projectonstudentdebt.org/initiative_view.php?initiative_idx=8 (referring to H.R. 2492, which was introduced in 2009, but has not yet become law).
13. studentaid.ed.gov/repay-loans/forgiveness-cancellation/charts/public-service.
14. papers.ssrn.com/sol3/papers.cfm?abstract_id=2270175. This work indicates that "a draft of the full paper" is also available on the Social Science Research Network. *See* nd.edu/~ndlaw/law-and-econ-program/Simkovic-TheEconomicValueofaLaw Degree.pdf.
15. A July 2013 list of over 20 articles or blogs commenting on the presentation appears in "TaxProfBlog" at taxprof.typepad.com/taxprof_blog/2013/07/rasmussen-.html.
16. According to the Charlotte School of Law website (charlottelaw.edu/):

    > Earlier this year, the American Bar Association issued a report (Report of the Task Force on the Future of Legal Education) highlighting the significant chasm between what the legal profession wants and law schools do. Charlotte School of Law Dean Jay Conison served as the reporter for the task force, which calls upon law schools to become more responsive to the needs of students and employers or become irrelevant...

17. 11 U.S.C. § 523(a)(8). An exception allowing discharge in cases of undue hardship is narrowly construed. For a recent case addressing the issue see, e.g., *Hedlund v. Educational Resources Institute, Inc.*, 718 F.3d 848 (9th Cir. 2013).

Further Grant Decreases Required by Lower Income

Income

All IOLTA income earned in 2014 will not be received and entered until after this edition of the *Journal* goes to press. We can report, however, that the income from IOLTA accounts has continued to decrease as many banks recertify their comparability rates at lower levels. Over the first three quarters of the year, income from IOLTA accounts declined by 7%. Unfortunately, we did not receive any significant funds from court awards designated to legal aid in 2014 as we had in the previous two years. We expect that income from IOLTA accounts and our total income will be under $2 million.

Grants

Beginning with 2010 grants, we have limited our grant-making to a core group of (mainly) legal aid providers. Even with that restriction and using over $2.5 million in reserve funds over the last five years, grants had dramatically decreased (by over 40%). For the last three years, we were able to keep grants steady at the decreased amount of ~$2.3 million using funds from reserve and from court awards designated for civil legal aid. For 2015, the trustees had to reduce grants further (by 19.29%) to $1,901,640. We project having to use over 50% of our remaining reserve (of ~$745,000) to make those grants.

State Funds

In addition to its own funds, NC IOLTA administers the state funding for legal aid on behalf of the NC State Bar. Total state funding distributed for the 2013-14 fiscal year was $3.5 million. The state budget adjustments for 2014-15 eliminated the appropriation for legal aid work (currently $671,250). Though the proposed Senate budget had also eliminated the Access to Civil Justice funding from court fees (~$1.8 million), that funding was continued in the final budget—with significant additional reporting requirements for Legal Aid of NC. The Equal Access to Justice Commission and the NCBA continue to work to sustain and improve the funding for legal aid. ■

In Memoriam

Robert Martin Addison
Chattanooga, TN

Charles J. Alexander II
Winston-Salem, NC

Cade Lee Austin
Charlotte, NC

Henry Grady Barnhill Jr.
Winston-Salem, NC

George William Beswick
Morehead City, NC

Keith Gaylord Bloomer
Shelby, NC

Thomas Davis Bunn
Raleigh, NC

Roy Asberry Cooper Jr.
Nashville, NC

Thomas Johnston Dimmock
Raleigh, NC

Wright Tracy Dixon Jr.
Raleigh, NC

Randy Davis Doub
Greenville, NC

Walter J. Etringer
Eden, NC

Henry M. Fisher
Nashville, NC

Gary Robert Govert
Raleigh, NC

Jennifer Miller Green
Raleigh, NC

Drewry James Jones Jr.
Raleigh, NC

William H. McMillan
Statesville, NC

William R. Moore
Washington, NC

Billy Brown Olive
Durham, NC

Henry Neal Pharr II
Charlotte, NC

Margaret Louise Reeves
Marshall, NC

Rene M. Reilly
Jacksonville, NC

George W. Saintsing
Thomasville, NC

Robert Bruce Smith Jr.
Lexington, NC

Donald Lee Smith
Raleigh, NC

Sydnor Thompson Jr.
Charlotte, NC

W. Thomas White
Mocksville, NC

Catherine Ann Zanga
Charlotte, NC

Lawyers Receive Professional Discipline

Disbarments

Ertle Knox Chavis of Lumberton misappropriated entrusted client funds and engaged in a conflict of interest. He was disbarred by the DHC.

Lena Watts-Robinson of Gastonia misappropriated entrusted client funds, did not maintain entrusted funds separate from her own funds, did not disburse interest earned on entrusted funds to IOLTA or to the client, did not reconcile the account into which she deposited entrusted funds, neglected and did not communicate with her client, did not respond to the State Bar, did not participate in good faith in the State Bar's mandatory fee dispute resolution process, collected an excessive fee, and did not refund an unearned fee. She was disbarred by the DHC.

Suspensions & Stayed Suspensions

Robert Brady of Cary withdrew funds he had deposited into his daughter's custodial account and applied those funds for his personal benefit and not for the benefit of his daughter. The DHC suspended Brady for two years. The suspension is stayed for two years upon Brady's compliance with enumerated conditions.

A Haywood County jury convicted **Charles Mark Feagan**, formerly of Polk County, of felonious forgery and uttering, for which he received a probationary sentence. Feagan was already serving a five year suspension of his law license imposed in 2011. The DHC concluded that Feagan also misappropriated a traffic client's entrusted funds and concluded that Feagan was successfully participating in the LAP program. It announced its decision to impose an additional five year suspension to commence at the expiration of the existing five year suspension.

James Pardue of Cary did not reconcile his trust account at least quarterly, did not always identify the sources of deposits, did not provide a written accounting at least annually, and disbursed his legal fee and closing costs before funds were deposited into the trust account. The DHC suspended Pardue for one year. The suspension is stayed for 18 months upon compliance with numerous conditions.

The DHC announced its conclusion that **Peter Paul** of Cashiers inappropriately disbursed entrusted funds, did not provide annual accountings of entrusted funds, and, after causing the State Bar to have a misapprehension of the facts, did not correct that misapprehension. The DHC concluded that the evidence did not establish that Paul intentionally misappropriated or intentionally misled the State Bar. The DHC suspended Paul for one year. The suspension is stayed for one year.

John Roebuck of Rockingham pled guilty in Richmond County Superior Court to the felony of knowingly maintaining a vehicle for the purpose of using controlled substances. The conviction resulted from Roebuck's purchase of prescription pain medication from a former client. The DHC suspended Roebuck for four years.

The DHC concluded that **David Sutton** of Greenville violated numerous Rules of Professional Conduct by engaging in a pattern of aggressive, disruptive, and dishonest behavior. The DHC suspended Sutton for five years. After serving three years, Sutton may apply for a stay of the balance upon showing compliance with numerous conditions, including reformation of character.

Paul Whitfield of Charlotte refused to withdraw from a personal injury case after the client terminated the representation, filed an improper incompetency petition against his former client, issued improper subpoenas and deposition notices, and filed a frivolous lawsuit against his former client's new attorney. The DHC suspended Whitfield for two years. After serving six months, Whitfield may apply for a stay of the balance upon showing compliance with numerous conditions.

A. Wayland Cooke and **H. Davis North** of Greensboro commingled personal and entrusted funds by leaving earned fees in their trust accounts. They did not supervise an assistant to whom they delegated trust account duties and did not perform monthly and quarterly reconciliations of their trust accounts. The assistant misappropriated funds from the trust account but, due to the commingling of funds, no entrusted funds were impacted. The DHC suspended Cooke and North for one year. The suspensions are stayed for one year upon compliance with enumerated conditions.

Censures

Nicholas Ackerman of Greensboro was censured by the Grievance Committee. The committee found that Ackerman neglected and did not communicate with his client.

Bobby Mills of Raleigh was censured by the DHC. The DHC concluded that Mills did not supervise a subordinate attorney and a paralegal and that he committed conduct prejudicial to the administration of justice. Mills did not ensure that the pleadings, documents, and representations his associate and his paralegal made to the court in a termination of parental rights action were accurate. Mills attempted to use the termination order against a potential father to whom Mills had not given notice of the termination proceeding. The DHC concluded that the evidence did not establish dishonesty, fraud, deceit, or misrepresentation by Mills.

Leslie O. Wickham Jr. of Durham was censured by the Grievance Committee. Without implied or express consent to do so, Wickham revealed the names of a child's adoptive parents to the biological mother and to the child's former foster mother. The conduct constitutes a misdemeanor under NCGS § 48-10-105. The committee also found that Wickham failed to appreciate the real or potential harm his conduct caused to the child and to the adoptive family.

Reprimands

Joel Bowden of Greensboro was reprimanded by the Grievance Committee.

CONTINUED ON PAGE 33

Top Tips: Proposed Amendments to Trust Accounting Rules

By Peter Bolac

Note: At its January 23, 2015, meeting, the North Carolina State Bar Council voted to publish for comment proposed amendments to Rule 1.15 of the Rules of Professional Conduct. You are encouraged to read the full text of the proposed rule amendments on page 40 and submit your comments to the North Carolina State Bar Issues Committee. The council considers all comments—negative and positive—before any action is taken.

Background

The North Carolina State Bar Issues Committee formed a subcommittee in early 2014 to study Rule 1.15 of the Rules of Professional Conduct and determine if any changes should be made to facilitate prevention and early detection of internal theft, and to add clarity to the existing requirements. In addition to examining pre-existing rules, the Subcommittee on Trust Account Management was also tasked with developing a procedure whereby a firm with two or more lawyers may designate a firm partner to oversee the firm's general trust accounts. The subcommittee drafted the proposed amendments, the Issues and Executive Committees approved the amendments, and the full council approved the amendments for publication in the *Journal*. This article focuses on the substantive rule changes. For a full-text version of the proposed rule amendments, see page 40 of this edition of the *Journal*.

Proposed Amendments to Rules 1.15-1, 1.15-2, and 1.15-3

Proposed Amendment to Rule 1.15-1(a), "*Bank*" – Adds credit unions to the definition of "bank." This change allows lawyers and law firms to maintain trust accounts at credit unions.

Proposed Amendment to Rule 1.15-2(f), *Segregation of Lawyer's Funds* – Clarifies the lawyer's obligation to segregate trust funds from the lawyer's own funds or third party funds not held by the lawyer in connection with the performance of legal services.

Proposed Amendment to Rule 1.15-2(h), *Items Payable to Lawyer* – Gives the lawyer options for ways in which to identify, on a trust check payable to the lawyer, the client from whose balance the check is drawn. The previous language of the rule confused lawyers as to how the client must be identified on trust checks payable to lawyers. Remember, **Rule 1.15-3(b)(2)** requires the lawyer to identify the client on any item drawn from a general trust account regardless of the payee.

Proposed Amendment to Rule 1.15(2)(i), *No Bearer Items* – Specifies that no cash may be withdrawn from a trust account by any means including, but no longer limited to, debit cards. Further, **Proposed Rule 1.15-2(j)** prohibits the use of a debit card to withdraw funds or make payments from any trust or fiduciary account.

Proposed Amendment to Rule 1.15-2(o), *Duty to Report Misappropriation* – Details the lawyer's responsibility to report misappropriation or misapplication of entrusted property to the State Bar. The amendments to the rule require the lawyer to immediately report any intentional theft or fraud when discovered, but relieves the lawyer from reporting a misapplication resulting from an accounting or bank error if the misapplication is discovered and rectified on or before the lawyer's next required quarterly reconciliation. **Proposed Comment 24** further explains the lawyer's duty to report misappropriation or misapplication of entrusted funds, and **proposed amendments to comment 1 of Rule 8.3, *Reporting Professional Misconduct***, clarifies that a lawyer has a duty to report misappropriation or misapplication of trust funds regardless of whether the lawyer is reporting the lawyer's own conduct or that of another person.

Proposed Rule 1.15-2(S), *Signature on Trust Checks* – Requires that checks drawn on a trust account must be signed by a lawyer or by an employee who is not responsible for reconciling the trust account and who is supervised by a lawyer. Further, any lawyer or employee who exercises signature authority must take a one-hour trust account management CLE course before exercising such authority. The rule also prohibits the use of signature stamps, preprinted signature lines, or electronic signatures on trust account checks. **Proposed Comment 22** further explains the new signature requirements.

Proposed Amendment to Rule 1.15-3(d), *Reconciliations of General Trust Accounts* – Explains in more detail how to perform quarterly three-way reconciliations, and requires a lawyer to review, sign, date, and retain a printed copy of the monthly and quarterly reconciliation reports.

Proposed Rule 1.15-3(i), *Reviews* – A proposed new provision requires lawyers to review the monthly bank statements and cancelled checks for all trust and fiduciary accounts, and to perform a quarterly review of a random sample of at least three transactions for each account to verify that disbursements were properly made. The lawyer must maintain a record of the monthly and quarterly reviews. **Proposed Comment 21** further explains the review requirement.

Proposed Rule 1.15-3(j), *Retention of Records in Electronic Format* – Allows printed or paper reports to be saved in an electronic format provided the original paper report was signed and dated at the time of preparation and the electronic copy cannot be electronically manipulated.

Proposed Comment 23 – Provides a list

of fraud prevention measures for lawyers to consider implementing to safeguard trust funds from embezzlement.

Proposed Rule 1.15-4, *Trust Account Management in Multiple-Lawyer Firm*

This proposed new rule will allow a law firm to designate a partner in the firm to serve as the trust account oversight officer (TAOO) for any general trust account into which more than one firm lawyer deposits funds. A summary of the rule is below, but please read the full text of the rule on page 42.

Proposed Rule 1.15-4(a), ***Trust Account Oversight Officer*** - Permits a firm to designate a partner as the firm's TAOO. A partner is defined as a member of a partnership, a shareholder in a law firm organized as a professional corporation, or a member of an association authorized to practice law. The designation must be in writing, and signed by the TAOO and the managing lawyers of the firm. A law firm may designate more than one partner as a TAOO. **Proposed Comment 25** explains the supervisory requirements for delegation under Rule 5.1 and states that "delegation consistent with the requirements of Rule 1.15-4 is evidence of a lawyer's good faith effort to comply with Rule 5.1."

