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THE NORTH CAROLINA STATE BAR

# JOURNAL

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**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](http://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](mailto:amaner@ncbar.gov). In deciding what address to list with the State Bar, be advised that this address will be used for all official correspondence from the State Bar and that membership information is a public record pursuant to the NC Public Records Act.

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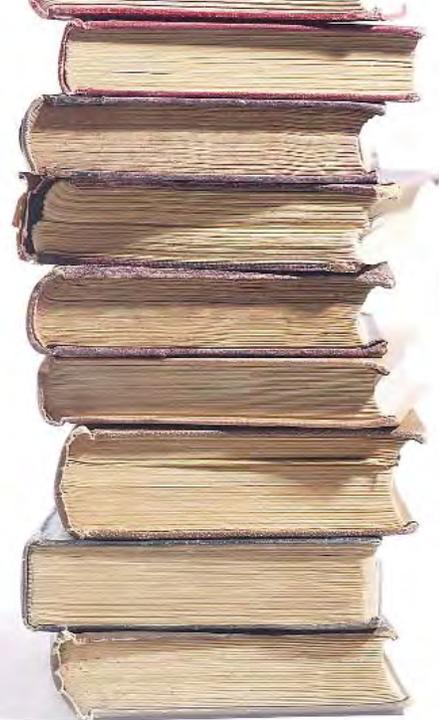
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## 11th Annual Fiction Writing Competition



The Publications Committee of the *Journal* is pleased to announce that it will sponsor the 11th Annual Fiction Writing Competition in accordance with the rules set forth below. The purposes of the competition are to enhance interest in the *Journal*, to encourage writing excellence by members of the bar, and to provide an innovative vehicle for the illustration of the life and work of lawyers. If you have any questions about the contest, please contact Jennifer Duncan, Director of Communications, North Carolina State Bar, 6568 Towles Rd., Wilmington, NC, 28409; ncbar@bellsouth.net; 910.397-0353.

### Rules for Annual Fiction Writing Competition

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

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

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

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

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

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

6. **All submissions must be received in proper form prior to the close of business on May 30, 2014.** Submissions received after that date and time will not be considered. Please direct all questions and submissions to: Fiction Writing Competition, Jennifer Duncan, 6568 Towles Rd., Wilmington, NC, 28409, ncbar@bellsouth.net.

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

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

**Deadline is May 30, 2014**

# The State Bar in the Courts

BY RONALD G. BAKER SR.

**B**efore becoming chair of the Grievance Committee some years ago and an officer of the State Bar a couple of years ago, I did not realize: (1) how often I would be a named party in lawsuits against the State Bar and (2) the large amount of time and resources that are expended by the officers and the Office of Counsel dealing with litigation. We get sued by complainants who are unhappy when their grievances do not result in discipline for the lawyer. We get sued by lawyers who are unhappy that a grievance against them resulted in discipline. Of more import, we bring suits to try to halt the unauthorized practice of law and, of late, have been sued by entities such as LegalZoom seeking to stop the State Bar from seeking to enjoin what the council feels to be the unauthorized practice of law. I thought it might of interest to the membership of the State Bar to peruse a summary of the lawsuits in which the State Bar is involved.

*The North Carolina Dental Board v. The Federal Trade Commission*—One of the most important pieces of litigation that the State Bar is involved in at this point is one in which it is not even a party. That is *The North Carolina Dental Board v. The Federal Trade Commission*. The case is currently before the United State Supreme Court on a petition for *certiorari*. The State Bar is not in the habit of inserting itself into others' disputes. In this particular case, however, the ruling by the Fourth Circuit Court of Appeals has the potential to significantly impact the way the State Bar does business and, theoretically at least, could expose State Bar counselors to Sherman Act antitrust liability. The matter arose out of the Dental



Board's attempt to halt teeth whitening by persons other than licensed dentists. Teeth whitening certainly seemed to be something that fell within the statutory definition of the practice of dentistry. The FTC began proceedings against the Dental Board and ultimately ruled that the Dental Board's actions were anti-competitive and violated the Sherman Act. The Dental Board appealed to the Fourth Circuit. The Fourth Circuit held that since the Dental Board was largely made up of dentists elected by the other dentists in the state, and since it was not supervised by other arms of the state government, it was not entitled to state action immunity, thus subjecting the board members to potential personal antitrust liability. That ruling is a matter of interest to the State Bar Council, as much of the language would seem to apply to the way it operates. Although there are differences between the way the two boards operate, the similarities create great concern. No counselor or officer wants to risk antitrust liability every time the State Bar sends a cease and desist letter to someone engaging in the unauthorized practice of law or the Grievance Committee disciplines a lawyer. As a result, the State Bar retained antitrust counsel and filed an amicus brief supporting the Dental Board's petition for rehearing, and, upon the denial of that, an amicus brief supporting the Dental Board's petition for *certiorari*. Stay tuned for further developments.

*LegalZoom.com, Inc. v. North Carolina State Bar and North Carolina State Bar v. Lienguard (Business Court)*—LegalZoom, a national online document preparation service, commenced this action against the State Bar in September 2011. By way of background, the Authorized Practice Committee sent LegalZoom a "cease and desist" letter

advising it to cease engaging in the unauthorized practice of law in North Carolina. The State Bar's Rules, approved by the Supreme Court, specifically provide for such letters. In 2010, LegalZoom filed an application to register a purported prepaid legal service plan. The Authorized Practice Committee did not register the proposed plan because in its collective opinion the plan failed to meet the definition of a prepaid legal service plan. The committee sent LegalZoom written notice of its decision and requested LegalZoom to address the issues that were of concern to the committee. Nothing further was received from LegalZoom and the committee took no further action. LegalZoom then filed suit wherein it alleges that the State Bar is violating the anti-monopoly and equal protection clauses of the North Carolina constitution, and seeks declaratory and injunctive relief. The matter was transferred to the business court at LegalZoom's request, and the parties await rulings on their cross-motions for judgment on the pleadings and on LegalZoom's motion for jury trial, which was not made in the complaint, but only after motions were filed by the State Bar. The State Bar is represented by the Attorney General's Office.

With respect to the Lienguard case, at its October 2010 meeting the Executive Committee of the State Bar authorized the Office of Counsel to seek an injunction against the unauthorized practice of law by Lienguard, Inc. Lienguard is an Illinois corporation that offers to prepare and file materialmen's liens in any jurisdiction. Suit was filed after Lienguard refused to cease its activities in North Carolina. After the suit was underway and Lienguard had filed answer, LegalZoom's local counsel entered an appearance for Lienguard and filed various motions, including a motion to assert a counterclaim containing the same claims made in the LegalZoom case. The matter was transferred to the business court and its status currently is the same as the LegalZoom case. The Attorney General's Office is han-

dling the defense of this matter as well.

*State of North Carolina ex rel Roy Cooper and North Carolina State Bar v. Swift Rock Financial, Inc., d/b/a World Law Debt, aka/la World Law Group; Orion Processing, LLC, d/b/a World Law Processing; and Derrin Scott.* (Wake County Superior Court)—In October 2012 the Office of Counsel was authorized to bring an action as co-counsel with the Consumer Protection Division of the North Carolina Department of Justice to obtain injunctive relief against a number of people and entities operating under the name “World Law Group” (WLG). The WLG people and entities operate a debt relief business out of Texas that drafts and provides pleadings for debtors to file *pro se*. The complaint was filed in Wake County Superior Court in May 2013. The court issued a preliminary injunction in June. The Office of Counsel represents the State Bar.

*World Law South, Inc. v. North Carolina State Bar (Business Court)*—World Law South, Inc. (WLS) was incorporated on August 6, 2013, by the lawyer who represents LegalZoom and Lianguard and some of the defendants in the World Law Group case. WLS filed this action on August 19, 2013, 13 days after it came into existence. WLS alleges that in May 2012 the State Bar sent a cease and desist letter to WLG; that on May 22, 2013, the State Bar and the Attorney General filed the WLG case against parties other than WLS; that WLS is “related to” WLG and conducts its business “identically” to WLG; that the State Bar’s cease and desist letter to WLG was wrongful and somehow harms WLS; and that the court should enter an order granting relief both to WLS and to WLG, which is not a plaintiff in the action. The case was transferred to the business court. The State Bar’s motion to dismiss is pending. The court has not scheduled oral argument. The attorney general represents the State Bar.

*LegalZoom, Inc. v. North Carolina State Bar (Wake County Superior Court)*—On October 11, 2013, LegalZoom filed this lawsuit alleging that the State Bar did not comply with NC Gen. Stat. Chapter 132 in responding to its fifth public records request. LegalZoom alleged that the State Bar produced too few and too many documents in response to its second, third, and fourth public records requests. It sought an order compelling the State Bar to respond differently and an award of attorney fees. LegalZoom

scheduled an “emergency” hearing on October 16, 2013, at which it did not present any evidence to support its claims. On December 27, 2013, the court ordered the parties to mediation. The State Bar is preparing an objection and motion to amend that order. The attorney general represents the State Bar.

*World Law South, Inc. v. North Carolina State Bar (Wake County Superior Court)*—On October 14, 2013, WLS filed a complaint alleging that the State Bar did not comply with NC Gen. Stat. Chapter 132 because it allegedly did not respond “as promptly as possible” to a public records request served on the State Bar on September 18, 2013, by the lawyer who represents LegalZoom and some of the defendants in the World Law Group case. WLS has not served a public records request on the State Bar. WLS scheduled an “emergency” hearing on October 16, 2013, at which it did not present any evidence to support its claims and at which it conceded that this lawsuit was filed “preemptively.” On December 27, 2013, the court ordered the parties to mediation. The State Bar is preparing an objection and motion to amend that order. The attorney general represents the State Bar.