Proposed Rule 1.15-4(b), ***Limitations on Delegation*** – Lawyers remain individually responsible for the oversight of any dedicated trust account or fiduciary account associated with a legal matter for which the lawyer is primary legal counsel. The lawyer must continue to review disbursements, ledgers, and balances for any such account. **Proposed Comments 26 and 27** further explain the limitations on delegation.

Proposed Rule 1.15-4(c), ***Training of the TAOO*** – Explains the initial and annual training requirements of a TAOO. **Proposed Comment 28** further explains this requirement.

Proposed Rule 1.15-4(d), ***Designation and Annual Certification*** – Sets forth what must be included in the written agreement designating a lawyer as a TAOO.

Proposed Rule 1.15-4(e), ***Mandatory Oversight Measures*** – Requires any firm that designates a TAOO to have a written policy detailing the firm's trust account management procedures.

Random Audits

Lawyers randomly selected for audit are drawn from a list generated from the State Bar's database based upon judicial district membership designations in the database. The randomly selected judicial districts used to generate the list for the 1st quarter of 2015 were District 9A (Caswell and Person Counties) and District 14 (Durham County). ■

Disciplinary Department (cont.)

Bowden did not ensure that a nonlawyer assistant's actions in seeking new clients complied with his professional obligations.

The Grievance Committee reprimanded **Wayne Clontz** of Morganton. After his client terminated the representation and asked Clontz to return her file, Clontz commenced a civil action purportedly on her behalf. Clontz did not ensure that a nonlawyer assistant's conduct was compatible with his professional obligations. He also paid bills for the client for expenses that were not the subject of pending or contemplated litigation.

Charles Lamm of Charlotte was reprimanded by the Grievance Committee. Lamm engaged in a conflict of interest by representing both the estate of his client's mother and the client as former executrix of the estate. He did not advise his client of the conflict and of his disqualification by the court. Lamm did not respond to inquiries from the local Grievance Committee and the State Bar.

Rachel Faultersack of Wilmington was reprimanded by the Grievance Committee. In an effort to avoid a late payment fee, Faultersack affixed a false date to her CLE Annual Report Form. She also misrepresented the circumstances surrounding her submission of the late form in her response to the Grievance Committee.

Timothy D. Smith of Charlotte was reprimanded by the Grievance Committee. Smith did not respond reasonably to his client's requests for information, repeatedly disregarded his client's requested changes to documents, and did not communicate with his client about the means by which her objectives could be accomplished.

Transfers to Disability Inactive Status

Elesha Smith of Raleigh was transferred to disability inactive status by the chair of the Grievance Committee.

Reinstatements

In July 2013 the DHC suspended **Kenneth P. Andresen**, formerly of Charlotte, for four years. The DHC found Andresen entered into a prohibited business transaction with a client, applied funds held in trust to pay his fee without authorization, did not promptly remove an earned fee from his trust account, and used entrusted property for one other than the beneficial owner. After serving one year, Andresen was eligible to seek a stay of the balance of the suspension upon demonstrating compliance with numerous conditions. In November 2014 the DHC found that Andresen met the conditions and stayed the balance of the suspension.

Douglas T. Simons of Durham surrendered his law license and was disbarred by the State Bar Council in April 2005. Simons admitted that he misappropriated at least $300,000 and that he falsified bank records to conceal the misappropriation. In March 2014 the DHC recommended that Simons' petition for reinstatement be denied. Simons appealed to the council. At its January 23 meeting, the State Bar Council voted to accept the DHC's recommendation and denied reinstatement.

In November 2007 **Ralph Bryant** of Newport surrendered his law license and was disbarred by the DHC. Bryant admitted that he misappropriated entrusted funds totaling $64,847. In August 2014 the DHC recommended that his petition for reinstatement be denied. The DHC found that Bryant had reformed, but that his reinstatement would be detrimental to the integrity and standing of the bar, the administration of justice, or to the public's interest. Bryant appealed to the council. At its January 23 meeting, the State Bar Council voted to accept the DHC's recommendation and denied reinstatement. ■

Stress, Burnout, and Balance

By Robynn Moraites

Practicing law is stressful. Practicing medicine is stressful, too, but there is a difference, as illustrated in this example we often use in our CLE presentations:

> As a lawyer, you are like a brain surgeon. Imagine the patient is laid out on the table in front of you. It is your job to operate and save his life. You are bringing all of your training, knowledge, and skills to bear to try to save the patient's life. Now imagine that you have another doctor standing on the other side of the table—equally skilled, equally trained—and his primary goal is to kill the patient that you are trying to save. Now imagine you have 10 to 12 of these patients a day. And now imagine that after you have saved these patients' lives (and sacrificed time with your own family to do it), the patients are all complaining about your fee and refusing to pay.

Are you getting the picture? This silly example may seem far-fetched, but in reality lawyers are often under that kind of emotional pressure and stress day-in and day-out.

The sheer volume of work adds another dimension of stress. When we are especially pressured for time, the first activities we discard are those that do not produce a useful end product or advance the ball toward the goal line. Namely, we discard vacations and hobbies and interests outside of our professional life. The reality of practice today is that every day you are out of the office is another day you're behind; it's another day you have to catch up upon your return. Yet those outside hobbies and interests and those vacations are what trigger the release of all the "good stuff" in our limbic brains, which sustains us during times of stress.

Think of your limbic brain like a piggy bank of emotional resilience. Every day you have a client with bad facts you have to take a penny out. Every day you have a difficult or unreasonable client you have to take a penny out. Every day you see clients in intense distress you have to take a penny out. The list is endless. You have to put pennies in that piggy bank every now and then. It is actually more important for lawyers to have hobbies and interests outside of work and to take vacations than for people working in other industries. Other professions are much more collaborative than the legal profession. We, as lawyers, actually need more emotional resilience in the face of our competitive, combative, and conflict-driven professional culture. And like the little kid who smashes the piggy bank looking for those last pennies, if we have not nourished ourselves emotionally, we too will break.

Burnout is a step or two past compassion fatigue. Burnout is a state of emotional, mental, and physical exhaustion caused by excessive and prolonged stress. It occurs when you feel overwhelmed and unable to meet constant demands. As the stress continues, you begin to lose the interest or motivation that led you to take on a certain role in the first place. Burnout is different from stress itself, as the chart on the following page illustrates.

Burnout is a gradual process that occurs over an extended period of time. It doesn't happen overnight, and it can creep up on you if you're not paying attention to the warning signals. The signs and symptoms of burnout are subtle at first, but they get more pronounced as time goes on.

Physical signs and symptoms of burnout:

- Feeling tired and drained most of the time
- Lowered immunity, feeling sick a lot
- Frequent headaches (migraines), back pain, muscle aches
- Change in appetite or sleep habits

Emotional signs and symptoms of burnout:

- Sense of failure and self-doubt
- Feeling helpless, trapped, and defeated
- Detachment, feeling alone in the world
- Loss of motivation
- Increasingly cynical and negative outlook

- Decreased satisfaction and sense of accomplishment

Behavioral signs and symptoms of burnout:

- Withdrawing from responsibilities
- Isolating from others
- Procrastinating, taking longer to get things done
- Using food, drugs, or alcohol to cope
- Taking out frustrations on others
- Skipping work or coming in late and leaving early

There are many contributing factors that can lead to burnout.

Work-related causes of burnout:

- Feeling like you have little or no control over your work
- Lack of recognition or rewards for good work
- Unclear or overly demanding job expectations
- Doing work that's monotonous or unchallenging
- Working in a chaotic or high-pressure environment

Lifestyle causes of burnout:

- Working too much without enough time for relaxing and socializing
- Being expected (by ourselves or others) to be too many things to too many people
- Taking on too many responsibilities

without enough help from others
- Not getting enough sleep
- Lack of close, supportive relationships

Personality traits can contribute to burnout:

- Perfectionistic
- Pessimistic view
- The need to be in control
- Reluctance to delegate tasks
- High-achieving, Type-A personality

Sound like anyone you know? The really good news is that we have some control over healing from burnout. If you recognize the warning signs of burnout in yourself, remember that it will only get worse if ignored. But if you take steps to get your life back into balance, you can prevent burnout from becoming a full-blown breakdown.

Finding Balance

Here are some strategies for preventing burnout and maintaining a sense of emotional well-being and balance.

Start the day differently. Rather than jumping out of bed as soon as you wake up, spend at least 15 minutes meditating, writing in your journal, doing yoga, or reading something that inspires you.

Adopt healthy eating, exercising, and sleeping habits. Proper nutrition, sleep, and exercise provide the energy and resilience to deal with the daily demands of a law practice.

Set boundaries. Don't overextend yourself. Learn how to say "no" to requests for your time. If you find this difficult, remind yourself that saying "no" allows you to say "yes" to the things that you truly want to do. It can take a while to realize clients will not fire you if you do not cater to their every whim and demand. A very successful strategy is to substitute what you can do as an option when you cannot do what a client wants at that moment. For example, you are leaving the office on a Wednesday for some form of travel (business or pleasure) and will not be back until Monday. A client calls just as you are about to leave and says, "It is urgent. I have to see you this afternoon." Instead of canceling your plans, try telling the client, "I was just about to leave the office and will not be back until Monday. Let's meet first thing on Monday to get this taken care of for you. What time works better for you: 9:30, 11:30, or 2:00?" You will be surprised how effective this strategy is.

Take a daily break from technology. Completely disconnect from technology when you get home (or after business hours). Put away your laptop, turn off your smartphone, and stop checking email.

Nourish your creative side. Creativity is a powerful antidote to burnout. Try something new, start a fun project, or resume a favorite hobby. Choose activities that have nothing to do with work. As explained above, these activities in particular help nourish the limbic brain, which provides greater emotional resilience.

Past the Breaking Point

Sometimes it's too late to prevent burnout—you're already past the breaking point. If that's the case, it's important to take burnout very seriously. Trying to push through the exhaustion and continue as you have been will only cause further emotional and physical damage.

When you've reached the end stage of burnout, adjusting your attitude or looking after your health isn't going to solve the problem. You need to force yourself to slow down or take a break. Cut back whatever commitments and activities you can. Give yourself time to rest, reflect, and heal.

Burnout is an undeniable sign that something important in your life is not working. Take time to think about your hopes, goals, and dreams. Are you neglecting something that is truly important to you? Burnout can be an opportunity to rediscover what really makes you happy and to change course accordingly.

The most effective way to combat job burnout is to quit doing what you're doing and do something else, whether that means changing jobs or changing practice areas, and for some lawyers even changing careers. But if that isn't an option for you, there are still things you can do to improve your situation, or at least your state of mind.

Actively address problems. Take a proactive rather than a passive approach to issues in your workplace, including stress at work. You'll feel less helpless if you assert yourself and express your needs. If you don't have the authority or resources to solve the problem, talk to a superior. Or, if you are the supervisor, take the risk to delegate more.

Ask for new duties. If you've been doing the exact same work for a long time, try something new—a different practice area, a different focus within your current practice area, a different role within your practice area.

Take time off. If burnout has progressed to the breaking point, take a complete break from work. Go on vacation, use up your sick days, ask for a temporary leave-of-absence—anything to remove yourself from the situation. Delegate work to an associate or partner. Use the time away to recharge your batteries and gain some perspective. Most lawyers think they have no choice and that this is not an option, which is usually followed by forced time off in the form of hospitalization. None of us is indispensable. You may be surprised to find more support within your firm than you imagined when taking some time off.

CONTINUED ON PAGE 49

Stress vs. Burnout

Stress	Burnout
Characterized by over engagement	Characterized by disengagement
Emotions are overreactive	Emotions are blunted
Produces urgency and hyperactivity	Produces helplessness and hopelessness
Loss of energy	Loss of motivation, ideals, and hope
Leads to anxiety disorders	Leads to detachment and depression
Primary damage is physical	Primary damage is emotional
May kill you prematurely	May make life seem not worth living

Profiles in Specialization—Lisa Salines-Mondello

By Denise Mullen, Assistant Director of Legal Specialization

I recently had an opportunity to talk with Lisa Salines-Mondello, a board certified specialist in elder law practicing in Wilmington. Lisa attended Salem State College, earning her undergraduate degree in political science and subsequently received her law degree from the University of Massachusetts School of Law (formerly Southern New England School of Law). She also received an LL.M. in taxation from the Boston University School of Law. After focusing on estate planning and tax law in the Boston area for several years, Lisa and her family moved to Wilmington in 2005, and she shifted her focus to estate planning, elder law, and special needs planning. She has practiced as a solo practitioner in North Carolina since 2005, and opened the Salines-Mondello Law Firm, PC in 2009. Lisa became board certified in elder law in 2014. Following are some of her comments about the specialization program and the impact she anticipates it will have on her career.


Salines-Mondello

Q: Why did you pursue certification?

I knew that I wanted to work with the elderly population even before I became aware of the term "elder law." When I learned about certification in elder law, I knew that it was the right fit for me. The practice area involves competency in handling legal issues in 12 specific experience categories.[1] I focused my work and education on those, and when I was eligible I applied for certification through both the National Elder Law Foundation (NELF)[2] and the North Carolina State Bar. I wanted to distinguish myself and my practice for clients and the community.

Q: How did you prepare for the examination?

I took studying for the exam very seriously and approached it from three different directions. I joined a national study group led by Robert Fleming, a well-respected Certified Elder Law Attorney (CELA) in Arizona. There were approximately 15 lawyers involved, all preparing to take the exam. It was a great opportunity to bounce ideas off of each other. I also purchased several sets of audio CDs from the National Academy of Elder Law Attorneys (NAELA)[3] and listened to them as often as I could. I prepared a list of the 12 experience categories and read and outlined everything I could find from many different sources, including the books *Representing Elderly Clients* and *The Special Needs Handbook*. I started from scratch in my review, with the assumption that I knew nothing about the subject matter, and read through every section and subsection even if I thought I was already well versed in the area. For several months I treated it as a part-time job and dedicated set times each week to review.

Q: Was that process valuable to you in any way?

The process of preparing for the exam was amazingly valuable to me. I was able to dedicate time to learning and broadening my knowledge base. I am certain that the process made me a better lawyer.

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

I view the certification as the keystone in my practice. Having the certification demonstrates to the public and to other professionals that I have experience and a depth of knowledge in all 12 areas of elder law. It further shows the time and effort that I put into achieving this goal. I view everything else in my practice as leaning on that foundation of certification. That keeps me centered and encourages me to always be reaching for improvement.

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

Many knew that I had set that goal and were very supportive. When I passed the exam, I received several calls and notes of congratulations. It was really nice to have that recognition, particularly from those who understood its significance.

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

Certification lets my clients know that I have a dedication to elder and special needs law and a commitment to excellence in my practice. I have met the threshold for all of the qualifications to become certified including substantial involvement, peer review, and a rigorous exam. I am certain knowing that will give clients and the community confidence in the services that I provide.

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

There are so many, but two that I find important right now are assisted suicide/end of life decisions versus health insurance provisions. We have an aging population that wants more control over their lives than earlier generations may have had. The second topic is elder abuse and exploitation, both of which are sometimes difficult to identify and can have many serious implications. Certified elder law attorneys possess the experience and knowledge to help clients and families navigate through these difficult situations.

Q: How does your certification relate to those?

Elder law is riddled with ethical challenges. Those of us who have dedicated ourselves to this practice area know the rules and regulations and can help clients make plans and decisions. We are also in a position to combat elder abuse and exploitation. We have studied the ethics rules and case law. We can identify issues and work within family dynamics to come up with good, ethical solutions.

Q: How do you stay current in your field?

I moved here from Massachusetts where there were no requirements for continuing

legal education courses, but I was already in the habit of taking courses to improve my practice. I take many courses through NAELA and the North Carolina Bar Foundation. If my schedule doesn't allow me to attend in person, I purchase the course materials and study them on my own. I also frequently speak at continuing legal education courses and to various companies and civic groups around Wilmington. I recently spoke to 137 retired General Electric workers about elder law, special needs health care, and powers of attorney.

Q: Is certification important in your practice area?

It is. I sometimes feel that I could study elder law forever and still have more to learn. It is critical that the elderly population—and their families and caregivers—have access to qualified legal assistance. It is very difficult for a lawyer who doesn't routinely work with these clients to jump in without knowing all of the issues involved. It can also be difficult for members of the public to navigate some of the legal forms that they find online. Certified elder law attorneys can provide a high level of services and help clients anticipate the road ahead of them, which may include how to live, die, or deal with a disability. Clients appreciate and deserve that level of caring competency.

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

I think certification is the future for lawyers. The public wants a way to identify lawyers who specialize. Elder law itself is a huge subject area that realistically cannot be combined with other general practice areas. If you want to be proficient at your work, you need to choose one or two areas on which to focus on. As the public becomes more aware and has higher expectations, certification is one great way to provide them the information they need to choose a qualified lawyer for their needs. ■

For more information on the State Bar's specialization programs, visit us online at nclawspecialists.gov.

Endnotes

1. Health and personal care planning; pre-mortem legal planning; fiduciary representation; legal capacity counseling; public benefits advice; special needs counseling; advice on insurance matters; resident rights advocacy; housing counseling; employment and retirement advice; age, and/or disability discrimination; and litigation and administrative advocacy.
2. NELF is a nonprofit organization offering the only national certification for lawyers in the areas of elder law and special needs.
3. NAELA is a professional association whose primary focus is providing continuing legal education courses for elder law attorneys.

Congratulations to North Carolina's 2014 Certified Specialists

The following lawyers met all of the certification requirements, and were certified by the North Carolina State Bar Board of Legal Specialization on November 24, 2014, unless otherwise noted.

Bankruptcy - certified on January 20, 2015

Brian Anderson - Business, Greensboro
Brian Behr - Business and Consumer, Raleigh
Erich Fabricius - Consumer, Knightdale
Erik Harvey - Consumer, Winston-Salem
Koury Hicks - Consumer, Durham
Charles Livermon - Business and Consumer, Rocky Mount
Kristin Nardone - Consumer, Concord
Benson Pitts - Consumer, Asheville
James White - Business, Durham

Appellate

Matthew Leerberg, Raleigh
Vernon Sumwalt, Charlotte

Criminal (including Juvenile Delinquency)

Larry Archie - State, Greensboro
Stephanie Davis - State, Raleigh
Kate Eaton - State, Wilmington
Anna Goodwin - State and Juvenile Delinquency, Monroe
Christon Halkiotis - State, High Point
Rodney Hasty - Federal and State, Asheville
Stephanie Jackson - State, Charlotte
Mark Jones - Federal and State, Winston-Salem
Deborrah Newton - Federal and State, Raleigh
James Quander - Federal and State, Winston-Salem
Stacey Rubain - Federal and State, Winston-Salem
Christopher Welch - State, Jacksonville
Lisa Williams - State, Durham
Todd Williams - State, Asheville
Roderick Wright - Federal and State, Charlotte

Elder Law

Lisa Salines-Mondello, Wilmington

Estate Planning

Charles "Chess" Griffin, Raleigh
Jessica Hardin, Charlotte

Family

Jessica Bullock, Greensboro
Sophia Crawford, Rockingham
Melanie Crenshaw, Greensboro
Jonathan Csuka, Greensboro
Adrian Davis, Raleigh
A.T. Debnam, Raleigh
Alex Gomes, Asheville
Joy McIver, Asheville
C. Scott Montgomery, Cary
Lynn Prather, Raleigh
Mariana Russell, Raleigh
John Vermitsky, Winston-Salem
Carrie Tortora, Raleigh

Immigration

Ann-Marie Dooley, Greensboro
Thomas Fulghum, Durham
Jack Rockers, Durham

Real Property Law

James Hill, Residential, Whiteville
Kevin Joyce, Residential, Gastonia

Social Security

Charles Hall IV, Colonial Heights, VA
Ashley Maxwell, Raleigh
Paul McChesney, Spartanburg, SC
Judith Romanowski, Durham
Michael Shay, Winston-Salem

Trademark

Kathryn Gromlovits, Charlotte
Vedia Jones-Richardson, Durham

Workers' Compensation

Richard Granowsky, Greensboro

Necessary Evil or Slippery Slimy Slope?

By Suzanne Lever

The Ethics Committee is currently considering an inquiry from a lawyer seeking guidance as to the use of a private investigator in the investigation of an employer who is believed to be violating the North Carolina Wage and Hour Act. The private investigator proposes to make certain misrepresentations during the investigation, such as pretending to be a candidate interested in being hired by the employer, in order to determine if wage and hour violations are taking place. The ethics issue is whether this type of investigation violates Rule 8.4, which prohibits a lawyer from engaging in "conduct involving dishonesty, fraud, deceit, or misrepresentation" and from violating the Rules of Professional Conduct "through the acts of another."

Some committee members feel very strongly that the Ethics Committee should not publish an opinion condoning lawyer supervision in conduct involving misrepresentations under any circumstances. Other members believe that lawyers should be allowed to supervise investigations involving some amount of deception because there are compelling scenarios where the use of deception is necessary to root out corruption. As stated in the proposed opinion, the challenge "is to balance the public's interest in having unlawful activity fully investigated and possibly thereby stopped, with the public's and the profession's interest in ensuring that lawyers conduct themselves with integrity and honesty."

After much debate, the Ethics Committee voted to publish a proposed opinion for comment. Proposed 2014 FEO 9 is extremely limited and provides that a private lawyer[1] may supervise an investigation involving misrepresentation if done in pursuit of a public interest and certain conditions are satisfied. Specifically, the proposed opinion states:

> In the pursuit of a legitimate public interest, such as investigations of discrimination in housing, employment and accommodations, patent and intellectual property infringement, and the production and sale of contaminated and harmful products, a lawyer may advise, direct, or supervise the use of misrepresentation (1) in lawful efforts to obtain information on actionable violations of criminal law, civil law, or constitutional rights; (2) if the lawyer's conduct is otherwise in compliance with the Rules of Professional Conduct; (3) the lawyer has a good faith belief that there is a reasonable possibility that a violation of criminal law, civil law, or constitutional rights has taken place, is taking place, or will take place in the foreseeable future; (4) misrepresentations are limited to identity or purpose; and (5) the evidence sought is not reasonably available through other means. A lawyer may not advise, direct, or supervise the use of misrepresentation to pursue the purely personal interests of the lawyer's clients, where there is no public policy purpose, such as the interests of the principal in a family law matter. [Footnote omitted.]

Although some committee members continue to oppose the proposed opinion, the majority of committee members voted to publish the proposed opinion for comment after it was revised to emphasize that an investigation involving misrepresentation must be in pursuit of a legitimate public interest and is not permissible to pursue purely personal interests.

Jurisdictions that have grappled with this sticky issue have taken various approaches to allowing pretexting in certain circumstances. Some states have narrowed their version of Rule 8.4(c) to provide that it is professional misconduct for a lawyer to engage in conduct involving dishonest, fraud, deceit, or misrepresentation only if the conduct reflects adversely on the lawyer's fitness to practice law. *See, e.g.* Mich. R. Prof'l Conduct 8.4(b); N.D. R. Prof'l Conduct 8.4(c); Or. R. Prof'l Conduct 8.4(a)(3); Va. R. Prof'l Conduct 8.4(c).

Other jurisdictions have interpreted their Rules of Professional Conduct to permit lawyer supervision of investigations involving misrepresentation in certain circumstances. For example, the bars of Arizona and Maryland permit lawyers to use "testers" who employ misrepresentation to collect evidence of discriminatory practices. Ariz. State Bar Comm. on the Rules of Prof'l Conduct, Op. 99-11 (1999); Md. Bar Ass'n, Op. 2006-02 (2005). The Alabama Bar has concluded that, during pre-litigation investigation of suspected infringers of intellectual property rights, "a lawyer may employ private investigators to pose as customers under the pretext of seeking services of the suspected infringers on the same basis or in the same manner as a member of the general public." Ala. Op. RO-2007-05 (2007). The New York County Bar has approved limited deceptive techniques in the investigation of a violation of civil rights or intellectual property rights. NYCLA Comm. on Prof'l Ethics, Formal Op. 737 (2007).

The primary rationale for these rule changes and ethics opinions is the belief that the use of testers or investigators who employ deception is the only way to detect and prove certain types of unlawful conduct. Note that one of the conditions set out in the proposed opinion is that the evidence sought is not "reasonably available through other means." Arguably, an absolute prohibition on investigations involving misrepresentation would prevent lawyers from conducting appropriate pre-filing investigations in violation of Rule 1.1 (Competence) and Rule 3.1 (Meritorious Claims and Contentions).

Do you believe that deception is sometimes necessary to get to the truth? Do you think the Ethics Committee struck the

CONTINUED ON PAGE 51

Amendments Pending Approval by the Supreme Court

At its meetings on July 25, 2014, October 24, 2014, and January 23, 2015, 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 2014 and Winter 2014 editions of the *Journal* or visit the State Bar website):

Proposed Amendments to the Discipline and Disability Rules

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

The proposed amendments change the name of the Trust Accounting Supervisory Program to the Trust Account Compliance Program. There are no changes to the substance of the rule other than the name change.

Proposed Amendments to the Rules Governing the Board of Law Examiners and the Training of Law Students

27 N.C.A.C. 1C, Section .0100, Board of Law Examiners

The proposed amendments will allow graduates of law schools that are not accredited by the American Bar Association to qualify for admission to the North Carolina State Bar under certain circumstances.

Proposed Amendments to the Rules Governing the Administration of the CLE Program

27 N.C.A.C. 1D, Section .1500, Rules Governing the Administration of the Continuing Legal Education Program

The proposed amendments change the name of the mandatory CLE program for new lawyers from "Professionalism for New Admittees" to "Professionalism for New Attorneys" (PNA program) and permit the Board of Continuing Education to approve alternative timeframes for the PNA program, thereby giving CLE providers more flexibility to be creative in their presentations of the program.

Proposed Amendments to The Plan of Legal Specialization

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

The proposed amendments will eliminate the possibility of one person serving as board chair for an excessive period of time, and will enable a logical succession of the chairmanship among the members of the board.

Proposed Amendments to the Standards for Certification as a Specialist

27 N.C.A.C. 1D, Section .2500, Certification Standards for the Criminal Law Specialty, and Section .2700, Certification Standards for Workers' Compensation Law Specialty

The proposed amendments to the criminal law standards reduce the number of practice hours required to meet the substantial involvement standard for the juvenile delinquency subspecialty and allow for additional forms of practice equivalents for the subspecialty. In the standards for the workers' compensation specialty, the proposed amendments will add insurance as a related field in which a lawyer may earn CLE credits for certification and recertification.

Proposed Amendments to the Standards for Certification of Paralegals

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

The proposed amendments permit a degree from a foreign educational institution to satisfy part of the educational requirements for certification if the foreign degree is evaluated by a qualified credential evaluation service and found to be equivalent to an associate's or bachelor's degree from an accredited US institution.

Proposed Amendments to the Rules of Professional Conduct to Address Bullying and Intimidation

27 N.C.A.C. 2, The Rules of Professional Conduct, Rule 1.0, *Terminology*, Rule 3.5, *Impartiality and Decorum of the Tribunal*, Rule 4.4, *Respect for Rights of Third Persons*, and Rule 8.4, *Misconduct*

The proposed amendment to Rule 1.0 clarifies that the term "tribunal" encompasses any proceeding of a court including a deposition. The proposed amendments to the comments to Rule 3.5, Rule 4.4, and Rule 8.4 confirm that conduct that constitutes bullying and attempts to intimidate are prohibited by existing provisions of the Rules of Professional Conduct.

Proposed Amendments to the Rules of the Board of Law Examiners

Rules Governing Admission to the Practice of Law in the State of North Carolina, Section .0100, Organization

The proposed amendments to Rules Governing Admission to the Practice of Law change the street and mailing address listed for the offices of the Board of Law Examiners to reflect the board's recent move to a new location.

Proposed Amendments

At its meeting on January 23, 2015, the council voted to publish the following proposed rule amendments for comment from the members of the Bar:

Proposed Amendments to the Rule on *Pro Bono* Practice by Out of State Lawyers

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

The proposed amendments allow an out-of-state lawyer employed by a nonprofit corporation rendering legal services to indigent

persons to obtain *pro bono* practice status during the pendency of the lawyer's application for admission to the North Carolina State Bar. In addition, the proposed amendments clarify that an out-of-state lawyer employed as in-house counsel for a business organization with offices in North Carolina may petition and qualify for *pro bono* practice status.