*Christopher Livingston v. Carolin Bakewell, Margaret Cloutier, Carmen Bannon, and the North Carolina State Bar (Wake County Superior Court)*—Carolin Bakewell is a former State Bar employee. Margaret Cloutier and Carmen Bannon are current State Bar employees. Christopher Livingston was admonished by the DHC in 2008 for practicing law in other jurisdictions in which he was not admitted, and for making disrespectful accusations about a federal district court judge. In January 2011 he filed this lawsuit seeking damages, injunctive relief, and attorney fees. The pleading asserts various theories of recovery, but does not allege facts that would give rise to liability. The court allowed the defendants’ motion to dismiss in December 2012. Livingston gave notice of appeal. The court of appeals scheduled the case for decision without oral argument. The Office of Counsel represents the defendants.

*Alan Pitts et al v. HUD et al.* (US District Court, EDNC)—Counsel learned that State Bar employee Jennifer Porter, State Bar President Ronald Baker, and “responsible members of the North Carolina Bar Association” were among numerous named

defendants in a *pro se* lawsuit filed by Pitts and his wife. A summons was issued for Porter, but was never served. No summons was issued for Baker or “responsible members of the North Carolina Bar Association.” The complaint alleges that in 1997 the plaintiffs did not receive title to all of the property they thought they were buying at a foreclosure sale due to a mistake in the property description. The complaint does not allege that Porter, Baker, or the State Bar played any role in these events. The complaint appears to confuse the Bar Association with the State Bar. The court allowed the served defendants’ motion to dismiss. Pitts gave notice of appeal. The Office of Counsel represents the State Bar defendants, but has made no appearance because none of those it represents has been served with process.

*Loushanda Myers v. Krista Bennett, Fern Gunn Simeon, John Silverstein, and unnamed “unknown agents of the North Carolina State Bar” et al.* (US District Court, EDNC)—Krista Bennett and Fern Gunn Simeon are State Bar employees. John Silverstein is a State Bar councilor. Myers asserts that the State Bar defendants, the North Carolina court system, and a multitude of Johnston County government officials violated her rights. She does not describe this alleged violation with particularity, but it appears to arise out of Ms. Myers’ arrest by Johnston County law enforcement officials. The court allowed the State Bar defendants’ motions to strike and to dismiss. Myers appealed to the Fourth Circuit. The Fourth Circuit dismissed her appeal as interlocutory. The Office of Counsel represents the State Bar defendants. This is pending in the sense that until there is final order from which she can appeal, and she either does not appeal timely or appeals timely and loses the appeal, we cannot call it a closed file.

*Loushanda Myers v. “North Carolina Bar” et al.* (NC Industrial Commission)—Myers asserts this action under the State Tort Claims Act seeking damages she allegedly suffered because the “North Carolina Bar” dismissed a grievance against her former lawyer. She also joined a number of Johnston County officials. The claim arises out of her arrest by Johnston County law enforcement officers. The Attorney General’s Office represents the State Bar.

CONTINUED ON PAGE 9

# Ethics Inquiry

BY L. THOMAS LUNSFORD II

*The following correspondence was obtained by the media pursuant to a request for public records. It is being published in the State Bar Journal in the interest of full disclosure.*

Dear Alice,

This is directed to you in your capacity as the State Bar's ethics counsel regarding a matter of personal and professional importance to me. Please consider this as a request for a confidential ethics advisory opinion under the provisions of Rule .0102(c). To insure that my status as your boss doesn't affect the exercise of your independent professional judgment, I am inquiring anonymously and postponing your annual review. Oh, and as you consider this inquiry, please bear in mind that the council pays me far less than I could make in private practice. I have to make up the difference in tips.

Tom

To whom it may concern: I am the executive director of a state agency that is responsible for regulating a profession that is integral to the administration of justice. Over the past few years, a dear friend and former president of the organization has been offering me tickets to UNC basketball games that he can't persuade anyone else to attend with him. Earlier this year as his beneficiary I saw the Heels lose big to the Little Sisters of the Poor (LSP), and I'm afraid he's going to soon offer me a ticket to the Duke game. Normally I'd accept such a gratuity without hesitation, because the Tar Heels are usually good and because I'm underpaid and feel entitled. But this year I have misgivings. The team is wildly inconsistent and I think my friend may be trying to get me to use my influence to wangle him an appointment to the Ethics Committee as an advisory mem-



ber. Our legal counsel says that I should return the ticket to the LSP game and try to forget that I was ever there. She says I should refuse the Duke ticket and try to imagine that Duke doesn't even exist. I, of course, want to do the right thing, within reason. Have I acted unethically? Has my benefactor? Can I accept another ticket? Would your answer be different if P.J. Hairston were eligible to play?

Ethically yours,  
Anonymous

Dear Tom Anonymous,

This will acknowledge receipt of your request for an ethics advisory under the terms of Rule .0102(c). For the reasons enumerated below, I must advise you that the State Bar cannot provide the advice and accommodation you desire.

1. In the first place, the rule specified does not contemplate correspondence with an anonymous individual. It clearly presumes that any inquiry warranting a response will be attributable and attributed to an identified attorney. In that regard, I would point out that subsection (a) of the same rule does admit the possibility of providing advice to a person who is not a member of the Bar if "special circumstances" exist. Although you are, and have been for some time, relatively innocent of the law, our records plainly disclose that you are a licensed attorney. That being the case, I suggest that you "man up" and sign your own correspondence.

2. We cannot treat your inquiry as confidential. Confidentiality is available to inquiring attorneys, but only in regard to requests for "informal ethics advisories" under the Rule .0102(b). Since you sought an opinion under Rule .0102(c), I am compelled to send your letter and my response directly to the local newspaper, which has recently filed a public records request demanding copies of

all embarrassing correspondence received or generated by the State Bar since the beginning of time.

3. Even if you had requested an opinion under the right provision of the rule, I could not have given you an ethics advisory. Remarkably, your short letter offends at least three requirements common to both .0102(b) and (c). In the first place, an ethics advisory may only be issued in regard to the inquiring lawyer's own conduct. Since you have quite plainly called into question the actions and motives of another member of the Bar, an ethics advisory would not be appropriate. Although the person in question has probably erred only in being kind to you, he is a stranger to this correspondence and it wouldn't be fair for me to opine without his input.

4. Please note also that ethics advisories are available only in regard to "prospective" conduct. Since you accepted a ticket to a game that has already been played, your actions are most properly viewed as "past" conduct. As such, your behavior is cognizable not so much by the State Bar's Ethics Committee as by its Grievance Committee. By copy of this correspondence, I am therefore advising our general counsel, Katherine Jean, of your activities, with respect to which I am, of course, unable to comment officially.

5. It should also be noted that ethics advisories are only issued where the underlying "inquiry is routine, the responsive advice is readily ascertainable from the Revised Rules of Professional Conduct and formal ethics opinions, or the inquiry requires urgent action to protect some legal right, privilege, or interest." Your inquiry is definitely not routine. It is, rather, inane and unprecedented. Moreover, any answer that might be fairly characterized as "responsive" is probably not ascertainable from the Rules of Professional Conduct. Indeed, it seems to me that your activities, occurring as they did outside the

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## State Bar Outlook (cont.)

context of any existing attorney-client relationship, were most likely criminal and almost certainly violated several unwritten NCAA rules. Under the circumstances, I think the best you can hope for is an interminable investigation and an ultimate finding that the State Bar, under your leadership, is suffering from a serious lack of “institutional control.”

6. My unofficial advice is that you resign immediately in favor of the current assistant executive director. She teaches Professional Responsibility at Duke Law School, is cute, and can probably get a ticket to the big game without promising anybody a place on the Ethics Committee.

Even More Ethically Yours,  
Alice Neece Mine

Assistant Executive Director

P.S. Everything would be different if P.J. Hairston were playing. ■

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

## President's Message (cont.)

*Jason and McKeisha Vicks v. North Carolina State Bar (NC Office of Administrative Hearings)*—Plaintiffs contend they were harmed by dismissal of two grievances they filed against their former lawyer. The case is scheduled for hearing in Charlotte in April. The State Bar will file motions to dismiss. The State Bar is represented by the attorney general.

*North Carolina State Bar v. Grover and Patricia Jones (Wake County Superior Court)*—In July 2012 the office filed a civil action to enjoin the unauthorized practice of law by Grover and Patricia Jones, who operate a West Virginia business that claims to assist inmates on *habeas corpus* petitions and other legal matters. The office obtained a permanent injunction in October 2013. The defendants gave notice of appeal, but have done nothing further to perfect their appeal. Counsel will move to dismiss the appeal.

In addition to the above there are seven other matters on which the State Bar Counsel has authorized the Office of Counsel to file

suit to seek to enjoin the unauthorized practice of law. It should be obvious that the State Bar takes seriously its obligation to protect the public from harm resulting from attempts to practice law by those who are not properly trained to do so.

We are grateful for the skilled assistance of the attorneys in the Attorney General's Office in defending many of the suits filed against the State Bar. It allows our in-house attorneys to focus their efforts on investigating—and prosecuting where appropriate—lawyers who run afoul of the Rules of Professional Conduct, and persons and organizations who violate the provisions of Chapter 84 of the General Statutes. Perhaps the day will come when so much litigation is unnecessary. I doubt it, but one never knows. In the meanwhile our Office of Counsel is probably one of the busier trial practice law firms in this state. In addition to that, my name is immortalized in court records all over the state as a defendant. ■

*Ronald G Baker Sr. is a partner with the Kitty Hawk firm of Sharp, Michael, Graham & Baker LLP.*

# Facing Facebook

BY ROBERT L. BYMAN

In September 2012, Facebook posted that it had reached the one billion user mark—one in every seven persons on the planet, Facebook beamed, has a Facebook account. Well, actually, Facebook only knows how many accounts it has, not how



many persons. Anthony Weiner must have two accounts, one in his own name and one in the name of Carlos Danger. And with so many possible plays on names for Weiner and his friends (Really? Her name was really Sidney Leathers, even before she started her porn site?), it's a fair guess he has more than two accounts.

A billion, a schmillion, whatever—Facebook has a lot of users. Every one of them a potential gunshot to their own foot.