.0905 *Pro Bono* Practice by Out of State Lawyers

(a) A lawyer licensed to practice in another state but not North Carolina who desires to provide legal services free of charge to indigent persons may file a petition with the secretary addressed to the council setting forth:

(1) ...

(d) Upon receipt of a petition and other information satisfying the provisions of this rule, the council may, in its discretion, enter an order permitting the petitioner to provide legal services to indigent persons on a ***pro bono*** basis under the supervision of a member employed by a nonprofit corporation qualified to render legal services pursuant to G.S. 84-5.1...

(e) A petitioner may be a compensated employee of a nonprofit corporation qualified to render legal services pursuant to G.S. 84-5.1 and, if granted *pro bono* practice status, may provide legal services to the indigent clients of that corporation subject to the following conditions:

(1) the petitioner has filed an application for admission with the North Carolina Board of Law Examiners (BLE) and has never previously been denied admission to the North Carolina State Bar for any reason; a copy of the petitioner's application shall be provided with the petition for *pro bono* practice;

(2) if the petitioner is granted *pro bono* practice status, that status will terminate when the BLE makes its final ruling on the petitioner's application for admission; and

(3) the petitioner is supervised in the provision of all legal services to indigent persons as set forth in paragraph (d).

(f) A lawyer who is paid in-house counsel for a business organization with offices in North Carolina may petition under this rule to provide legal services to indigent persons on a *pro bono* basis under the supervision of a member employed by a nonprofit corporation qualified to render legal services pursuant to G.S. 84-5.1.

~~(e)~~ **(g)** ...

Proposed Amendments to the Hearing and Appeal Rules of the Board of Legal Specialization

27 N.C.A.C. 1D, Section .1800, Hearing and Appeal Rules of the Board of Legal Specialization

The proposed amendments make clear that an "incomplete application" does not include an application with respect to which fewer than five completed peer review forms have been timely filed with the Board of Legal Specialization.

.1801 Incomplete Applications; Reconsideration of Applications Rejected by Specialty Committee; and Reconsideration Procedure

(a) Incomplete Applications. The executive director of the North Carolina State Bar Board of Legal Specialization (the board) will review every application to determine if the application is complete. **An application is incomplete if it does not include complete answers to every question on the application and copies of all documents requested on the application.** The applicant will be notified in writing if an application is incomplete. The applicant must submit the information necessary to complete the application within 21 days of the date of the notice. If the applicant fails to provide the required information during the requisite time period, the executive director will return the application to the applicant together with a refund of the application fee less a fifty dollar ($50) administrative fee. The decision of the executive director to reject an application as incomplete is final unless the applicant shows good cause for an extension of time to provide the required information. **This provision does not apply to an application with respect to which fewer than five completed peer review forms have been timely filed with the board**.

(b) Denial of Application by Specialty Committee.

...

Proposed Amendments to the Rules on Trust Accounting and Misconduct in the Rules of Professional Conduct

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

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.**

Amendments to Rule 1.15, *Safekeeping Property* (and its subparts, Rule 1.15-1, Rule 1.15-2, and Rule 1.15-3) and to Rule 8.5 *Misconduct,* are proposed primarily to add requirements that will facilitate the early detection of internal theft and errors. The proposed amendments also provide clearer explanations of existing record keeping and reconciliation requirements. A proposed new subpart, Rule 1.15-4, *Trust Account Management in Multiple-Lawyer Firm*, will create a procedure whereby a firm with two or more lawyers may designate a firm principal to serve as the trust account oversight officer to oversee the administration of the firm's general trust accounts in conformity with the requirements of Rule 1.15.

More specifically, the proposed amendment to Rule 1.15-1 adds credit unions to the list of possible depositories for trust accounts in light of the extension of FDIC insurance coverage to individual client deposits in such accounts. In Rule 1.15-2, the proposed amendments do the following: clarify how a lawyer indicates on a trust account check the name of the client whose balance is being used to pay the lawyer's fees; specify that cash and bearer withdrawals from a trust account are not allowed by any means and that debit cards may not be used to withdraw funds from a general trust or fiduciary account; clarify the duty to report misappropriation; and limit signature authority on trust account checks to (1) lawyers who have taken an approved one-hour course on trust account management or (2) supervised employees who do not perform monthly or quarterly reconciliations and who have also taken the approved course. In Rule 1.15-3,

the proposed amendments do the following: revise the quarterly reconciliation requirement to state exactly how a three-way reconciliation is done; add monthly and quarterly reviews to facilitate early detection and correction of errors and internal theft; and allow for electronic storage of certain trust account records. In Rule 8.3, the proposed amendments to the comment explain that the duty to report under Rule 8.3 does not require a lawyer to report her own misconduct, but the duty to report under Rule 1.15-2(p) does require self-reporting.

Rule 1.15 Safekeeping Property

This rule has ~~three~~ **four** subparts: Rule 1.15-1, Definitions; Rule 1.15-2, General Rules; ~~and~~ Rule 1.15-3, Records and Accountings; **and Rule 1.15-4, Trust Account Management in Multiple-Lawyer Firm**. The subparts set forth the requirements for preserving client property, including the requirements for preserving client property in a lawyer's trust account. The comment for all ~~three~~ **four** subparts as well as the annotations appear after the text for Rule ~~1.15-3~~ 1.15-4.

Rule 1.15-1 Definitions

For purposes of this Rule 1.15, the following definitions apply:

(a) "Bank" denotes a bank~~, or~~ savings and loan association**, or credit union** chartered under North Carolina or federal law.

(b) ...

Rule 1.15-2 General Rules

(a) Entrusted Property.

...

(f) ~~Segregation of Lawyer's Funds~~. **Funds in Trust Account. A trust account may only hold trust funds. Third party funds that are not received by or placed under the control of the lawyer in connection with the performance of legal services may not be deposited or maintained in a trust account. Additionally,** ~~No~~ **no** funds belonging to a lawyer shall be deposited **or maintained** in a trust account or fiduciary account of the lawyer except:

(1) funds sufficient to open or maintain an account, pay any bank service charges, or pay any tax levied on the account; or

(2) funds belonging in part to a client or other third party and in part currently or conditionally to the lawyer.

(g) Mixed Funds Deposited Intact. When funds belonging to the lawyer are received in combination with funds belonging to the client or other persons, all of the funds shall be deposited intact. The amounts currently or conditionally belonging to the lawyer shall be identified on the deposit slip or other record. After the deposit has been finally credited to the account, the lawyer ~~may~~ **shall** withdraw the amounts to which the lawyer is or becomes entitled. If the lawyer's entitlement is disputed, the disputed amounts shall remain in the trust account or fiduciary account until the dispute is resolved.

(h) Items Payable to Lawyer. Any item drawn on a trust account or fiduciary account for the payment of the lawyer's fees or expenses shall be made payable to the lawyer and shall indicate on the item **by client name, file number, or other identifying information** the client **from whose** balance ~~on which~~ the item is drawn. Any item that does not **include** ~~capture~~ this information may not be used to withdraw funds from a trust account or a fiduciary account for payment of the lawyer's fees or expenses.

(i) No Bearer Items. No item shall be drawn on a trust account or fiduciary account made payable to cash or bearer and no cash shall be withdrawn from a trust account or fiduciary account by **any** means ~~of a debit card~~.

(j) **Debit Cards Prohibited. Use of a debit card to withdraw funds from a general or dedicated trust account or a fiduciary account is prohibited.**

~~(j)~~ **(k)** No ~~Personal~~ Benefit **to Lawyer or Third Party**. A lawyer shall not use or pledge any entrusted property to obtain credit or other personal benefit for the lawyer or any person other than the legal or beneficial owner of that property.

~~(k)~~ **(l)** Bank Directive.

...

[Re-lettering intervening paragraphs.]

~~(o)~~ **(p)** Duty to Report Misappropriation. A lawyer who discovers or reasonably believes that entrusted property has been misappropriated or misapplied shall promptly inform the **Trust Account Compliance Counsel (TACC) in the** North Carolina State Bar **Office of Counsel. Discovery of intentional theft or fraud must be reported to the TACC immediately. When an accounting or bank error results in an unintentional and inadvertent use of one client's trust funds to pay the obligations of another client, the event must be reported unless the misapplication is discovered and rectified on or before the next quarterly reconciliation required by Rule 1.15-3(d)(1). This rule requires disclosure of information otherwise protected by Rule 1.6 if necessary to report the misappropriation or misapplication.**

~~(p)~~ **(q)** Interest on Deposited Funds.

...

~~(q)~~ **(r)** Abandoned Property.

...

(s) Signature on Trust Checks.

(1) Checks drawn on a trust account must be signed by a lawyer, or by an employee who is not responsible for performing monthly or quarterly reconciliations and who is supervised by a lawyer. Prior to exercising signature authority, a lawyer or supervised employee shall take a one-hour trust account management continuing legal education (CLE) course approved by the State Bar for this purpose. The CLE course must be taken at least once for every law firm at which the lawyer or the supervised employee is given signature authority.

(2) Trust account checks may not be signed using signature stamps, preprinted signature lines on checks, or electronic signatures.

Rule 1.15-3 Records and Accountings

(a) Check Format...

(b) Minimum Records for Accounts at Banks. The minimum records required for general trust accounts, dedicated trust accounts, and fiduciary accounts maintained at a bank shall consist of the following:

(1) ...;

(2) all canceled checks or other items drawn on the account, or printed digital images thereof furnished by the bank, showing the amount, date, and recipient of the disbursement, and, in the case of a general trust account, the **client name, file number, or other identifying information of the client from whose** ~~client~~ balance ~~against which~~ each item is drawn, provided, that:...

...

(d) Reconciliations of General Trust Accounts.

(1) Quarterly Reconciliations. ~~At least quarterly, the individual client balances shown on the ledger of a general trust account must be totaled and reconciled with the current bank statement balance for the trust account as a whole~~. **For each**

general trust account, a printed reconciliation report shall be prepared at least quarterly. Each reconciliation report shall show all of the following balances and verify that they are identical:

(A) The balance that appears in the general ledger as of the reporting date;

(B) The total of all subsidiary ledger balances in the general trust account, determined by listing and totaling the positive balances in the individual client ledgers and the administrative ledger maintained for servicing the account, as of the reporting date; and

(C) The adjusted bank balance, determined by adding outstanding deposits and other credits to the ending balance in the monthly bank statement and subtracting outstanding checks and other deductions from the balance in the monthly statement.

(2) Monthly Reconciliations. Each month, the balance of the trust account as shown on the lawyer's records shall be reconciled with the current bank statement balance for the trust account.

(3) The lawyer shall review, sign, date, and retain a printed copy of the reconciliations of the general trust account for a period of six years in accordance with Rule 1.15-3(g).

(e) Accountings for Trust Funds.

...

(i) Reviews.

(1) Each month, for each general trust account, dedicated trust account, and fiduciary account, the lawyer shall review the bank statement and cancelled checks for the month covered by the bank statement.

(2) Each quarter, for each general trust account, dedicated trust account, and fiduciary account, the lawyer shall review the statement of costs and receipts, client ledger, and cancelled checks of a random sample of representative transactions completed during the quarter to verify that the disbursements were properly made. A sample of three representative transactions shall satisfy this requirement, but a larger sample may be advisable.

(3) The lawyer shall take the necessary steps to investigate, identify, and resolve within ten days any discrepancies discovered during the monthly and quarterly reviews.

(4) A report of each monthly and quarterly review, including a description of the review, the transactions sampled, and any remedial action taken, shall be prepared. The lawyer shall sign, date, and retain a printed copy of the report and associated documentation for a period of six years in accordance with Rule 1.15-3(g).

(j) Retention of Records in Electronic Format. Any printed or paper report required by this rule may be saved, for the required period, in an electronic format provided the original paper report was signed and dated at the time of preparation and the electronic copy is retained in a format that cannot be electronically manipulated such as PDF.

Rule 1.15-4, Trust Account Management in Multiple-Lawyer Firm

(a) Trust Account Oversight Officer (TAOO).

Lawyers in a law firm of two or more lawyers may designate a partner in the firm to serve as the trust account oversight officer (TAOO) for any general trust account into which more than one firm lawyer deposits fiduciary funds. The TAOO and the partners of the firm, or those with comparable managerial authority (managing lawyers), shall agree in writing that the TAOO will oversee the administration of any such trust account in conformity with the requirements of Rule 1.15, including, specifically, the requirements of this Rule 1.15-4. More than one partner may be designated as a TAOO for a law firm.

(b) Limitations on Delegation.

Designation of a TAOO does not relieve any lawyer in the law firm of responsibility for the following:

(1) oversight of the administration of any dedicated trust account or fiduciary account associated with a legal matter for which the lawyer is primary legal counsel; and

(2) review of the disbursement sheets or statements of costs and receipts, client ledgers, and trust account balances for those legal matters for which the lawyer is primary legal counsel.

(c) Training of the TAOO.

(1) Within the six months prior to beginning service as a TAOO, a lawyer shall,

(A) read all subparts and comments to Rule 1.15, all formal ethics opinions of the North Carolina State Bar interpreting Rule 1.15, and the North Carolina State Bar *Trust Account Handbook*;

(B) complete one hour of accredited continuing legal education (CLE) on trust account management approved by the State Bar for the purpose of training a lawyer to serve as a TAOO;

(C) complete two hours of training (live, online, or self-guided) presented by a qualified educational provider on one or more of the following topics: (i) financial fraud, (ii) safeguarding funds from embezzlement, (iii) risk assessment and management for bank accounts, (iv) information security and online banking, or (v) accounting basics; and

(D) become familiar with the law firm's accounting system for trust accounts.

(2) During each year of service as a TAOO, the designated lawyer shall attend one hour of accredited continuing legal education (CLE) on trust account management approved by the State Bar for the purpose of training a TAOO or one hour of training, presented by a qualified educational provider, on one or more of the subjects listed in paragraph (c)(1)(C).

(d) Designation and Annual Certification.

The written agreement designating a lawyer as the TAOO described in paragraph (a) shall contain the following:

(1) A statement by the TAOO that the TAOO agrees to oversee the operation of the firm's general trust accounts in compliance with the requirements of all subparts of Rule 1.15, specifically including the mandatory oversight measures in paragraph (e) of this rule;

(2) Identification of the trust accounts that the TAOO will oversee;

(3) An acknowledgement that the TAOO has completed the training described in paragraph (c)(1) and a description of that training;

(4) A statement certifying that the TAOO understands the law firm's accounting system for trust accounts; and

(5) An acknowledgement that the lawyers in the firm remain professionally responsible for the operation of the firm's trust accounts in compliance with Rule 1.15.

Each year on the anniversary of the execution of the agreement, the TAOO and the

managing lawyers shall execute a statement confirming the continuing designation of the lawyer as the TAOO, certifying compliance with the requirements of this rule, describing the training undertaken by the TAOO as required by paragraph (c)(2), and reciting the statements required by subparagraphs (d)(1), (2), (4), and (5). During the lawyer's tenure as TAOO and for six years thereafter, the agreement and all subsequent annual statements shall be maintained with the trust account records (*see* Rule 1.15-3(g)).

(e) Mandatory Oversight Measures.

In addition to any other record keeping or accounting requirement set forth in Rule 1.15-2 and Rule 1.15-3, the firm shall adopt a written policy detailing the firm's trust account management procedures which shall annually be reviewed, updated, and signed by the TAOO and the managing lawyers. Each version of the policy shall be retained for the minimum record keeping period set forth in Rule 1.15-3(g).

Comment [to follow Rule 1.15-4]

[1] ...

Fraud Prevention Measures

[21] The mandatory monthly and quarterly reviews and oversight measures in Rule 1.15-3(i) facilitate early detection of internal theft and early detection and correction of errors. They are minimum fraud prevention measures necessary for the protection of funds on deposit in a firm trust or fiduciary account from theft by any person with access to the account. Internal theft from trust accounts by insiders at a law firm can only be timely detected if the records of the firm's trust accounts are routinely reviewed. For this reason, Rule 1.15-3(i)(1) requires monthly reviews of the bank statements and cancelled checks for all general, dedicated, and fiduciary accounts. In addition, Rule 1.15-3(i)(2) requires quarterly reviews of a random sample of three transactions for each trust account, dedicated trust account, and fiduciary account including examination of the statement of costs and receipts, client ledger, and cancelled checks for the transactions. Review of these documents will enable the lawyer to verify that the disbursements were made properly. Although not required by the rule, a larger sample than three transactions is advisable to increase the likelihood that internal theft will be detected.

[22] Another internal control to prevent fraud is found in Rule 1.15-2(s) which addresses the signature authority for trust account checks. The provision prohibits an employee who is responsible for performing the monthly or quarterly reconciliations for a trust account from being a signatory on a check for that account. Dividing the check signing and reconciliation responsibilities makes it more difficult for one employee to hide fraudulent transactions. Similarly, signature stamps, preprinted signature lines on checks, and electronic signatures are prohibited to prevent their use for fraudulent purposes.

[23] In addition to the recommendations in the North Carolina State Bar *Trust Account Handbook* (see the chapter on *Safeguarding Funds from Embezzlement*), the following fraud prevention measures are recommended:

(1) Enrolling the trust account in an automated fraud detection program;

(2) Implementation of security measures to prevent fraudulent wire transfers of funds;

(3) Actively maintaining end-user security at the law firm through safety practices such as strong password policies and procedures, the use of encryption and security software, and periodic consultation with an information technology security professional to advise firm employees; and

(4) Insuring that all staff members who assist with the management of the trust account receive training on and abide by the security measures adopted by the firm.

Lawyers should frequently evaluate whether additional fraud control measures are necessary and appropriate.

Duty to Report Misappropriation or Misapplication

[24] A lawyer is required by Rule 1.15-2(p) to report to the trust account compliance counsel of the North Carolina State Bar Office of Counsel if the lawyer knows or reasonably believes that entrusted property, including trust funds, has been misappropriated or misapplied. The rule requires the reporting of an unintentional misapplication of trust funds, such as the inadvertent use of one client's funds on deposit in a general trust account to pay the obligations of another client, unless the lawyer discovers and rectifies the error on or before the next scheduled quarterly reconciliation. A lawyer is required to report the conduct of lawyers and nonlawyers as well as the lawyer's own conduct. A report is required regardless of whether information leading to the discovery of the misappropriation or misapplication would otherwise be protected by Rule 1.6. If disclosure of confidential client information is necessary to comply with this rule, the lawyer's disclosure should be limited to the information that is necessary to enable the State Bar to investigate. *See* Rule 1.6, cmt. [15].

Designation of a Trust Account Oversight Officer

[25] In a firm with two or more lawyers, personal oversight of all of the activities in the general trust accounts by all of the lawyers in the firm is often impractical. Nevertheless, any lawyer in the firm who deposits into a general trust account funds entrusted to the lawyer by or on behalf of a client is professionally responsible for the administration of the trust account in compliance with Rule 1.15 regardless of whether the lawyer directly participates in the administration of the trust account. Moreover, Rule 5.1 requires all lawyers with managerial or supervisory authority over the other lawyers in a firm to make reasonable efforts to ensure that the other lawyers conform to the Rules of Professional Conduct. Rule 1.15-4 provides a procedure for delegation of the oversight of the routine administration of a general trust account to a firm partner, shareholder, or member (*see* Rule 1.0(h)) in a manner that is professionally responsible. By identifying, training, and documenting the appointment of a trust account oversight officer (TAOO) for the law firm, the lawyers in a multiple-lawyer firm may responsibly delegate the routine administration of the firm's general trust accounts to a qualified lawyer. Delegation consistent with the requirements of Rule 1.15-4 is evidence of a lawyer's good faith effort to comply with Rule 5.1.

[26] Nevertheless, designation of a TAOO does not insulate from professional discipline a lawyer who personally engaged in dishonest or fraudulent conduct. Moreover, a lawyer having actual or constructive knowledge of dishonest or fraudulent conduct or the mismanagement of a trust account in violation of the Rules of Professional Conduct by any firm lawyer or employee remains subject to professional discipline if the lawyer fails to promptly take

CONTINUED ON PAGE 49

Committee Provides Guidance on When a Lawyer May Prepare a Pleading for an Unrepresented Opposing Party

Council Actions

At its meeting on January 23, 2015, the State Bar Council adopted the ethics opinions summarized below:

2013 Formal Ethics Opinion 14

Representation of Parties to a Commercial Real Estate Loan Closing

Opinion rules that common representation in a commercial real estate loan closing is, in most instances, a "nonconsentable" conflict, meaning that a lawyer may not ask the borrower and the lender to consent to common representation. Note that alternative proposed opinions were published in the Winter 2014 edition of the *Journal*. The council adopted the first alternative published in the Proposed Opinions article of that *Journal*.

2014 Formal Ethics Opinion 8

Accepting an Invitation from a Judge to Connect on LinkedIn

Opinion rules that a lawyer may accept an invitation from a judge to be a "connection" on a professional networking website, and may endorse a judge. However, a lawyer may not accept a legal skill or expertise endorsement or a recommendation from a judge.

2014 Formal Ethics Opinion 10

Lawyer Owned Adoption Agency

Opinion rules that a lawyer who handles adoptions as part of her or his law practice and also owns a financial interest in a for-profit adoption agency may, with informed consent, represent an adopting couple utilizing the services of the adoption agency, but may not represent the biological parents.

Ethics Committee Actions

At its meeting on January 22, 2015, the Ethics Committee voted to ask a subcommittee to continue to study proposed 2014 FEO 1, *Protecting Confidential Client Information when Mentoring*, and voted to send proposed 2014 FEO 11, *Notice to Parents Prior to Seeking Nonsecure Custody Order*, to a subcommittee for further consideration. The Ethics Committee also voted to revise and republish one proposed opinion (Proposed 2014 FEO 9) and to publish three new proposed opinions.

The comments of readers on the proposed opinions are welcomed.

Proposed 2014 Formal Ethics Opinion 9
Private Lawyer Use of Misrepresentation in Investigation that Serves a Public Interest
January 22, 2015

Proposed opinion rules that a private lawyer may supervise an investigation involving misrepresentation if done in pursuit of a public interest and certain conditions are satisfied.

Note:

This opinion does not apply to the conduct of a government lawyer. As explained in comment [1] to Rule 8.4, the prohibition in Rule 8.4(a) against knowingly assisting another to violate the Rules of Professional Conduct or violating the Rules of Professional Conduct through the acts of another does not prohibit a government lawyer from providing legal advice to investigatory personnel relative to any action such investigatory personnel are lawfully entitled to take.

In addition, this opinion is limited to private lawyers who advise, direct, or supervise conduct involving dishonesty, deceit, or misrepresentation as opposed to a lawyer who personally participates in such conduct.

Inquiry:

Attorney A was retained by Client C to investigate and, if appropriate, file a lawsuit against Client C's former employer, E. Employer E employed Client C as a janitor and required him to work 60 hours per week. E paid Client C a salary of $400 per week. Attorney A believes that because his client's employment was a "nonexempt position" under the North Carolina Wage and Hour Act, the payment method used by E was unlawful. Instead, E should have paid Client C at least $7.25 (minimum wage) per hour for each of the first 40 hours Client C worked per week, and at least $10.88 (time and a half) for each hour in excess of 40 (overtime) that Client C worked per week.

Prior to filing a lawsuit, Attorney A wants to retain a private investigator to investigate E's payment practices. The private investigator suggests using lawful but misleading or deceptive tactics to obtain the information Attorney A seeks. For example, the private investigator may pose as a person interested in being hired by E in the same capacity as Client C to see if E violates the North Carolina Wage and Hour Act when compensating the investigator.

Prior to filing a lawsuit, may Attorney A retain a private investigator who will misrepresent his identity and purpose when conducting an investigation into E's payment practices?

Opinion:

Rule 8.4(c) provides that it is professional misconduct for a lawyer to "engage in conduct involving dishonesty, fraud, deceit, or misrepresentation." This prohibition is extended by Rule 8.4(a) to third parties acting at the direction of a lawyer. However, the Rules of Professional Conduct are rules of reason and there are instances when the use of misrepresentation does not violate Rule 8.4(a). *See* Rule 0.2, *Scope*.

Other jurisdictions have interpreted their Rules of Professional Conduct to permit lawyer supervision of investigations involving misrepresentation in circumstances similar to that set out in the instant inquiry. For example, the bars of Arizona and Maryland permit lawyers to use "testers" who employ misrepre-

sentation to collect evidence of discriminatory practices. Ariz. State Bar Comm. on the Rules of Prof'l Conduct, Op. 99-11 (1999); Maryland Bar Ass'n, Op. 2006-02 (2005). These ethics opinions conclude that testers are necessary to prove discriminatory practices and, therefore, serve an important public policy. The State Bar of Arizona opined that it would be inconsistent with the intent of the Rules of Professional Conduct to interpret the rules to prohibit a lawyer from supervising the activity of testers. Ariz. State Bar Comm. on the Rules of Prof'l Conduct, Op. 99-11 (1999).

The intent of Rule 8.4 is set out in comment [3] to the rule: "The purpose of professional discipline for misconduct is not punishment, but to protect the public, the courts, and the legal profession." The challenge is to balance the public's interest in having unlawful activity fully investigated and possibly thereby stopped, with the public's and the profession's interest in ensuring that lawyers conduct themselves with integrity and honesty. In an attempt to balance these two important interests, we conclude that a lawyer may advise, direct, or supervise an investigation involving pretext under certain limited circumstances.

In the pursuit of a legitimate public interest such as in investigations of discrimination in housing, employment, and accommodations, patent and intellectual property infringement, and the production and sale of contaminated and harmful products, a lawyer may advise, direct, and supervise the use of misrepresentation (1) in lawful efforts to obtain information on actionable violations of criminal law, civil law, or constitutional rights; (2) if the lawyer's conduct is otherwise in compliance with the Rules of Professional Conduct;[1] (3) the lawyer has a good faith belief that there is a reasonable possibility that a violation of criminal law, civil law, or constitutional rights has taken place, is taking place, or will take place in the foreseeable future; (4) misrepresentations are limited to identity or purpose; and (5) the evidence sought is not reasonably available through other means. A lawyer may not advise, direct, or supervise the use of misrepresentation to pursue the purely personal interests of the lawyer's client, where there is no public policy purpose, such as the interests of the principal in a family law matter.

If Attorney A concludes that each of the above conditions is satisfied, he may retain a private investigator to look into E's payment practices, which investigation may include misrepresentations as to identity and purpose.

Endnote

1. Rule 4.2(a) prohibits a lawyer from communicating about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter unless the other lawyer consents or the communication is authorized by law or court order. A lawyer may not violate this rule through the acts of another, including an investigator. Rule 8.4(a).

Proposed 2015 Formal Ethics Opinion 1
Preparing Pleadings and Other Filings for an Unrepresented Opposing Party
January 22, 2015

Proposed opinion rules that a lawyer may not prepare pleadings and other filings for an unrepresented opposing party in a civil proceeding currently pending before a tribunal if doing so is tantamount to giving legal advice to that person.

Background:

The Ethics Committee recently received several inquiries on whether a lawyer may prepare a pleading or other filing for an unrepresented opposing party in a civil proceeding. There are a number of rules and ethics opinions that address this issue, but not collectively. The purpose of this opinion is to provide guiding principles for when a lawyer may prepare a pleading or other filing for an unrepresented opposing party.

This opinion is limited to the drafting of pleadings and filings attendant to a proceeding that is currently pending before a tribunal (as that term is defined in Rule 1.0(n)), and to the drafting of any agreement between the parties to resolve the issues in dispute in the proceeding including a release or settlement agreement. The principles do not address the drafting of documents necessary to close a business transaction or other matters that are not the subject of a formal proceeding before a tribunal. "Pleading or filing" is used throughout the opinion to include any document that is filed with the tribunal and any agreement between the parties to settle their dispute and terminate the proceeding.

Survey of Rules and Opinions:

Rule 4.3(a) provides that, in dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not give legal advice to the person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such person are or have a reasonable possibility of being in conflict with the interests of the client.