## Let Me Show You How Funny I Am

Take Toby Sutton, hired as a funeral science professor who, for reasons that must have seemed funny to him at the time, posted to Facebook “Toby Sutton hopes this teaching gig works out. Guess I shouldn't have cheated through mortuary school and faked people out.” Toby, you're a riot. Oh,

and Toby, you're fired. *Sutton v. Bailey*, 702 F.3d 444 (8th Cir. 2012).

Take Franklin Jeffries, embroiled in a visitation dispute, who thought he would express his thoughts in a music video he posted to his Facebook account with the catchy lyric, “Cause if I have to kill a judge, or a lawyer, or a woman I don't care. 'Cause this is my daughter we're talking about.” Oh, Franklin, what a kidder you are—hilarious! Oh, and you're guilty of transmitting a threat to injure a person in interstate commerce, 18

U.S.C. § 875(c). Go directly to jail. Do not pass go. *United States v. Jeffries*, 692 F.3d 473 (6th Cir. 2012).

Or take Chelsea Chaney. Chelsea, it seems, had her picture taken when she was a 17 year old high school senior, standing next to a life sized cardboard cut-out of Snoop Dogg (now Snoop Lion), as he proudly holds a can of 12% alcohol Blast. Chelsea herself is clad in an it'sy bitsy teeny weensy bikini that shows off her navel piercing and bling. Chelsea was proud enough of the picture that she posted it to her Facebook account.

Now, Facebook does not allow minors to make their accounts available to the entire public. The least restrictive privacy setting a minor can select is “friends plus friends of friends.” So that's how Chelsea “protected” her picture.

The typical old man who writes columns for the *National Law Journal* has 39 Facebook friends, so let's assume that a hip, attractive high school senior has at least 100 friends; and every one of her friends has 50

different friends. So Chelsea knew—or could easily have figured out—that she was sharing her Snoop Dogg, Blast, bling moment with 5,000 people, give or take.

And one of the people she shared with, who apparently was a friend of one of Chelsea's friends, happened to be an administrator at her high school who downloaded the photo for a seminar he was putting on for a couple hundred people as an example of "be careful what you post." He was trying to make the point that maybe, just maybe, Chelsea—and others like her—might not want pictures like these available online. Forever. It might be embarrassing.

### How Embarrassing

Exactly! Chelsea was outraged to have her embarrassing photo shared with 200 people. Her parents were outraged. Her lawyer was especially outraged. Chelsea filed suit against the school district, seeking \$2 million in damages for intentional infliction of emotional distress. *Chaney v. Fayette County Public School District*, Case No. 13-cv-00089, US District Court for the Northern District of Georgia.

Did I say Chelsea was outraged? What she actually said—on camera—was, "I was embarrassed. I was horrified." So embarrassed and horrified that she gave express permission to the news media to republish the same picture as she explained her horror. Whether permission was needed is a fair question, given that Chelsea had already posted the photo in a way that allowed 5,000 or so people to see it, copy it, download it, and transmit it, but she gave permission for the media to use the photo and, boy, did they ever. Google "Chelsea Chaney Facebook Lawsuit" and you will get about 70,000 hits, most of them with copies of the photo or videos that imbed the photo or links to the photo. *Fox News*, *USA Today*, *Huffington Post*, and *ABC News*, among many others, post the picture. The *ABA Journal* does not post it, but there is an easy link that makes the photo a finger press away.

I take Chelsea at her word that she was embarrassed to have the school district share the photo with 200 people in non-electronic form. But I am trying to sort out the right adjective to describe how she must now feel about her own re-publication to, well, pretty much the world, or at least to the two billion or so people who have access to the Internet.

Now, here's where it gets interesting. The

school district has filed a motion to dismiss, predictably opposed by Chelsea. But if I were her future self, I would think twice about wishing that her lawsuit survives the motion and goes to discovery. Maybe the Dogg photo was the only post ever that seemed like a good idea at the time, but not so much now. But every personal post Chelsea has ever made may become fair game in discovery.

### You May Try to Keep Facebook Postings Private; but Good Luck with That

Even if Chelsea had selected the highest possible level of Facebook privacy for her posts, post them she did. And if a litigant can demonstrate potential relevance, those posts become discoverable. In *Giacchetto v. Patchogue-Medford Union Free School Dist.*, 2013 US Dist. LEXIS 83341 (E.D.N.Y. 2013), the court ordered a dive into the plaintiff's privacy-protected Facebook account, noting that "in seeking emotional distress damages, Plaintiff has opened the door to discovery." The court cautioned that unfettered access would not be allowed, but anything related to alternate stress factors was clearly relevant. *See also Moore v. Miller*, 2013 US Dist. LEXIS 79568 (D. Colo. 2013)(ordering disclosure of plaintiff's "entire Facebook activity" because it may be relevant to his claims of emotional distress and physical injury).

In Chelsea's case, an argument could be made that the defense is entitled to other possibly embarrassing photos as well as any message traffic that shows how Chelsea took it when a friend "liked" such a photo—was she really embarrassed by pictures like these, or proud? Of course, Chelsea's Facebook account is likely very different now than it was then. She likely has changed her privacy settings. She likely has taken down posts of other possibly compromising pictures and chats. But if so, she will have that whole spoliation thing to deal with. Have fun in discovery, Chelsea.

You can't make this stuff up. No, wait, yes you can. The admissibility of evidence found on the Internet and Facebook in particular presents unique authentication issues for the very reason that anyone can pretty much post anything they like. And friends or strangers can create total fictions. Fraudulent Facebook postings are so common that there is a term for it: status-tory

frape. Someone hacks your account, or you use a public terminal and forget to log out, or someone merely creates an account using your name. Ask Manti Te'o, the Notre Dame linebacker who fell in love with a woman who turned out not to be a woman but a man, or Diane O'Meara, the actual woman whose photo was used without her knowledge to create a false Facebook account to sell the hoax to Manti.

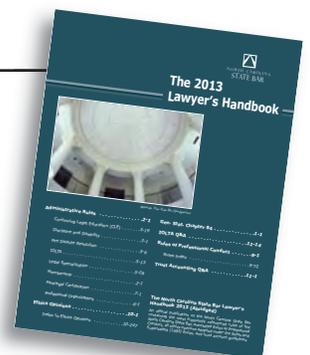
But put aside fraud and pranks. Consider what we voluntarily do to ourselves. Chelsea merely embarrassed herself, or so she says. Toby got fired, Franklin got jailed. And there are legions of similar stories. Dennis Morris had his parole revoked in part because he posted a picture of himself holding a firearm. *United States v. Morris*, 2013 US App. LEXIS 4510 (4th Cir. 2013); Sara Jaszczyszyn was fired when, while she was on disability leave, she posted pictures of herself reveling at a local beer festival. *Jaszczyszyn v. Advantage Health*, 504 Fed. Appx. 440 (6th Cir. 2012).

So here is my advice. Don't post anything to your Facebook account unless your mother has approved it first. Of course, that wouldn't have worked for Chelsea—her mother's friend took the picture. But it would probably work for the other billion of us. ■

*Robert Byman is treasurer and a member of the Executive Committee of the American College of Trial lawyers, and a partner at Chicago's Jenner & Block.*

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# Socrates is Alive and Well and Living in Cleveland

BY G. GRAY WILSON

Professor Kingsfield had it right in the 1973 cult classic movie “The Paper Chase” when he marched into the first-year contracts class at Harvard Law School and announced, “You come in here with a skull full of mush, but you



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will leave thinking like a lawyer.” Whatever shortcomings the standard law school curriculum may have, the overriding purpose of a legal education is to learn how to analyze a factual scenario through the lens of the law.

While most of us in the profession would agree that this discipline of legal reasoning can be honed by experience, few would dispute that it has to be taught and learned properly at the outset in order to stick. Sadly, some lawyers do not master the rudiments of legal reasoning even after three years of law school and a lifetime of practice. They may learn how to try a fender-bender adequately, to examine witnesses and present a respectable closing argument, thus amassing

a successful track record in a comfortable practice niche. But that may not be everyone’s idea of success. Uninformed or unstructured judgment is no better than cloistered virtue. As a former mentor of mine often said, all a real lawyer has to be able to do is think. The rest is just icing on the cake.

This in no way disparages the value of a trial skills or other practical internship course during law school, including a summer clerkship program with a public or private firm.

Thinking and doing are not mutually exclusive concepts, but the notion that one can master the art of legal reasoning that spans a professional lifetime in less than three years of training in an academic setting lacks an empirical database. One cannot look to ancient history when lawyers merely read the law attached to a venerable advocate for guidance in this regard, as the practice of law has changed markedly over the centuries. Nor do analogies drawn from the medical or other professions, which involve institutionalized apprenticeships, necessarily apply to the legal field. For better or worse, the study of law is a unique undertaking that only lawyers ultimately come to understand and appreciate.

It is naïve to expect that somehow altering the law school curriculum will magically transform more modern-day litigators into trial lawyers. Knowing how to litigate a case

through pretrial pleadings, discovery, and motions is not the same as knowing how to try a case before a jury. Yet law schools are neither to blame for this difference, nor do they offer a remedy. While law school professors are often excellent at teaching the fundamentals of legal analysis, not many of them boast expertise at handling jury trials, much less the experience of several decades in court handling all facets of a busy case load. Adjunct professors from the community can certainly contribute in this regard, but they also likely have a busy trial practice that renders their service part-time at best. There is simply no easy way to transform law students into wily courtroom gladiators, especially when they have yet to master the basic concepts of logical deduction where facts and law collide.

The medical profession offers no template for lawyers. With its internship and residency programs, following rotation among various clinical services during the latter years of medical school, the application of medical science requires the observation and performance of testing and procedures on the human body, with a wide assortment of software, hardware, equipment, and facilities. It is also important to learn how to think like a doctor—an inductive process in which the “hands on” application is literal. This is not to suggest that medical science is a field exalted over the practice of law; it just involves different tools for problem solving. But the practice of law is much more than just pushing paper. To pick a crude example, there are a number of online legal services—permitted in some states—that offer virtual legal representation with a host of forms and algorithms to guide the user through the legal maze to the formation of a will, deed, divorce complaint, whatever. People who employ this type of internet service avoid the higher cost of legal representation. They can also get into trouble quickly.

Given the phenomenon of the vanishing jury trial, along with the increasing complexity of civil litigation, a trial lawyer cannot be trained the old-fashioned way, when there were 15-20 relatively simple jury trials per year, and sometimes two or more jury trials (drawn from the same jury pool no less) within the same week or two-week session of court. But a number of other innovative resources are being tested in the 21st century. Practical skills boot camp courses, legal job corps, and even law school-sponsored non-profit law firms for jobless graduates are



Leonard T. Jernigan, Jr., attorney and adjunct professor of law at NCCU School of Law, is pleased to announce that his 2013-14 supplement to Jernigan’s *North Carolina Workers’ Compensation: Law and Practice* (4th Edition) is now available from West Publishing (1-800-344-5009).

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underway across the country. The University of Maryland offers a trial skills program taught by fellows of the American College of Trial Lawyers, with a seven-week litigation training program in seven categories: jury selection, discovery, questioning techniques, expert witnesses, ADR, evidence, and closing argument. These efforts are matched by other state and local bar programs fashioned to address the crying need for the inculcation and development of genuine trial skills in the courtroom, namely, the art of persuasion. The consummate advocate hones his courtroom acumen over the course of a professional career, taking decades to reach peak potential, but only with the solid foundation provided by a sound legal education in an academic setting where Socrates is alive and well and living in Cleveland.

All drama aside, the Socratic or casebook method of instruction is not nearly as draconian as Kingsfield would have us believe. Poor Socrates developed this dialectical method of discourse in response to the false teachings of the Sophists, who were more interested in scoring points in an argument than getting to the truth of the matter. While zealous advoca-

cy may not always be synonymous with truth-seeking, the paramount function of the judicial system is to get to the correct legal result. So who do you really want by your side in court? Alcibiades (blowhard) or Socrates (master of critical thinking)? The former may be able to bluff his way past a single issue and a mediocre bench, but the latter will consistently reason his way to the best solution and correct result for the client. Bad arguments, bad policy, and bad law form closed minds that eschew core values for experience. A good trial lawyer learns early on how to argue both sides of an issue, not by ignoring the dictates of conscience, but rather by focusing on rational decision-making that flows from keeping an open mind. Unfortunately, this is not a skill that can be picked up off the street. It requires years of concentrated tutelage and study in a rigorous, disciplined classroom setting with exposure to a variety of areas of the law. That cloistered environment is a law school, and just like a Porsche, there is no substitute. ■

*G. Gray Wilson is a senior partner with the Wilson Helms & Cartledge, LLP, and a State Bar councilor representing Judicial District 21.*

# An Interview with Joe Webster

BY JOHN E. GEHRING

*“He hath shewed thee, O man, what is good; and what doth the Lord require of thee, but to do justly, and to love mercy and to walk humbly with thy God?”*

—Micah 6:8

Joe L. Webster and I have been friends for most of our adult lives, having met early in our careers as “country lawyers”; one from Madison and one from Walnut Cove. I started my practice in Walnut Cove as a “not from around here” young lawyer carrying a strange last name, wearing wire-rimmed glasses and a bow tie—something then unheard of in Stokes County. Joe grew up in Madison, graduated Phi Beta Kappa from Howard University, and was one of the first African-American lawyers in Rockingham County, and the very first in his hometown of Madison—something also unheard of in our area. Needless to say, we were not welcomed by some of the unenlightened segments of our communities.

Joe left Madison pursuing an uncertain horizon and I remained in Walnut Cove as a country lawyer. The certainty of his horizon soon became crystal clear as milestone after milestone was reached. A few of these milestones were: as a sole practitioner, receiving the *Pro Bono* Lawyer of the Year Award by the North Carolina Bar Association; serving as chair of the North Carolina Board of Law Examiners; being appointed as a North Carolina Administrative Law judge; and now serving as a federal magistrate judge for the Middle District of North Carolina. All of these milestones were reached by his calm purpose to help change things from the inside, fully realizing that his goal was service to mankind.

I cannot help but think that the above-quoted verse from the *Book of Micah* epitomizes the life of Joe L. Webster. And thus, my interview with him.



John Gehring (JG): Your journey from country lawyer to magistrate judge has been long and successful. Please tell me about your childhood in Rockingham County and the influences that guided you.

Judge Webster: While I did not know it at the time, growing up in rural Rockingham County, NC, was the perfect place for me. There were plenty of role models there, models of hard work and persevering spirits, and while my father only went to the 4th grade and my mother the 10th, like so many of their peers, they overcame the lack of education and other obstacles with hard work and faith in God. These two lessons alone have carried me farther than I ever dreamed was possible. My parents, and many uncles, aunts, and teachers in my formative years lived exemplary lives and encouraged me to become all that I could become.

Looking back on my life as a youth brings back mostly fond memories. I have fond memories of my five brothers and two sisters and many cousins growing up in the same community. I was the fourth born child to my parents. My parents had five boys before having their first girl. There were many happy times around the kitchen table. Early in my youth I recall having to stand up at the table to eat because there were not enough chairs. During the first 12 years of my life, my family didn't have an indoor bathroom or running water. We never complained about that because we didn't know anyone else that had such luxuries. Shortly after I turned 12, my parents bought a farm, and we had our first indoor bathroom. With indoor plumbing came hard work in the scorching hot sun of rural Rockingham



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County. Occasionally I had allergic reactions to chemicals on or in the tobacco. As I left the field too sick to continue, over 40 years later I can still hear my father's voice, "Boy, you better go on to school." He saw that I was not cut out to be a farmer.

Also when I was 12 years old, I remember my sixth grade teacher, Mrs. Searcy, at the all black Charles R. Drew High School (grades 1-12) passing out to each student papers that I now know to have been consent documents which if signed, would allow the students to attend "the white school" as we called it then, under "freedom of choice." To this day I still do not know why I was one of the students who chose to help integrate the Madison-Mayodan Schools. Other than me telling my parents that is what I was going to do, I don't remember any advice my parents gave me. Looking back, I believe that they trusted my judgment, even as a 12-year-old child. The first day of school in my first integrated environment was uneventful, although I remember well waiting anxiously at the bus stop and taking my first steps onto the bus. It seems I recall that all eyes were on me and every step

I made until I found an empty seat. Only once under freedom of choice did I experience any intimidation or violence, and I could not know then whether a few remarks made toward me as I was alone in the school's bathroom were because of my race. Two years after my freedom of choice experience, mandatory integration took place in my school district. My greatest highlights of my high school years involved my being a starting guard on a basketball team that went 27-0 before losing our first game in the semi-finals of the 3A state tournament. I recall quitting the team once or twice during my junior year. I was not mature enough to handle being relegated to being a bench player, so I quit the team, but later rejoined. I have never been a quitter since then. This too helped me understand the importance of team play and perseverance, especially during adversity.

**JG:** Judge Frank Freeman of the old 17th Judicial Bar always let us know when we argued cases before him that there were both the letter of the law and the spirit of the law to be considered. We have had countless dis-

cussions about these concepts. Have your thoughts about these ideals changed as you have worked as a defense attorney and then *pro bono* advocate to law examiner, and then to your judicial positions? Can both of these visions of the law work side by side in the Federal District Court?

**Judge Webster:** It has been written that the letter of the law versus the spirit of the law is an idiomatic antithesis, which suggests that in interpreting a law, there are two choices; one of interpreting the law literally, and the other focusing on the intent of the law. I do not believe that the letter and spirit of the law have to be viewed only as the antithesis or polar opposites of one another, although these concepts have been viewed as opposites for 2,000 years. Even some of Shakespeare's plays incorporated these two concepts. I believe both of these views of the law not only can, but must work side-by-side in the federal district court and other courts. During my career as advocate and judge, my ideas about the concepts of letter and spirit of the law have not changed, even though my role as advocate and impartial

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judge are different. Late last year I took an oath that I would “administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as a United States magistrate judge under the Constitution and laws of the United States...” My oath requires me to administer justice in a manner that all will understand and consider as being fair and just.

**JG:** At what point in your life were you called to the ministry, and when were you ordained? How has being a minister impacted your life? Your commitment to helping young people is an example of your faith in action. The humming of gospel hymns while at work may be another example. Will you be able to continue your work with young people while also serving as a magistrate judge?

**Judge Webster:** I was called into the ministry in the summer of 1998 and ordained in 2001. My ministry’s impact on me is incalculable at this time, yet I know that my life and that of my family has been impacted. Long before I accepted my ministry call, I sought very hard to avoid even the appearance of impropriety, an imperative thrust upon not only ministers, but lawyers as well. So in many ways, my life has not changed considerably. I have also subscribed to the view that “to whom much is given, much is required.” I do know that there is a constant pull on my life to do good, and that my life is not my own. I know that I must do all I can to help others. Yes, our youth and what they are experiencing right now stays on my mind. It seems that our youth today, especially our African-American males, are having more difficulty than perhaps my ancestors did, when in comparison they had so little in material things. For example, on April 3, 2013, I presided over initial appear-

ances and detention hearings in Greensboro. I conducted 14 hearings. All—except one—involved young, African-American males, most in their 20s or 30s, and many of the cases involved possession of firearms by felons and illegal drug offenses. Most were not employed or were underemployed. All were single and many had fathered children, yet had little or no means to support them. Most had not graduated from high school. As I sat there listening attentively, I could not help but wonder, how did we get here and what can be done about it? This is the one of the most critical problems facing America today.