Comment [2] to Rule 4.3 clarifies that Rule 4.3 does not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an unrepresented person. As long as the lawyer explains that the lawyer represents an adverse party and is not representing the person, the lawyer may inform the person of the terms on which the lawyer's client will enter into an agreement or settle a matter and may prepare documents that require the unrepresented person's signature.

CPR 296, which was adopted in 1981 under the Code of Professional Responsibility

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: NC Rules of Prof'l Conduct Rule 1.1 (2003)

· To cite a North Carolina formal ethics opinion: NC 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.

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 March 30, 2015.

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.

which was then in effect, opines that a lawyer may not send to or directly make available to an unrepresented defendant an acceptance of service and waiver form waiving the right to answer and to be notified of the date of trial. However, a lawyer may send to a defendant a form solely for acceptance of service. *See* CPR 121.

RPC 165, adopted in 1993, states that, "[i]n order to accomplish her client's purposes, the attorney may draft a confession of judgment for execution by the adverse party and solicit its execution by the adverse party so long as the attorney does not undertake to advise the unrepresented party concerning the meaning or significance of the document or to state or imply that she is disinterested." The opinion continues:

> [a]lthough previous ethics opinions, CPRs 121 and 296, have ruled that it is unethical for a lawyer to furnish consent judgments to unrepresented adverse parties for their consideration and execution, there appears to be no basis for such a prohibition when the lawyer is not furnishing a document which appears to represent the position of the adverse party such as an answer, and the lawyer furnishing a confession of judgment or consent judgment does not undertake to advise the adverse party or feign disinterestedness. CPRs 121 and 296 are therefore overruled to the extent they are in conflict with this opinion.

2009 Formal Ethics Opinion 12 rules that a lawyer may prepare an affidavit and confession of judgment for an unrepresented adverse party provided the lawyer explains who he represents and does not give the unrepresented party legal advice; however, the lawyer may not prepare a waiver of exemptions for the adverse party.

2002 Formal Ethics Opinion 6 provides that the lawyer for the plaintiff may not prepare the answer to a complaint for an unrepresented adverse party to file *pro se*. The basis for this holding is also the prohibition on giving legal advice to a person who is not represented by the lawyer.

Guiding Principles

The survey of the existing opinions demonstrates that some pleadings or filings that solely represent the interests of one party to a civil proceeding may be prepared by a lawyer representing the interests of the opposing party. However, because of the prohibitions in Rule 4.3, a lawyer may not draft a pleading or filing to be signed solely by an unrepresented opposing party if doing so is tantamount to giving legal advice to that person. A lawyer may draft a pleading or filing to be signed solely by an unrepresented opposing party if the document is necessary to settle the dispute with the lawyer's client and will achieve objectives of both the lawyer's client and the unrepresented opposing party. Pursuant to Rule 4.4(a), which prohibits the use of "means" that have no substantial purpose other than to embarrass, delay, or burden a third person, when presenting a pleading or filing for execution, the lawyer must avoid using tactics that intimidate or harass the unrepresented opposing party.

In applying these guiding principles, a lawyer must avoid the overreaching which is tantamount to providing legal advice to an unrepresented opposing party. The lawyer should consider whether (1) the rights, if any, of the unrepresented opposing party will be waived, lost, or otherwise adversely impacted by the pleading or filing, and the significance of those rights; (2) the pleading or filing solely represents the position of the unrepresented opposing party (e.g., an answer to a complaint); (3) the pleading or filing gives the unrepresented opposing party some benefit (e.g., acceptance of service to avoid personal service by the sheriff at the person's home or work place); (4) the legal consequences of signing the document are not clear from the document itself (e.g., the hidden consequences of signing a waiver of right to file an answer in a divorce proceeding has hidden consequences); (5) the pleading or filing goes beyond what is necessary to achieve the client's primary objectives; or (6) the pleading or filing will require the signature of a judge or other neutral who can independently evaluate the pleading or filing. If a disinterested lawyer would conclude that the unrepresented opposing party should not agree to sign the pleading or filing under any circumstances without advice of counsel, or the lawyer is not able to articulate why it is in the interest of the unrepresented opposing party to rely upon the lawyer's draft of the document, the lawyer cannot properly ask the unrepresented opposing party to sign the document.

Opinion:

Applying the guidelines and considerations above leads to the conclusion that a lawyer may prepare the following pleadings or filings for an unrepresented opposing party: an acceptance of service, a confession of judgment, a settlement agreement, a release of claims, an affidavit that accurately reflects the factual circumstances and does not waive the affiant's rights, and a dismissal with (or without) prejudice pursuant to settlement agreement or release. However, prior to obtaining the signature of the unrepresented opposing party on the pleading or filing, the person must be given the opportunity to review and make corrections to the pleading or filing. It is recommended that the pleading or filing include a written disclosure that indicates the name of the lawyer preparing the document, and specifies that the lawyer represents the other

party and has not and cannot provide legal advice to the unrepresented opposing party except the advice to seek representation from independent counsel.

A lawyer should not prepare on behalf of an unrepresented opposing party a waiver of right to file an answer to a complaint, an answer to a complaint, or a waiver of exemptions. A waiver of notice of hearing should only be prepared for the unrepresented opposing party if the lawyer is satisfied that, upon analysis of the considerations indicated above, the lawyer is not asking the unrepresented opposing party to relinquish significant rights without obtaining some benefit.

Neither of the above lists of pleadings or filings is intended to be exhaustive. Before determining whether a pleading or filing may be prepared for an unrepresented opposing party, the lawyer must conclude that she is able to comply with the guiding principles above.

Proposed 2015 Formal Ethics Opinion 2
Preparing Waiver of Right to Notice of Foreclosure for Unrepresented Borrower
January 22, 2015

Proposed opinion rules that when the original debt is $100,000 or more, a lawyer for a lender may prepare and provide to an unrepresented borrower, owner, or guarantor a waiver of the right to notice of foreclosure and the right to a foreclosure hearing pursuant to N.C.G.S. § 45-21.16(f) if the lawyer explains the lawyer's role and does not give legal advice to any unrepresented person. However, a lawyer may not prepare such a waiver if the waiver is a part of a loan modification package for a mortgage secured by the borrower's primary residence.

Inquiry #1:

N.C. Gen. Stat. §45-21.16(f) provides that in a nonjudicial power of sale foreclosure, any person entitled to notice of the foreclosure (including owners, borrowers, and guarantors) (the "Notice Parties") "may waive after default the right to notice and hearing by written instrument signed and duly acknowledged by such party." The statute provides that in foreclosures where the original debt was less than $100,000, only the clerk may send the waiver form to the Notice Parties and the form can only be sent "after service of the notice of hearing." In foreclosures where the original debt is $100,000 or more, the statute does not specify how the waiver form shall be provided to the Notice Parties or who can draft the waiver form.

It is common practice for lenders dealing with defaulted loans in excess of $100,000 to require Notice Parties to execute a N.C. Gen. Stat. §45-21.16(f) waiver in connection with a forbearance, modification, or reinstatement agreement.

The filing of a foreclosure notice of hearing does not require a Notice Party to file an answer or to attend the foreclosure hearing. *See* N.C.G.S. §45-21.16(c)(7)(a) (requiring foreclosure notice to inform debtor that "failure to attend the hearing will not affect the debtor's right to pay the indebtedness...or to attend the actual sale, should the debtor elect to do so.") The execution of a N.C. Gen. Stat. §45-21.16(f) waiver "waives" the right to receive notice of the foreclosure hearing and the right to require a foreclosure hearing to be held. The clerk is still required to receive evidence and make the findings required by N.C.G.S. § 45-21.16(d), but can do so based upon affidavits from the lender without holding a formal hearing.

May a lawyer who represents the lender on a debt of $100,000 or more draft a N.C. Gen. Stat. §45-21.16(f) waiver form and provide the waiver form to unrepresented Notice Parties for execution?

Opinion #1:

Yes, provided the lawyer complies with the requirements of N.C. Gen. Stat. §45-21.16 and with Rule 4.3 (*Dealing with Unrepresented Persons*). However, in the consumer context, when the property subject to foreclosure is the borrower's primary residence, compliance with Rule 4.3 prohibits a lawyer from drafting the waiver form for inclusion in a loan modification package for execution by the unrepresented borrower.

In dealing on behalf of a client with a person who is not represented by counsel, Rule 4.3(a) states that a lawyer shall not give legal advice to the person, other than the advice to secure counsel if the lawyer knows or reasonably should know that the interests of such person are or have a reasonable possibility of being in conflict with the interests of the client. In addition, paragraph (b) of the rule prohibits the lawyer from stating or implying that the lawyer is disinterested and requires the lawyer to make reasonable efforts to correct any misunderstanding that the unrepresented person may have in this regard.

The Ethics Committee has previously considered whether a lawyer may prepare documents for execution by an unrepresented person. 2004 FEO 10 rules that the lawyer for the buyer in a residential real estate closing may prepare a deed as an accommodation to the needs of her client, the buyer, provided the lawyer makes the disclosures required by Rule 4.3 and does not give legal advice to the seller other than the advice to obtain legal counsel. Similarly, 2009 FEO 12 holds that a lawyer may prepare an affidavit and confession of judgment for an unrepresented adverse party as long as the lawyer explains who he represents and does not give the unrepresented party legal advice. *Accord* RPC 165.

However, other opinions have held that a lawyer may not prepare an answer or an acceptance of service and waiver form for an unrepresented opposing party. *See* CPR 121, CPR 296, RPC 165. 2002 FEO 6 explains the rationale for these prior opinions as follows:

> The committee has consistently held, however, that a lawyer representing the plaintiff may not send a form answer to the defendant that admits the allegations of the divorce complaint nor may the lawyer send the defendant an "acceptance of service and waiver" form waiving the defendant's right to answer the complaint. CPR 121, CPR 125, CPR 296. The basis for these opinions is the prohibition on giving legal advice to a person who is not represented by counsel.

Except as noted below, the waiver form contemplated by the current inquiry is like a deed or a confession of judgment: it is prepared to accommodate the needs of the lawyer's client and usually prepared in conjunction with negotiations between the lender and the borrower relative to avoiding the consequences of a default by execution of a forbearance, modification, or reinstatement agreement. A foreclosure notice of hearing does not require a Notice Party to take any action prior to a foreclosure hearing or to attend the hearing. After execution of a waiver form, the borrower may still pay the indebtedness or attend the foreclosure sale. Therefore, except as noted below, preparing a N.C. Gen. Stat. §45-21.16(f) waiver form for unrepresented Notice Parties is not tantamount to giving legal advice to an unrepresented person and the lender's lawyer may

draft the waiver and give it to unrepresented Notice Parties if the lawyer does not undertake to advise the unrepresented Notice Parties concerning the meaning or significance of the waiver form or state or imply that the lawyer is disinterested.

There is an exception to this holding in the consumer context. When the property subject to foreclosure is the borrower's primary residence, compliance with Rule 4.3 prohibits a lawyer from drafting a waiver form for inclusion in a loan modification package for execution by the unrepresented borrower. In this context, preparation of the waiver form is tantamount to giving legal advice to an unrepresented person because the waiver prospectively eliminates a significant right or interest of the unrepresented person—the borrower's right to notice of foreclosure upon default on the new or modified loan—and there is a substantial risk that an unsophisticated, distressed borrower will not understand this. *See* Proposed 2015 FEO 1.

Inquiry #2:

Does it make a difference if the waiver is executed in conjunction with other lender prepared documents, such as a forbearance agreement, modification agreement, or reinstatement agreement?

Opinion #2:

Subject to the limitation noted in the last paragraph of Opinion #1 on drafting a waiver form for inclusion in a loan modification package for a loan secured by the unrepresented borrower's primary residence, this does not make a difference. Comment [2] to Rule 4.3 clarifies that Rule 4.3 does not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an unrepresented person. So long as the lawyer has explained that the lawyer represents an adverse party, the lawyer may inform the unrepresented person of the terms on which the lawyer's client will enter into an agreement or settle a matter and may prepare documents that require the unrepresented person's signature. In dealing with unrepresented Notice Parties, however, the lender's lawyer must fully disclose that the lawyer represents the interests of the lender and will draft the documents consistent with the interests of the lender. The lawyer may not give any legal advice to the Notice Parties except the advice to obtain legal counsel. Rule 4.3.

Proposed 2015 Formal Ethics Opinion 3
Offering Prospective Client a Computer Tablet in Direct Mail Solicitation
January 22, 2015

Proposed opinion rules that a lawyer may not offer a computer tablet to a prospective client in a direct mail solicitation letter.

Inquiry #1:

Lawyer represents clients in personal injury matters. Lawyer advertises his legal services by way of targeted direct mail solicitation. The solicitation letter includes a flyer that states:

> NEW CLIENTS TO LAW FIRM: NEW COMPUTER TABLET
>
> New clients of law firm wishing to communicate electronically may be issued a computer tablet with an internet-capable web cam that will allow low cost-free video conferences and electronic mail directly with the lawyer.
>
> Disclaimer: Any equipment issued is issued free-of-charge to new clients to better facilitate communication with the law firm during representation.

The flyer does not indicate that the computer tablet is on loan and must be returned to Lawyer at the conclusion of the representation.

After a client hires the firm, Lawyer presents the client with an office equipment agreement. The agreement provides that the tablet must be returned to Lawyer at the end of the representation and, at that time, the client will have the option to purchase the tablet at cost. The client must pay for the tablet if it is not returned timely and in good condition. If the tablet is damaged, the client agrees to repair the tablet, replace the tablet with one of equal value, or purchase the tablet at cost from Lawyer.

May Lawyer offer a computer tablet to a prospective client in a direct mail solicitation letter?

Opinion #1:

No. A lawyer shall not make false or misleading communications about the lawyer or the lawyer's services. Rule 7.1. Neither Lawyer's direct mail solicitation letter nor the flyer makes clear that the tablet is on loan and must be returned at the conclusion of the representation unless the client elects to purchase the tablet from Lawyer. The disclaimer included on the flyer is inadequate under the circumstances and is misleading.