I find it ironic that you ask about whether I can continue to reach out to our youth. If anything I believe the blessing of becoming a United States magistrate judge means that I must do even more to help our youth. On April 11, 2013, my chambers in Durham will begin a monthly dialogue with students coming to our court and chambers from the middle schools of Durham. I have named it “CourtCares.” I sense that society—and especially the populations that the courts serve most—does not believe that the courts or anyone else cares about them, which is far from the case. Maybe by telling them my story and the story of other guest speakers who have fallen down and found the strength to rise up again and become successful, the students might be able to overcome the obstacles facing them. We also plan to conduct a brief mock criminal trial with myself and my law clerks and staff as judge, prosecutor, and defense counsel. So, yes, I plan to continue my outreach to our youth, and pray that at least some will be affected by what we say and do.

**JG:** Congratulations on your becoming a United States magistrate judge. What are your duties and what types of cases do you hear? Is your court the place where Blue Ridge Parkway speeding tickets are heard? Have you enjoyed your new work thus far?

**Judge Webster:** Thank you for your congratulations and well wishes. I have many duties as a United States magistrate judge. In criminal cases, I preside at initial appearances and detention hearings. Those arrested for a federal crime must be brought before a magistrate without unnecessary delay. The federal “detention hearing” is analogous to the state court bond hearing. Risk of flight and danger to the community are the two main issues in each detention hearing.

Magistrate judges also issue search and arrest warrants pursuant to motions filed by US officials including members of the US Attorney’s Office. And yes, getting a speeding ticket or committing other “petty offenses” in national parks, in the VA Hospital, or on other federally owned land could land you in front of a magistrate judge. However, the greatest majority of my time is spent on civil court filings. The Article III judges refer civil cases to magistrate judges to research and write memorandum opinions and recommendations. Also, if all parties consent, magistrate judges can handle all aspects of the civil case assigned to them, including presiding in trial of the case. And recently I fulfilled the duty of presiding at a naturalization service and administered the oath to 61 of my fellow Americans from 36 foreign countries. It was a joyous occasion and I must say that tears welled up in my eyes as the preliminary video was shown. All of my fellow citizens came up to take their picture with me, and one elderly lady from the Congo on the continent of Africa told me it took her 14 years to become a citizen. I’m entering my fifth month of work as a magistrate judge and I absolutely love it! I know that I still have much to learn and hopefully much to give.

**JG:** Do you have any further comments for the lawyers of North Carolina?

**Judge Webster:** It is my opinion that members of our honored profession have not been good stewards of our profession. Unless we figure out a way to make our services more accessible to the poor, we will lose the battle to save our profession. This burden is on our backs and it is ours alone to bear. Clearly many have done their part, but most have not. We will either continue to look the other way and accept the unlevelled playing field presented by *pro se* litigants, or as a profession make some critical decisions about doing all we can to promote the fairest system of justice possible, and to do equal right to the poor and to the rich as my own judicial oath dictates. This dilemma is the number one problem facing America’s system of justice today. I am confident that our profession has among its ranks scores of thousands of men and women of good will and knowledge who will undertake to solve this critical problem. ■

*Judge Webster is a 1979 graduate of the Howard University School of Law.*

# The State Bar's Art Collection

BY MAX HALPEREN

Every North Carolina lawyer who reads this is, of course, aware that the North Carolina State Bar acts as watchdog over the state's attorneys, more than 26,500 from the mountains to the coast. But many may not be aware that it also oversees an astonishing collection of North Carolina art, with the work of some of the state's major artists spread over the building's three floors—paintings, wall hangings, ceramics, prints, and photographs that take us from Nag's Head to the Blue Ridge.

The collection also takes us beyond the state, for more than one of the artists has an international reputation, their work coveted by foreign museums and collectors. Many are teachers who put their imprint on generations of young aspirants.

With the likes of Joe Cox, George Bireline, Claude Howell, Herb Jackson, Romare Bearden, Maud Gatewood, Tom



Top right: Joe Cox, *Cityscape*. Below: Marvin Saltzman, *Taride du Paris*.



Grubb, Thomas Sayre, Marvin Saltzman, Clarence Morgan, and Minnie Evans spotted around the building, the Bar has a growing collection, one as varied as the state's landscape and population.

An inside wall on the second floor holds two very different paintings—Joe Cox's semi-cubist "Cityscape" and Marvin Saltzman's "glyph"-covered "Taride du Paris"—which suggest the variety of approaches lying within the gathering we call North Carolina art.

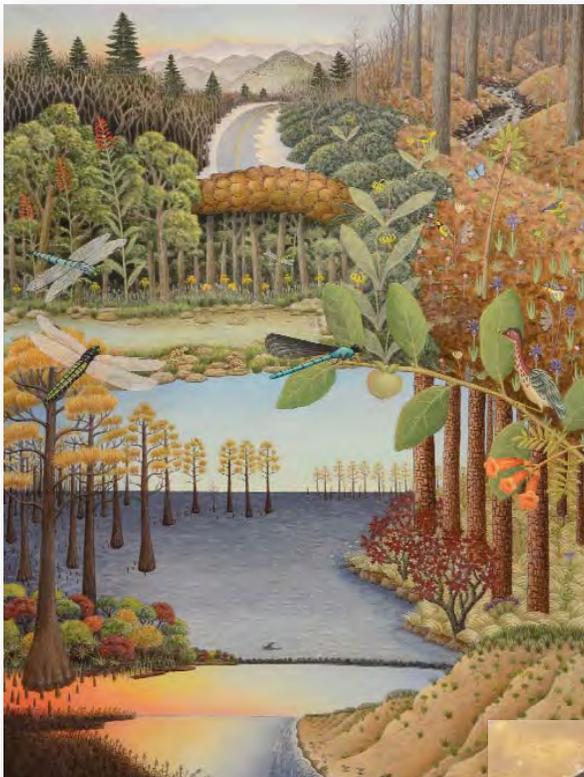
Like every other significant artist in the collection, both Cox and Saltzman transported themselves through any number of styles and forms in the course of their careers. Every artwork in the State Bar is a snapshot of one moment

in the artist's career.

Inevitably and fruitfully, a number of works at the Bar are landscapes, but none like any other: we have Robert Johnson's bright panorama cascading from the mountains to the sea, Maud Gatewood's near-conceptual river scene, Noyes Capehart's four-fold effort to paint the same scene and get it right, Jane Filer's magical houses and gardens, Sarah Powers' minimalist images of her world, Nancy Tuttle May's explosive yellows, Jim Henry's layer on layer of paint, and Louis Orr's masterful etchings.

Thoroughly removed in style is Tom Grubb's "North Pole Voyager Expedition," one of the "celestial star charts" he associates with his time as a crew member and then captain of commercial fishing boats in the North Atlantic.

As is true of almost every other painting in the collection, Jane Filer's exotic landscapes are unmistakably hers. The acrylic at the State Bar, "Uncommon Garden," may not be as complex as some of her others, but with its palette, oddly curving rooflines, unlikely windows, oversized florals, and miniature people,



Above: Robert Johnson, *Mountain to the Sea*.  
Right: Minnie Evans, *Untitled*.

it removes itself well beyond the commonplace to a near fairytale ambience.

The three Louis Orr etchings in the Bar are reminders of the enormous influence wielded by the near-legendary Robert Lee Humber, who almost single-handedly saw to the creation of the North Carolina Museum of Art, and who, when he was a state senator, helped create the community college system. In Paris, Humber met the American printmaker, born in Hartford, Connecticut, but with an established reputation throughout Europe. Orr, persuaded to return to these shores, created the 50 now-famous etchings of the state's historical sites, landscapes, buildings, and plantations. Of the three at the State Bar, the most impressive as a print is "Lyman House, St. Augustine College" with its solid full-face structure between Orr's typically feathered trees.

To all this, the Bar has added another cityscape—Rachel Herrick's mixed media "Fayetteville St.," staring up Raleigh's main stem to the state capitol—and another rural scene—Richard Fennell's "Wagner Farm," whose bright fall colors almost spill from its frame.

A large mural-sized work by Thomas Sayre

and three small felt pieces by Sharon Parker, both of Raleigh, are not quite landscapes, but they suggest the existence of great forested regions. Sayre has created huge sculptures—many earth-colored—that seem to emerge from the soil. His "Wicasset Trees" fills an entire white-painted wall; tree trunks of paint, carbon, and pigments are bare and leafless except for thin hair-like strands emerging from the heavily scored trees. Parker's felts are often beautifully-designed abstractions, but here, in three seemingly windswept felts, black branches stream across blue skies and past white trunks.

landscapes for over 30 years.

A long corridor on the first floor houses photographs that are both panoramas and close-ups of the African wild. The images take us across savannahs populated by animal herds and into astonishingly intimate moments among African carnivores. They were taken by John McMillan, past-president of the State Bar, while on safari.

Among the abstractions at the Bar is one of Herb Jackson's famous "Veronica's Veils," its canvas covered by layer upon layer of acrylic—cut, slashed, abraded, palette-knifed, fingernail-scratched—hiding, revealing, or hinting at forms beneath. A retired art professor, Jackson saw to the growth of the Davidson College art department from a tiny space to the Belk Visual Art Center.

Relatively early in his career, working in New York City, George Bireline moved through a prosperous period of color-field painting before settling in Raleigh to teach at NC State University and creating the massive and manifold production that underwrote his spreading reputation. In "Fire on the Moon" he returned to the realm of the color-field, though far beyond his earlier approaches.

Clarence Morgan's three bright abstract "vitrographs" are among the most colorful works in the collection. As their name implies, vitrographs employ glass plates that can withstand the pressure of a press. Developed by Harvey Littleton at the University of Wisconsin, the technique was brought to Spruce Pine, where Morgan and others encountered it. Thin circles cut through the vitrographs, seeming to collect areas of bright color as they move. Born, raised, and educated in Pennsylvania, Morgan came south to teach art at East Carolina University (from 1978 to 1992).

The collection has only one outsider artist, but that is Minnie Evans, among the most famous self-taught visionary artists in the country. Much sought after, her work is to be found not only in folk art museums, but also in the Museum of Modern Art, the Whitney Museum, and the High Museum.