Even with an adequate disclaimer, Lawyer's direct mail solicitation campaign is not permissible. A lawyer may advertise legal services by way of direct mail solicitation letters, but is prohibited from engaging in in-person, live, or telephone solicitation of prospective clients with whom the lawyer has no prior professional relationship. Rule 7.3. Rule 7.3(a) prohibits lawyer-initiated telephone solicitation of a prospective client because of the potential for abuse inherent in live telephone contact by a lawyer with a person known to be in need of legal services. An offer of promotional merchandise, whether on loan or as a gift, in a targeted direct mail solicitation letter is an inducement to a prospective client to call the lawyer's office solely to inquire about the merchandise, thereby giving the lawyer the improper opportunity to solicit the caller in person. 2004 FEO 2 (lawyer may not offer promotional merchandise in a targeted direct mail solicitation letter as an inducement to call the lawyer's office).

Inquiry #2:

Lawyer sends direct mail solicitation letters to prospective clients known to be in need of legal services. Lawyer does not offer merchandise to prospective clients in the solicitation letter. After being hired by a client, may Lawyer offer to clients temporary use of a computer tablet for purposes of communicating with Lawyer or gathering information and/or evidence to be used for the client's matter?

Opinion #2:

Rule 1.8(e) prohibits a lawyer from providing financial assistance to a client in connection with pending or contemplated litigation, except the lawyer may advance court costs and expenses of litigation.

Pursuant to comment [10] to Rule 1.8:

> Lawyers may not subsidize lawsuits or administrative proceedings brought on behalf of their clients, including making or guaranteeing loans to their clients for living expenses, because to do so would encourage clients to pursue lawsuits that might not otherwise be brought and because such assistance gives lawyers too great a financial stake in the litigation. These dangers do not warrant a prohibition on a lawyer lending a client court

costs and litigation expenses, including the expenses of medical examination *and the costs of obtaining and presenting evidence*, because these advances are virtually indistinguishable from contingent fees and help ensure access to the courts. Similarly, an exception allowing lawyers representing indigent clients to pay court costs and litigation expenses regardless of whether these funds will be repaid is warranted. [Emphasis added.]

Lawyer may loan a tablet to a client provided the tablet is necessary for the client to communicate with Lawyer and/or for the collection of evidence; the tablet is not *quid pro quo* for hiring Lawyer or law firm; and the client understands that the tablet is not a gift, but is on loan and must be returned to Lawyer or purchased at the end of the representation. Lawyer may not give a tablet to a client solely for use that is unrelated to the representation because to do so would be tantamount to loaning money to the client for living expenses. *See* 2001 FEO 7 (advancing cost of rental car prohibited if vehicle used only occasionally for client's transportation to medical exams). ■

Proposed Amendments (cont.)

reasonable remedial action to avoid the consequences of such conduct including reporting the conduct as required by Rule 1.15-2(p) or Rule 8.3. *See also* Rule 5.1 and Rule 5.3.

Limitations on Delegation to TAOO

[27] Despite the designation of a TAOO pursuant to Rule 1.15-4, each lawyer in the firm remains professionally responsible for the trust account activity associated with the legal matters for which the lawyer provides representation. Therefore, for each legal matter for which the lawyer is primary counsel, the lawyer must review and approve any disbursement sheet or settlement statement, trust account entry in the client ledger, and trust account balance associated with the matter. Similarly, a lawyer who establishes a dedicated trust account or fiduciary account in connection with the representation of a client is professionally responsible for the administration of the dedicated trust account or fiduciary account in compliance with Rule 1.15.

Training for Service as a TAOO

[28] A qualified provider of the educational training for a TAOO described in Rule 1.15-4(c)(1)(C) need not be an accredited sponsor of continuing legal education programs (*see* 27 NCAC 1D, Rule .1520), but must be knowledgeable and reputable in the specific field and must offer educational materials as part of its usual course of business. Training may be completed via live presentations, online courses, or self-guided study. Self-guided study may consist of reading articles, presentation materials, or websites that have been created for the purpose of education in the areas of financial fraud, safeguarding funds from embezzlement, risk management for bank accounts, information security, and online banking, or basic accounting.

Rule 8.3 Reporting Professional Misconduct

(a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects, shall inform the North Carolina State Bar or the court having jurisdiction over the matter.

(b) ...

(c) This Rule does not require disclosure of information otherwise protected by Rule 1.6.

(d) ...

(e) ...

Comment

[1] Self-regulation of the legal profession requires that members of the profession initiate disciplinary investigation when they know of a violation of the Rules of Professional Conduct. Lawyers have a similar obligation with respect to judicial misconduct. An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover. Reporting a violation is especially important where the victim is unlikely to discover the offense. **A lawyer is not generally required by this rule to report the lawyer's own professional misconduct; however, to advance the goals of self-regulation, lawyers are encouraged to report their own misconduct to the North Carolina State Bar or to a court if the misconduct would otherwise be reportable under this rule. Nevertheless, Rule 1.15-2(p) *requires* a lawyer to report the misappropriation or misapplication of entrusted property, including trust funds, to the North Carolina State Bar regardless of whether the lawyer is reporting the lawyer's own conduct or that of another person.**

[2] ... ■

Lawyer Assistance Program (cont.)

The LAP has helped thousands of lawyers navigate the process of finding better boundaries with our professional lives. At first it can seem really impractical, unattainable, or downright scary—we are sure we will lose our good reputations with our clients. Thousands of lawyers in NC can testify that this is not the case. There is a pathway to practicing law that does not emotionally demolish us in the process. It is a unique pathway for each lawyer. The LAP provides support and assistance all along the way. If we can assist you in this process, call or email us today. ■

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 nclap.org or call: Cathy Killian (for Charlotte and areas west) at 704-910-2310, Towanda Garner (in the Piedmont area) at 919-719-9290, or Nicole Ellington (for Raleigh and down east) at 919-719-9267.

NOTICE OF REVOCATION OF REGISTRATION OF PREPAID PLANS

The registrations of the following prepaid legal services plans have been revoked. These plans cannot operate in North Carolina nor can North Carolina licensed attorneys participate therein.

Personal Legal Defender
Business Protector

John B. McMillan Distinguished Service Award

John Quincy Beard

A native of Erwin, Mr. Beard earned his undergraduate degree from Duke University in 1958, and his law degree from Duke Law School in 1960. Mr. Beard began practice in Missouri before returning to Raleigh to practice business law with Poyner, Geraghty, Hartsfield & Townsend. Mr. Beard joined the firm of Sanford, Adams, McCullough & Beard in 1970, and remained at the firm for over 20 years. In 1993 he became president of Lawyers Mutual Insurance Company. Mr. Beard was a founding member, a member of the first Board of Directors, and the first elected president of Lawyers Mutual. Mr. Beard was the full time president of Lawyers Mutual until he retired in 2001, and was a frequent lecturer on the topic of professional ethics. Throughout his career Mr. Beard established himself as an outstanding lawyer and leader, serving as president of the North Carolina Bar Association in 1986 and as a State Bar councilor, and he is a most deserving recipient of the John B. McMillan Distinguished Service Award.

Charles E. Burgin

A native of McDowell County, Mr. Burgin earned his undergraduate degree from the University of North Carolina in 1961, and his law degree from Duke Law School in 1964. After a clerkship with Federal Judge J. Braxton Craven Jr. and a two-year term as solicitor of the McDowell County Criminal Court, Mr. Burgin began private practice with Dameron, Burgin, Parker & Jackson, PA, where he practiced for over 40 years until his retirement in 2009. Mr. Burgin is a fellow and former state chair of the American College of Trial Lawyers, a fellow of the International Society of Barristers, and has been named among the Best Lawyers in America and North Carolina's Super Lawyers. Throughout his career Mr. Burgin served on countless boards and commissions in his community, both in a legal and nonlegal capacity. He served on the board of the South Mountain Children's Home, on the County Recreation Commission, as the Marion City attorney, and as the attorney for the McDowell County Board of Education. Mr. Burgin served as the president of the North Carolina Bar Association in 1993, and was inducted into the Bar Association's General Practice Hall of Fame in 2008. Mr. Burgin's decorated legal career and lifelong service to both the legal and nonlegal community make him a deserving recipient of the John B. McMillan Distinguished Service Award.

R. Lee Farmer

Mr. Farmer earned his undergraduate degree from Elon College in 1970, and his law degree from Wake Forest Law School in 1973. Upon receiving his law license, Mr. Farmer began work in Caswell County at the firm of Pemberton and Blackwell, where he eventually became partner and continued to practice until 2004 when he formed the Law Offices of R. Lee Farmer. A true public servant, Mr. Farmer served as the county attorney for Caswell County, attorney for the Caswell County Board of Elections, and town attorney for the town of Yanceyville for nearly 20 years. Mr. Farmer worked tirelessly to reform North Carolina's criminal justice system as a member of both the North Carolina Criminal Code Commission and the North Carolina Criminal Justice Education and Training Standards Commission. In addition to serving the public through the reformation of the NC criminal code, Mr. Farmer diligently served nine years as a State Bar councilor for Judicial District 9A, ending in 2013. Among numerous other accolades, Mr. Farmer was awarded the Order of the Long Leaf Pine in 1984 by Governor James B. Hunt Jr. He has set a standard of excellence for small town lawyers in North Carolina and is a deserving recipient of the John B. McMillan Distinguished Service Award.

Allan B. Head

Mr. Head graduated from Wake Forest College in 1966 and from its law school in 1969. After military service he joined the North Carolina Bar Association in 1973 as executive secretary and became executive director in 1981. Mr. Head was the treasurer of the Wake County Bar Association for 32 years, from 1980-2012. Mr. Head was president of the National Association of Bar Executives in 2006, served on numerous committees and task forces for the American Bar Association, and served four years on the YMCA of the USA's Board of Directors. Under Mr. Head's leadership, the North Carolina Bar Association developed numerous award-winning programs and initiatives, and continues to provide a great service to lawyers across North Carolina. Throughout his career Mr. Head has presented at countless CLE programs, including the ABA's Bar Leadership Institute. Mr. Head continues to mentor young lawyers, providing guidance on entering the profession to any lawyer lucky enough to cross his path. Allan Head's career of service to the legal profession and to the citizens of North Carolina make him a deserving recipient of the North Carolina State Bar's John B. McMillan Distinguished Service Award.

Leonard T. Jernigan Jr.

Born in Durham, Mr. Jernigan earned his undergraduate degree from the University of North Carolina in 1972, and his law degree from NC Central School of Law in 1976. Mr. Jernigan has been in practice as a workers' compensation lawyer for over 30 years, and is a board certified specialist in workers' compensation law. Mr. Jernigan is a founder and past-president of the Workers' Injury Law and Advocacy Group, and currently serves on the North Carolina Industrial Commission's Advisory Council. He is an adjunct professor of workers' compensation law at North Carolina Central Law

School, where he has taught for over a decade. In addition to teaching many of North Carolina's workers' compensation lawyers, Mr. Jernigan literally wrote the book on the subject as the author of *North Carolina Workers' Compensation Law and Practice*, currently in its fourth edition. Mr. Jernigan has made a career of sharing his knowledge and advice with his fellow lawyers not only through numerous CLE presentations, but also by talking with and mentoring any lawyer who calls him. A member of the North Carolina Bar Association, North Carolina Advocates for Justice, and Wake County Bar Association, Mr. Jernigan's career achievements and commitment to educating the legal community make him a deserving recipient of the John B. McMillan Distinguished Service Award.

James M. Long

Judge Long earned his undergraduate degree as a Morehead Scholar from the University of North Carolina in 1959, and his law degree from UNC Law School in 1963. Judge Long began his career as a research assistant for the North Carolina Supreme Court before becoming a partner at Ramsey & Long in Roxboro, NC. In 1970, Judge Long was sworn in as a superior court judge for Judicial District 17B. He served as a superior court judge for 24 years, ending in 1994. Beginning with his time on the bench, Judge Long was dedicated to alternative dispute resolution, and served as the senior resident judge of the first pilot district implementing Mediated Settlement Conferences in North Carolina. In addition to his dedication to alternative dispute resolution, Judge Long also served as vice-president of the North Carolina Bar Association and president of the NC Conference of Superior Court Judges. In his community, Judge Long has served as president of the Caswell County Jaycees and as the chair of the Pilot (NC) Foundation, among numerous other civic activities. In 2011 Judge Long was awarded the Order of the Long Leaf Pine. Judge Long has worked tirelessly to improve the administration of justice in North Carolina, and is a deserving recipient of the John B. McMillan Distinguished Service Award.

Sally H. Scherer

A 1981 law graduate, Ms. Scherer has served as president of the Tenth Judicial District Bar, the Wake County Academy of Trial Lawyers, and the NC Conference of Bar Presidents. She also chairs the NCBA Committee on Women in the Legal Profession. She has been inducted into the NCBA General Practice Hall of Fame, and has been awarded the North Carolina Association of Women Attorneys' Gwyneth B. Davis Award. Ms. Scherer has worked tirelessly to reform the law and the administration of justice, and is the founder and executive director of The Child's Advocate, a 501 (c)(3) nonprofit that partners attorneys and mental health professionals to represent children in court actions in those areas where the state of North Carolina is unable to provide appointed representation. Throughout her career Ms. Scherer has been a strong advocate for an increased role of women and minorities at all levels of the profession, and has been a supportive role model to young women and minorities entering the profession. For a career spent practicing her belief in the law's potential to help the most vulnerable and underserved in our society, Sally H. Scherer is a deserving recipient of the John B. McMillan Distinguished Service Award.

Horace E. Stacy

A native of Lumberton, Mr. Stacy earned his undergraduate degree from the University of North Carolina in 1950 and, after serving in the US Air Force during the Korean War, his law degree from UNC Law School in 1956. Mr. Stacy began practicing in Lumberton at the McLean & Stacy Law Firm. He soon became a prominent attorney in the general practice of law, handling criminal and civil matters in his hometown until his retirement in 2013. In 1964 Mr. Stacy was appointed chair of the first tri-racial committee to help Lumberton prepare for the enactment of the Civil Rights Act. In addition to the countless civic organizations with which Mr. Stacy has been involved, he served as president of the Robeson County Bar Association and served on the North Carolina Board of Law Examiners for 23 years, five years as chair. In 2002 Mr. Stacy was inducted into the North Carolina Bar Association's General Practice Hall of Fame. A career long mentor, volunteer, and promoter of diversity, Mr. Stacy is considered the model of true professionalism by the lawyers of Robeson County and is a deserving recipient of the John B. McMillan Distinguished Service Award.