Several works go beyond land and buildings to the people of the south. Romare Bearden's primitivist lithograph "Conversation" suggests



The Bar has also added several interiors: a shimmering painting of a room at the Edenton Courthouse by Gayle Lowry, a carefully organized play on grays in "Dark Bowl as Interior" by Wayne McDowell, a delicate light gray on white in Paul Harcharik's "Parson's Table," and three photographs by Tim Buchman of Caswell County interiors designed and crafted by free black cabinet-maker Thomas Day (c. 1801-1861). Buchman has photographed buildings and

regions beyond what we see: a dark passenger train smokes on the horizon and a yellow telephone pole rises from a field, but neither the train nor the pole seem connected to anything or anybody. However, the two women leaning into each other clearly are connected to each other and their world. In prints, oils, collage, and watercolors, Bearden's bold, imaginative images of the Harlem Renaissance, the Deep South, and St. Martin in the Caribbean made him one of the most significant African-American artists of the century.

Ceramist Gayle Tustin is now the co-founder of an international non-profit art colony that meets every two years on Bald Head Island. In her own work she is best known as the maker of large ceramic wall sculptures like the Bar's three-piece ceramic mural, "We Are The People of North Carolina," crowded with young and old, a farm couple, a city professional, a laborer, and a wheelchair-bound retiree.

When Claude Howell graduated from a Wilmington high school in 1930, the town had not a single art gallery. When he died in 1997, Howell left behind an immense body of work, the satisfaction of having been part of an artistic renaissance in the state's coastal region, and a number of art students he helped shape in the art department

he created and chaired at what became UNCW. Though known largely as a painter of people and places along the coast, Howell was scarcely parochial; he spent a number of years in New York, mingled with major figures in the art scene, traveled frequently, and spent time at art colonies around the country. In "Mending Nets: Afternoon," most of the color is flat and unmodulated, and yet strong rhythms course through the work as a draped, curving net is held by three stolid figures.

The crafts collection at the State Bar has been carefully and lovingly chosen, though it has only begun to take note of the state's potters and other craftsmen and women. Ben Owen III represents the fertile crescent of potteries that runs from the coast to Sanford, and now includes a museum and pottery center. A large vitrine of colorful Owen jugs stands on the first floor, and another group is to be



Top: Claude Howell, *Mending Nets: Afternoon*.  
Left: Romare Bearden, *Conversation*.

found on the second. At this writing the Bar has also acquired a simply designed jar crafted by one of the greatest of North Carolina potters, Mark Hewitt. It joins a superbly shaped vessel by Daniel Johnston who, early in his career, was apprenticed to Hewitt.

Among other works in the Bar are Gary Beecham's coruscating "Persian Element" and "Cosmic Gate"—the first with two thick glass bowls inside one another; multicolored layers within each gleam through the glass. Wavelike striations course through Mark Peiser's cast glass bowl, "Topaz Arabesque." Four blown glass "bags" pile and lean against each other in a work by glass artists John Littleton and Kate Vogel.

As we climb the staircase from the first to the second floor of the Bar, we also climb through North Carolina history. Facing us is a large mural of legal documents, seals, and

courthouse facades that created and maintained the laws of the state. The work is by muralist Michael Brown, whose work appears throughout the US.

The new State Bar building had its grand opening on April 17, 2013. Its art collection, funded by contributions to the State Bar Foundation, is as magisterial as it is due in large part to the guidance of Rory Parnell, owner of The Mahler Fine Art, who has curated shows and directed art galleries for over 30 years. Parnell along with her former partner, Megg Rader, and associate, Shawn Brewster, began to examine possibilities a year prior to the building's opening, clambering among hard hats to take note of the best spaces to place art. Ultimate decisions were made by the Bar's art committee, consisting of Alice Mine, Nancy Black Norelli, and Glenn Dunn, with Leslie Silverstein as an ex-officio member. ■

*Max Halperen is an artist and art critic. A professor-emeritus at North Carolina State University, where he taught courses in contemporary art history and contemporary literature, he spoke frequently at local conferences and abroad. A specialist in the works of James Joyce, Ezra Pound, and William Butler Yeats, he has curated and juried art shows; written for national, regional, and local publications; and produced extended studies of North Carolina artists.*

# Expunction Projects: Second Chances Benefit Individuals and Our State

BY EVELYN PURSLEY

**T**hough it may involve a decades-old act or even an arrest with no conviction, having a criminal record is a daunting obstacle to job seekers and others. The magnitude of the problem in NC is underscored by the following statistics:

- 1.6 million of 9.5 million North Carolinians have criminal records.
- More than 90% of employers conduct criminal background checks.
- A job applicant with a criminal record is 50% less likely to receive a call back.
- More than 1,000 state and federal laws deny NC residents a wide range of privileges and rights, including public benefits, occupational licenses, and child custody, based on criminal record.

In a recent *Associated Press* article on expunctions, Daniel Bowes, an attorney with the Second Chance Initiative at the NC Justice Center, calls a criminal record “a scarlet letter that you can’t escape” due to the availability of electronic records and the fact that most employers and landlords run criminal background checks, which document every criminal incident. Often, these employers and landlords are denying worthy applicants based on long-ago convictions or even charges that were dismissed or disposed “not guilty.”

But thanks to the bipartisan work of NC General Assembly members, many of those records now are eligible to be expunged. First-time, nonviolent misdemeanors and low-level felony convictions committed as an

adult may be erased after 15 years with demonstrated good moral character and good behavior; first-time, nonviolent convictions and drug-related convictions occurring before ages 18 or 22, respectively, may be erased after shorter periods of good behavior; and some charges that did not result in conviction may also be expunged. Additionally, legislators took measures to protect the integrity of the expunction process by prohibiting employers and educational institutions from inquiring about expunged records. The legislation also requires state and local government agencies to affirmatively advise applicants that state law allows the applicant to not disclose any charge or conviction that has been expunged.

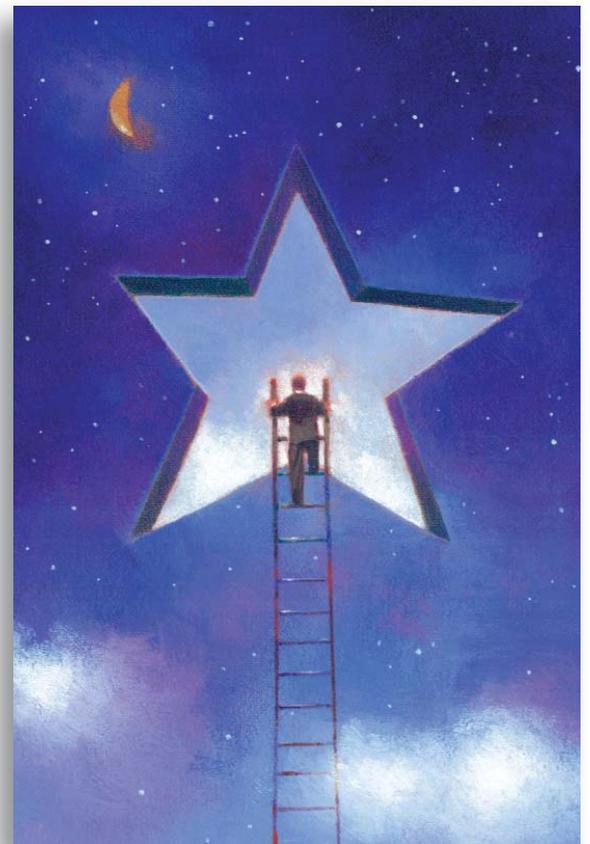
“The General Assembly has decided we’re better off letting these people improve their lives. Because if you can’t get a job, or you can’t get a meaningful job...there are a lot of societal ramifications to that,” as Garry Rice, in-house attorney at Duke Energy, explained in a *Charlotte Observer* article. “I think we’d all be better off if these people were able to get better-paying jobs.”

## Volunteer Lawyers Assist

Over 150 lawyers statewide along with paralegals and other staff are volunteering to

assist these individuals. “Sometimes it seems it takes a village,” says Katya Riasanovsky, hard-working director of *pro bono* services for Legal Services of Southern Piedmont and Legal Aid of North Carolina in Charlotte. Fortunately, that village of collaborators is hard at work assisting with expunctions that are allowing people to find jobs and make meaningful contributions to society.

“We had been doing this work with *pro*



Paul Anderson/Illustration Source

*bono* attorneys for about five years,” says Riasanovsky. “Early partners with us on the project were lawyers at TIAA-CREF and Hunton & Williams. Lawyers at corporations particularly like this *pro bono* work, perhaps because it is transactional and time limited. We were originally doing two to three cases a month when Duke Energy approached us for a project and also took it up. They wanted a *pro bono* project that their lawyers, paralegals, and administrators could work on together and found this to be a great fit.” Hoping for eight to ten new attorneys, they had over 70 attendees at a kick-off CLE program, in part because Parker Poe also became interested in the project and issued a challenge to Duke Energy that its team would match the number of clients Duke Energy had committed to serve. Kari Hamel, staff attorney with Legal Aid of North Carolina’s Durham office, worked to enlist and train Duke Energy and Parker Poe attorneys in the Triangle area. Through this project, expunction petitions were filed for more than 50 clients within a 60-day period, beginning in April 2013.

Will Esser, attorney and chair of Parker Poe’s *pro bono* committee says, “We are delighted to partner with Duke Energy on this project in both Charlotte and Raleigh, and are hopeful that the project can serve as a real turning point in the lives of the clients that we serve.”

### Law School Pro Bono Program Contribution

In Charlotte, the volunteer lawyer program works with law students at the Charlotte School of Law (CSL) and Prof. Sean Lew (director of CSL’s *pro bono* program) to identify eligible clients for these services and prepare the cases for the volunteer lawyers. A *pro bono* group of approximately 70 students does the intake, screening, income eligibility determination, and analysis for merit. They send rejection letters to those not eligible, and prepare the case summaries for eligible clients to send to the attorney. After their work is reviewed by an attorney at Legal Aid, all of the cases are completed by volunteer attorneys. In April 2013, Riasanovsky was delighted to attend the annual CSL *Pro Bono* Awards ceremony to support the expunction team as they received the top student team project award for the year.

CSL student team leaders of the project

believe their volunteer experiences have helped them develop as professionals in the legal field. According to Courtney Williams ‘16, “The expunction project has allowed me to get out of the classroom and work with real people from the community to solve their legal problems.” Faith Fox ‘15 notes, “Being a part of the expunction project allows me to make effective change in my community now while in pursuit of my law degree. The power of an expunction to change the course of a person’s life is fulfilling and motivates my desire to become a lawyer who can effect positive change in the life of one individual and the community overall.”

This project is regarded as a possible model for collaboration between other law schools and legal aid volunteer programs in other areas. In September the Charlotte group met with representatives from the UNC Law School student *pro bono* program to discuss how to expand this use of law students working with the program to the Triangle. They have also had inquiries from the law schools at Elon and Central.

### Mobile Re-entry Clinics

This expunction work is also being done outside the largest urban areas—in 12 communities so far—through clinics staffed by legal aid attorneys and students from four of the seven NC law schools. For example, 130 people attended an educational program about expunctions in Edenton. Those who had pre-registered were able to meet with law students and review documents to see if they were eligible to move forward. In March students from UNC plan to spend three days with legal aid attorneys in Wilmington, where a CLE program will be presented to interested attorneys (free for those willing to take two *pro bono* cases); an educational program on expunction will be presented to potential clients and a clinic will be held to work with individuals.

### Why We Do the Work: One Woman’s Story

A single parent attending an expunction workshop had graduated from paralegal school, but could only find work in the fast food and waste industries because of a dismissed drug charge from more than 20 years before. “Although the charges were dismissed through deferred prosecution, many positions I would not apply for because during

**To participate in continuing expunction efforts, please reach out to the Legal Aid office in your area:**

Winston-Salem (336) 725-9162  
Durham (919) 688-6396  
Charlotte (704) 971-8382  
Mobile Clinics (919) 861-2061

Or you can attend the upcoming CLE program—Removing Barriers and Restoring Hope: The Basics of Expungements & Certificates of Relief, Wednesday, May 7, 2014, at the NC Bar Center in Cary, CLE credit of 3.0 hours.

the application process I would have to disclose this, and I knew that the company would not hire me. I was disheartened because I believed I would never be able to have a career. With the help of a *pro bono* attorney, I had my record expunged. I cannot begin to say how it feels to have that dark cloud lifted from the paper trail that defines to those who do not know me, who I am. I am happy to say I have begun working in my field, and I love my job.”

### Summing it Up

Daniel Bowes of the Second Chance Initiative is also an attorney at Legal Aid of NC and believes, “The primary asset of our reentry efforts is the diversity of partners at the table. In the last few years, state legislators from across the political spectrum have come to recognize the unnecessary barriers to gainful employment and affordable housing facing individuals with nonviolent convictions, and have responded by passing a handful of laws that significantly expand expunction opportunities for first-time, nonviolent misdemeanors and felonies committed before the age of 18, or more than 15 years ago. Now you have law students, *pro bono* attorneys, local community groups, non-profit legal service providers, and private firms partnering to bring this important relief to underserved communities across the state. The result is hundreds of low-income individuals gaining genuine opportunities to move beyond their past mistakes and more fully contribute to their families and communities.” ■

*Evelyn Pursley has been the executive director of NC IOLTA since July 1997.*

# Meet the Federal Judges—Judge Catherine Eagles

BY MICHELLE RIPPON

**L**aw seems to be a new tradition for the Eagles family. Catherine Eagles was the first lawyer in her family; she is married to attorney William (Bill) Eagles, a Wake Forest Law grad with a mediation practice; her older son is a 2013 law school graduate; and her younger son is a 2L. Retired North Carolina Court of Appeals Chief Judge Sid Eagles, Bill's second cousin, describes well what to expect from Federal District Judge Catherine Eagles: "She is thoughtful, open-minded, moderate, and cuts to the chase."

Born in Memphis, Tennessee, Catherine Eagles grew up with four siblings in Marianna, Arkansas. Her father owned the weekly newspaper and her mother was the director of the school lunch program. She attended public schools in this small community of just 6,000, played clarinet in the school band, and was involved in a youth group at the Methodist church. During high school and college she spent the summers working and writing for her father's newspaper.

Eagles describes her years as an undergraduate at Rhodes College, then Southwestern at Memphis, as "idyllic." This, too, was a small institution, and her coursework in modern European and American history, which involved lots of essay exams and papers, offered her the opportunity to continue her writing. She was serious about her studies, but found time to engage in an occasional game of flag football. During her junior year, Eagles took a semester off to work for a congressman in Washington, DC, where her duties included drafting responses to constituent questions about legislation. She found the work interesting and decided a legal education would likely help in her

plan to work on Capitol Hill. Always practical, she also saw a career in law as one that offered responsibility, credibility, and independence. Therefore, it was not surprising that after her graduation with her bachelor's degree, she enrolled in George Washington University Law School, where she earned her law degree in 1982.

After a couple of years in DC, her interest in politics waned, as did her interest in big-city life. A clerkship with the United States Court of Appeals for the Eighth Circuit brought her to St. Louis, where Eagles worked as a staff attorney before returning to the south as a law clerk for Eighth Circuit Judge J. Smith Henley in Harrison, Arkansas.

She met her husband Bill while in Washington, DC. They were married between her two years of clerkship and decided to make their home in North Carolina, where Bill had grown up. Thus it was that in 1984 Catherine Eagles joined the firm of Smith, Moore, Smith, Schell, & Hunter in Greensboro (now Smith Moore & Leatherwood). Eagles concentrated her civil litigation practice on products liability, covenants not to compete, and trade secrets. For her the situation was ideal—"a big-city law practice in a smaller city." Although she describes herself as an introvert, Judge Eagles nevertheless enjoyed the courtroom work. As a litigator she came to appreciate the qualities of effective advocacy—the ability to think on your feet, to focus on what's important in the case, and the ability to understand the strengths and weaknesses of a case, attributes for which every attorney should strive.

After almost nine years in practice, Judge Eagles was appointed by then-Governor James Hunt to the superior court bench in Guilford County in 1993. She was elected in 1994, and re-elected in 1996 and 2004. In



2006 she became the first woman to hold the position of senior resident superior court judge for Guilford County. After serving almost 18 years as a trial judge, Judge Eagles was nominated to the federal bench for the United States District Court for the Middle District of North Carolina to replace Judge Norwood Tilley, who had taken senior status. Her nomination was confirmed by the Senate on December 16, 2010. Her experience alone would qualify her for the position, but it was her reputation as a thorough, balanced, and even-handed jurist that established her as the obvious choice.

The experience also provided her with a unique perspective as she quickly recognized the similarities and adjusted to the differences between state and federal court. She sees trials as establishing norms. They establish baselines where disputes are resolved

with “12 in the box.” Judge Eagles makes it clear that her job is to try cases, something about which she is as enthusiastic as she was when she began 20 years ago.

Alternative dispute resolution, of course, is nothing new to Judge Eagles. She was in the second class of mediator training when mediation went state-wide in superior court and was a member of the Dispute Resolution Commission for a number of years. As a superior court judge she relied on the now well-established mediation process to remove cases from the trial docket, which did not require jurors for resolution. The Middle District was a pioneer in establishing an arbitration program and still requires some form of ADR in most cases. While she now holds settlement conferences—usually about a month after the civil trial calendar has been published—she sees this as an opportunity for the parties to reach a settlement if they want; she usually does not directly participate in the discussions.

While in many ways her work as a federal judge is simply an extension of her job on the superior court bench, there are, of course, differences. Certainly there are fewer trials, less volume of cases, significantly more *pro se* civil rights cases, and the addition of federal employment discrimination cases. It is also much quieter. She now has two law clerks— young lawyers with whom she loves to work. During the past three years she has kept her clerks for both one and two years, and is still developing a schedule that will work for her and for them. There is also the advantage of more time to think about cases, especially those that involve complex issues.

Judge Eagles enjoys oral argument on civil motions, and schedules many such motions for hearing. She usually comes to the hearing fully prepared to rule, having read the briefs and cases and having done her own research. No different than in superior court, she expects attorneys with the weaker case to persuade her. During her years as a superior court judge, for the most part Judge Eagles ruled from the bench following hearings on dispositive motions. As a result she is comfortable ruling from the bench in her role as a federal district judge, and she does so in appropriate cases after explaining her reasoning in open court. After 20 years, Judge Eagles has developed good instincts about a case and they are generally correct.

Her advice to attorneys who appear before her is first and foremost to be respon-

sive. Listen to what she asks, respond to her questions, don't repeat what's in the briefs, and don't repeat yourself. For her, the hearing is an opportunity to clarify issues or concerns that she wants addressed. Attorneys will find Judge Eagles relatively approachable, eminently fair, and totally professional.

Judge Eagles' chambers are clearly the model of efficiency and organization. She works with three computer monitors and, of course, much of her communication both within and outside her office is electronically focused. Technology, she hopes, will eventually make it less costly for attorneys to help clients navigate through “the ever-increasing complexity of our lives.” Compared to when she began practicing law in 1982, it is significantly easier and quicker to research legal issues. She also appreciates and uses the electronic docket available in federal court and her always-nearby tablet computer, rarely printing or using hard copies of pleadings and briefs.

A discussion of Judge Eagles' judicial career would not be complete without mention being made of her role in the high profile trial of one-time senator and presidential candidate John Edwards, who was accused of committing campaign violations. Barely one year after her appointment to the federal bench, all eyes were on her, the accused, defense and prosecution witnesses, and the jury. Her common sense approach included repeated reminders to the jury that the trial was not about whether Edwards disappointed his supporters or hurt his family, but rather whether he broke the law by using campaign funds for illegal purposes. She emerged as a judge to be proud of. One journalist described her as “a welcome human counterpoint to the ongoing man-made disaster” who was “not indulgent with either the prosecution or defense” and remarkably “attentive to the needs of the jury.” The writer concluded that the proceedings were “in capable hands.”