Seeking Award Nominations

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

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

Legal Ethics (cont.)

proper balance in Proposed 2014 FEO 9? Should there be more, fewer, or different restrictions on when an investigation involving misrepresentation is permissible under the Rules of Professional Conduct? Or do you agree with those committee members who feel that the Ethics Committee should take an absolute unyielding stance on a lawyer's duty of honesty?

Speak now. The next Ethics Committee meeting will be held on April 16, 2015. At that meeting the committee will consider any comments received pertaining to Proposed 2014 FEO 9. Comments may be emailed to slever@ncbar.gov. ■

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

Endnote

1. As explained in comment [1] to Rule 8.4, the prohibition in Rule 8.4(a) against knowingly assisting another to violate the Rules of Professional Conduct or violating the Rules of Professional Conduct through the acts of another does not prohibit a government lawyer from providing legal advice to investigatory personnel relative to any action such investigatory personnel are lawfully entitled to take.

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

Stubbs Bankruptcy Clinic Opens—Campbell Law has added a third clinic to its portfolio. Named after prominent North Carolina bankruptcy and civil litigation attorney Trawick H. "Buzzy" Stubbs Jr., the Stubbs Bankruptcy Clinic began operation with the spring 2015 semester. The clinic will receive referrals from the US Bankruptcy Court and Legal Aid of North Carolina, and will be hosted within the US Bankruptcy Court at the historic Century Station Federal Building on Fayetteville Street in Raleigh. David F. Mills will direct the clinic and continue his private bankruptcy practice.

Alumni Association to Launch in 2015—Campbell Law will establish a formal alumni association in 2015. With more than 3,650 alumni practicing law in 44 states and six countries, Campbell Law graduated its first class in 1979. Research for establishing the alumni association began more than two years ago, with the formal process kicking off in late November 2014 when the law school hosted an alumni roundtable. Megan West, Campbell Law assistant dean of external relations, is leading the process.

Campbell Law Unveils Cheshire Schneider Advocacy Scholarship—An anonymous $100,000 gift to Campbell Law has paved the way for the Cheshire Schneider Advocacy Scholarship. The full-tuition competitive scholarship, previously named the Excellence in Advocacy Scholarship, is named in honor of prominent Raleigh attorneys Joseph Cheshire V and Alan Schneider of Cheshire Parker Schneider & Bryan.

Eleven Added to Campbell Law Board of Visitors—Campbell Law Dean J. Rich Leonard has announced the addition of 11 legal and industry leaders to the law school's Board of Visitors. Teresa Artis, the Honorable Stephani Humrickhouse, the Honorable Elaine Marshall, the Honorable Mark Martin, Claire Moritz, Dr. Peter Morris, Gary Shipman, Timothy Sparks, Hoyt Tessener, Wendy Vonnegut, and Thomas Walker will all serve two-year terms on the board.

Charlotte School of Law

2014 President's Higher Education Community Service Honor Roll—Charlotte School of Law's *pro bono* and community service programs were recently recognized by the Corporation for National and Community Service. This is the highest federal recognition that higher education institutions can receive. The Volunteer Income Tax Assistance program and the Expunction & Reentry Project that reduces collateral effects of criminal records were highlighted in the recognition.

Students Place First at Negotiation Invitational—Two Charlotte School of Law students, Christopher Bryant and Susan Patroski, placed first in the inaugural Negotiation Invitational hosted by William & Mary School of Law. The invitational included law schools from across the region with three rounds of simulated competitive exercises. Teams were judged on teamwork, problem solving, relationship building, and communication.

Student Wins National Competition—Jane O'Neil Edwards won first place in a national student writing competition sponsored by the ABA Judicial Division Lawyer's Conference. O'Neil Edwards' paper was entitled "With Age Comes Wisdom...Or Does It?" which looks at the mandatory retirement age of judges in North and South Carolina.

Innovative Internship Program Launched—Charlotte School of Law has collaborated with nationally recognized US law firms to create a ground-breaking internship opportunity. The program, The Entrepreneurial Practice Portal-Digital Tools and Skills for the 21st Century Lawyer, gives students the chance to work on digital journalism assignments such as reputable websites and blogs, video production of legal newscasts, and legal research projects.

New* Pro Bono *Project—Twenty-two Charlotte School of Law students held a community workshop through the Expunction & Reentry Project that evaluated nearly 40 Charlotte citizens' criminal records to explore the possibility of expungement under current NC law. Giving hope to some who seek a second chance, the project hopes to hold monthly workshops.

Duke Law School

Duke Law Assumes Publication of

Judicature—Duke Law School's Center for Judicial Studies has assumed publication of *Judicature*, the scholarly journal of the American Judicature Society (AJS), which is dissolving. *Judicature* is a nearly century-old journal of research and opinion about the American judicial system.

In announcing the acquisition, Dean David F. Levi said the center is well-positioned to combine its institutional strengths in law and political science with *Judicature's* reputation for scholarly and empirical legal writing in ways that will promote an understanding of judicial institutions and law reform.

Levi Co-authors New Manual on Federal Civil Procedure—Duke Law Dean David F. Levi and Center for Judicial Studies Director John K. Rabiej have joined with Judge Lee H. Rosenthal of the US District Court for the Southern District of Texas to co-author the new *Federal Civil Procedure Manual*. The manual, published by Juris Publications, is a comprehensive treatment of procedural law in federal courts that attorneys can rely on for quick answers to discrete issues. Before becoming dean, Levi was the chief US District judge for the Eastern District of California.

Faculty Chair in Business Law and Entrepreneurship Established—Duke Law alumnus Karl Leo and his wife, Fay, have endowed a new faculty chair in business law and entrepreneurship at the school with a $1.25 million gift. Leo is vice-president and chief legal officer of ABC Supply Co. and principal of Leo Law Firm, LLC, a boutique business law firm in Huntsville, Alabama. The Karl W. Leo Professorship is one of several significant recent efforts related to entrepreneurship at Duke Law. It is also the latest of eight new professorships secured as part of the Duke Forward fundraising campaign, and the fifth to be created with funds from the Stanley and Elizabeth Star Professorship Matching Program.

Elon University School of Law

Small Business & Entrepreneurship Clinic students, supervised by Distinguished Practitioner in Residence John Flynn, will assist members of Co//ab, a new co-working facility for entrepreneurs near Elon Law. Co//ab was established by the Greensboro Partnership, Action Greensboro, the Joseph M. Bryan Foundation, and Elon University.

Associate Professor David Levine, an affiliate scholar of Stanford Law's Center for Internet and Society and visiting research collaborator at Princeton University's Center for Information Technology Policy, has taken a leadership role in the analysis of legislation to confront cyberespionage against US corporations, publishing scholarship about the proposed legislation, authoring a letter to US Senate and House leaders signed by more than 30 law professors, raising concerns about unintended impacts of the bills, and presenting at a US Senate Judiciary Committee staff briefing on trade secret law.

Professor Henry Gabriel represented North Carolina at the annual meeting of the Uniform Law Commission. He was reappointed to the US State Department Advisory Committee for Private International Law. He was a US delegate to the UN Commission on International Trade Law Working Group on Electronic Commerce. He is a member of the Governing Council of the International Institute for the Unification of Private Law.

Faith Rivers James, associate dean for experiential learning and leadership, delivered the keynote address at the Dr. Martin Luther King Jr. Observance at Vermont Law School. In 2014 she delivered the Real Property Case Law Update at the annual meeting of the NCBA's Real Property Section.

Representing Elon, Elder Law Clinic Director Hannah Vaughan is a member of the executive partner and working group teams for the Guilford County Family Justice Center, which will house 17 provider agencies and create a single point of access for victims of domestic violence, sexual assault, child abuse, and elder abuse.

North Carolina Central University School of Law

Michelle Cofield recently joined NCCU's School of Law as its assistant dean of career services. In her first full year, she inaugurated the Pathways to Success Series in which law alumni come back to let NCCU students learn how even recent graduates are making significant headway toward their ultimate career goals.

As a 15-year veteran of the Public Service and *Pro Bono* Department of the North Carolina Bar Association Foundation, Cofield is an excellent match for a law school renowned for its *pro bono* clinical opportunities.

She is committed to ensuring students are exposed to the broad range of practice available to Legal Eagles post-graduation. For last fall's series presentations, she invited alumni from career paths that included patent and intellectual property, judicial clerkships, criminal law, and a new general practice emphasizing personal injury.

The lawyer who came to describe her new practice was 2010 graduate Anissa Graham-Davis. "The room was packed," said Cofield. "Students stayed afterward, standing around her and soaking in everything she had to say."

For her part, Graham-Davis was pleased to offer these students the kind of practical advice she knows they will need if they wish to follow her path and establish a PLLC—personal limited liability company. She counseled the assembled students that private practice was a lot of hard work, but that it was both attainable and very rewarding.

Graham-Davis was also quick to dispel the perception that in private practice, they would be completely on their own, without any support. "You can't pretend that you know everything," she said. "You've got to ask questions. I've approached a judge, other lawyers—and no one has ever declined to help me."

Cofield wants her students to attend these sessions and "feel connected and validated when they hear these Eagles speak."

University of North Carolina School of Law

Election Protection Hotline—More than 40 volunteers from UNC School of Law fielded 928 phone calls on election day, November 4, as part of the national, nonpartisan Election Protection Hotline. The UNC Center for Civil Rights coordinated the effort to answer questions from voters and poll monitors. The UNC office is the only NC-based hub for the hotline. Through the program, trained law students and staff provided voters with information to help them understand their voting rights.

Frye Portrait Unveiled—More than 100 alumni, community members, students and faculty gathered in the UNC School of Law Graham Kenan Courtroom on November 14 for the unveiling of a portrait of the Honorable Henry E. Frye '59. The portrait is a gift of the UNC School of Law Class of 2013. Frye was the first African American to pursue to completion three full years of legal study and earn a law degree at UNC, the first

African American in the 20th century to serve in the North Carolina General Assembly, and the first African American to be appointed to the North Carolina Supreme Court and to serve as the Court's chief justice.

Documentary Features Alumni—A documentary highlighting North Carolina leaders and UNC School of Law alumni Bill Friday '48, Terry Sanford '46, and William Aycock '48, among others, aired on UNC-TV on January 8. "A Generation of Change: Bill Friday, Terry Sanford, and North Carolina from the 1920s-1972," celebrates the public contributions of a group of North Carolinians, most of whom were members of the same study group at UNC School of Law.

CLE Programs—Recent and upcoming CLE programs include the Festival of Legal Learning, Chapel Hill, February 13-14; the 2015 ABC's of Banking Law, Charlotte, April 1; the 2015 Banking Institute, Charlotte, April 2. Visit law.unc.edu/cle.

Wake Forest University School of Law

Wake Forest Law Professor Michael Green was recognized by the Association of American Law Schools (AALS) Torts and Compensation Systems Section on Sunday, January 4. The section presented Green with the annual William L. Prosser Award for outstanding contribution in scholarship, teaching, and service related to tort law. In attendance were Interim Dean Suzanne Reynolds ('77), Executive Associate Dean for Academic Affairs Ron Wright, and Associate Dean for Research and Development Jonathan Cardi, who was one of Green's former law students. "I am very humbled by this award," he said. "This was a signal honor and hard to believe that I belong among those who have won this award in the past, people I have so admired for their contributions to tort law over the years." Green also participated in the AALS Torts & Compensation Systems Section panel, entitled "Tort Law and a Healthier Society," led by Indiana University Robert H. McKinney School of Law's Andrew Klein. Other panel participants were Michelle Mello, Stanford Law School; Dorit Reiss, University of California, Hastings College of the Law; and Diana Winters, Indiana University Robert H. McKinney School of Law. The program focused on on leading issues at the intersection of tort and health law.

Professor Mark Rabil, director of the Wake Forest Law's Innocence and Justice Clinic, joined Wake Forest Law alumnus the Honorable Samuel Wilson on a panel discussion regarding the US death penalty system on Tuesday, December 16, at Taiwan National University in Taipei. "Panelists were selected for this seminar for their diversity of perspectives and experiences," Wilson explained. "Mark brought something exceptional to the discussion: the example of a lawyer in the earnest pursuit of social justice well after others might have thought there was nothing further to do." ■

Client Security Fund Reimburses Victims

At its January 22, 2015, meeting, the North Carolina State Bar Client Security Fund Board of Trustees approved payments of $42,924.47 to four applicants who suffered financial losses due to the misconduct of North Carolina lawyers.

The payments authorized were:

1. An award of $16,825 to applicants who suffered a loss caused by Leon R. Coxe III of Jacksonville. The board determined that Coxe, while representing a client who owned a construction company, received $16,825 from a real estate closing conducted by another lawyer for Coxe to hold in escrow until a dispute could be resolved between Coxe's client and the applicants. After the court determined in 2010 that the applicants were entitled to the escrowed funds, Coxe's trust account balance was insufficient to cover all of Coxe's clients' obligations due to misappropriation. Coxe was disbarred on April 19, 2013. The board previously reimbursed a client of Coxe's a total of $100,000.

2. An award of $5,253.60 to a former client of L. Pendleton Hayes of Pinehurst. The board determined that Hayes was retained to handle a client's real estate closing. Hayes failed to make all the proper disbursements from the closing proceeds prior to her trust account being frozen by the State Bar due to misappropriation. Hayes' trust account balance was insufficient to satisfy all of her clients' obligations. Hayes was disbarred on November 21, 2014. The board previously reimbursed two other Hayes' clients a total of $2,900.63.

3. An award of $500 to a former client of L. Pendleton Hayes. The board determined that Hayes was retained to prepare estate planning documents for a client's parents. Hayes failed to produce any documents for the client's parents prior to ceasing the practice of law during a State Bar investigation.

4. An award of $20,345.87 to an applicant who suffered a loss caused by Michael C. Stamey of Jamestown. The board determined that on February 15, 2007, Stamey conducted a closing from which he retained $34,681.16 in closing proceeds until a dispute could be settled between the applicant and Stamey's client. On March 15, 2012, a judge ordered that Stamey's client should get $14,335.31 of the escrowed funds and the applicant should get the balance. Stamey never disbursed the applicant his $20,345.87. Due to apparent misappropriation, Stamey's trust account balance is well below that amount. Stamey was suspended on February 7, 2013, for failing to comply with CLE requirements. ■

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