Friends and family agree that away from the bench Judge Eagles is equally devoted to her family. Sid Eagles enthusiastically reports stories about her boys who were raised to be respectful, compassionate, and giving. The extended Eagles family meets annually for its family reunion in Bill's hometown of Crisp. Central to her life is her volunteer work at her church, a Quaker meeting in Greensboro. Away from her work at the court, Judge Eagles likes to cook and read,



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mostly non-fiction. She also practices and teaches yoga.

Capturing the essence of Judge Eagles is challenging. She is extraordinarily balanced and comfortable, and confident with who she is. She is calm, efficient, thorough, and deliberate. She is demanding of herself and others yet at the same time she is considerate and always willing to listen. She is firm but fair. In both her personal and her professional life, she lives the biblical admonition to “be quick to listen, slow to speak, and slow to become angry.” James 1:19. ■

*Michelle Rippon is of counsel with Constangy Brooks & Smith in Asheville. She is also an adjunct professor in the Business Management Department at UNC-Asheville.*

# Upon Considering...The Seven Deadly Sins of Legal Writing

BY BRENDA D. GIBSON

What a daunting task—writing a review of a book that takes on *The Seven Deadly Sins of Legal Writing*. As a “natural writer” (at least that’s what I used to call myself before legal writing took a hold of me), I must confess that I had more than a moderate curiosity when I was handed this book by my colleague this past summer. As a director and professor of legal writing, I could not wait to find some additional tools to put into my legal writing tool chest. I was excited to read and discover anything that would help my students (and me) improve our legal writing skills.

Reading the book, that was easy. After all, it was only 49 pages—the length of one of my children’s first chapter books, and it was written to be very reader-friendly—none (or very few) of those big words that may cause a reader to pause and reach for the dictionary.

Writing the review was a bit harder. Usually, as my students know, I do not have a problem sharing my opinion. However, on this occasion, writing this review presented a challenge, especially after I read Blumberg’s short work and discovered that I often committed at least two of the “deadly sins” when I wrote. But, I pressed forward and below is the result.

Theodore L. Blumberg’s *The Seven Deadly Sins of Legal Writing* is a delightfully short, but informative, work. As legal writers, we have all undoubtedly committed a few of the “deadly sins” described therein. Blumberg does an excellent job of describing each of the seven sins: (1) passivity (overuse of the passive voice); (2) abstraction; (3) adverbage; (4) verbosity (“Blumberg’s Rule

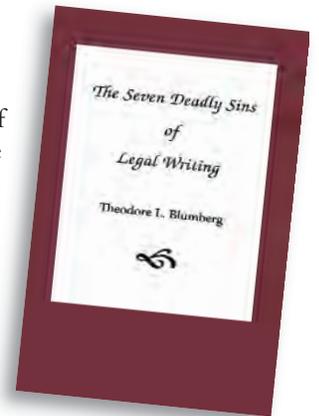
of Infliction”); (5) redundancy; (6) speaking footnotes; and (7) negativity. Most of the descriptors are self-explanatory, but I must confess that some of the names of the sins were a little obscure. After reading Blumberg’s explanations, however, I quickly recognized the “sin” of which he spoke.

Passivity, verbosity, and redundancy are terms with which we are all familiar. I think at some point, early on, of course, in our legal careers, each of us has found ourselves overusing the passive voice, and being a little verbose or redundant. While Blumberg does admit that there are some instances (for example, when a defendant’s attorney must speak of the victim’s demise at his client’s hands) where passive voice is most useful, he explains that the passive voice “usually impedes clarity because it fights the way we naturally process language.” While active voice makes for shorter, easier to understand sentences, Blumberg notes that passive voice makes for longer, confusing sentences. One is never really sure “what is being perpetrated by whom and on whom.”<sup>1</sup> As for verbosity, also referred to by the author as “Blumberg’s Rule of Infliction,” Blumberg admonishes, “In short, write short.” I agree. After seven years of teaching, I believe that there is no excuse for verbosity, and no good use for it. Alas, it is ALWAYS a “deadly sin” for the legal reader or writer. Finally, for the “sin” of redundancy—a close relative of verbosity—I was a bit skeptical, because I have always felt that some redundancy is necessary in legal writing. Much like the Romans, lawyers use the three-fold argument style in making their case. I call it the “hard sell” when I refer to this necessary redundancy in my legal writing classes. Blumberg puts my skepticism to rest explaining that he is speaking particular-

ly of the use of two or more words to say the same thing—“baby puppies,” “wet water,” “terrible tragedy;” or the doublets or triplets—“cease and desist,” “indemnify and hold harmless,” “give, devise, and bequeath;” or “The Needlessly Repeated Title,” where the written document is titled with the case name and number, and in the opening sentence the writer refers the reader to “the above-referenced action.”

The four remaining sins were slightly less familiar—at least the terms that Blumberg used for them were. Abstraction as a term for a “sin” in legal writing was new to me. However, after reading Blumberg’s explanation and example of this “deadly sin,” I believe that it is no more than what I think of as broad, imprecise language—language that leaves the reader without a clue as to what the author is really talking about. I came away understanding that abstract language is the opposite of concrete language; that abstract language (much like passive voice) clouds the meaning of what is written. That’s why it’s so deadly—because lawyers must clearly convey what is meant, quickly and concisely.

Adverbage, I found, was yet another “sin” that I knew by a different term. It, like passivity, has its uses and only merits “deadly sin” status when it is overused. Blumberg quotes, “Indiscriminate use of adverbs... insults the reader’s intelligence.”<sup>2</sup> I found myself convicted of this offense, but was



relieved to see my usage—to convey information—was one of the exceptions to this “deadly sin.”

Speaking footnotes was the sixth “deadly sin,” and I completely agreed with Blumberg. After all, don’t you hate it when you have to go to the bottom of a page to read “digressive blocks of text” that should have been included in the body of the document or, better, just left out? Blumberg agrees (as a voracious citer, I was relieved) that footnotes are properly used for citations.

Finally, Blumberg discusses the sin of “negativity.” No, he’s not speaking of those folk around you who are always angry or unhappy and who tend to bring you down. Blumberg is speaking of the legal writer’s tendency to use double-negatives in their documents, which result in a puzzle for the reader. He suggests turning double-negatives into positive statements. For example, Blumberg posits, “Instead of saying swimming is not prohibited, tell us it’s allowed.” Blumberg admits, however, that there are some instances in which double-negatives are somewhat useful: (1) establishing nuances and shades of meaning;<sup>3</sup> and (2) imparting an arch, understated, or ironic tone.<sup>4</sup>

After a brief conclusion, recapitulating the evils of the “seven deadly sins,” and exhorting legal writers to “Write plain English[, and] [c]ommit to clarity[.]” Blumberg includes a few (five to be exact) exercises to assist the reader in correcting those sins.

Okay, now I get it; but what does one do if this is the “culture” of the profession? After reading this fine book, how does a writer possibly address all of these sins (if he happens to have committed them all) at once? The answer I posit, for all practical purposes, is you cannot. You must first (as in we Baptists say) confess your “sins” (or at least acknowledge them) and then attempt to correct them one or two at a time. If one tries to correct all of his deadly legal writing sins at once, he will be ineffective. It would simply be too overwhelming.

I conclude, therefore, that while the book is quite an honorable undertaking, the “sins” simply cannot be addressed wholesale. As any book written to address correcting writing deficiencies and building stronger skills, it must be approached in a “triage” or “piecemeal” manner, taking care of the most serious or flagrant first and gradually moving on until perfection, or

## IT’S TIME TO MAKE YOUR VOICE HEARD. EVALUATE NON- INCUMBENT JUDICIAL CANDIDATES — AND OUR NEWEST JUDGES

**“Our carefully developed  
judicial evaluation  
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participation is vital.”**

NCBA President Alan W. Duncan

### Take a few minutes to evaluate non-incumbent candidates and recently appointed judges who file for election in 2014.

The JPE Survey–Phase II will be emailed by [bcrossland@bdo.com](mailto:bcrossland@bdo.com) via SurveyMonkey to attorneys and sent by mail to judges and public sector attorneys in early March. Responses must be received by March 21.

#### You can help make a real difference in the quality of our judiciary by participating in this survey.

The JPE Survey–Phase II gives lawyers an opportunity to evaluate the newest judges and the non-incumbent candidates seeking seats in the 2014 election. Candidates will be given an overall rating for performance and graded on legal ability, integrity and fairness, professionalism, communication and administrative skills.

The NCBA is committed to publishing comprehensive information provided by those who know these candidates best—you, the practicing attorneys.

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The JPE survey website, online at [www.ElectNCJudges.org](http://www.ElectNCJudges.org), registered more than 20,000 unique visitors and over 100,000 page views in 2012. We expect even more voters will utilize this website in 2014.

#### Please respond by March 21. Questions? Contact David Bohm at [dboh@ncbar.org](mailto:dboh@ncbar.org) or 919.657.1553

something close thereto, is reached. ■

Patricia Timmons-Goodson.

#### Endnotes

1. Theodore L. Blumberg, *The Seven Deadly Sins of Legal Writing*, quoting renowned writer William Zinser, *On Writing Well* (1998).
2. *Id.*, quoting Frederick Wiener, *Effective Appellate Advocacy* (2004).
3. For example, stating that a patient was “not uncomfortable” during a root canal is more effective than saying that the patient was comfortable.
4. For example, if a public school teacher wins \$4 million in the lottery, the money would “not [be] unwelcome.”

# “I Accept This Award in Memory of...”

REMARKS BY JONATHAN R. HARKAVY

The following remarks were made by Jonathan R. Harkavy to a meeting of the NCBA Board of Governors when he was presented with the H. Brent McKnight Renaissance Lawyer Award, in honor of Judge McKnight’s contributions to professionalism and the practice of law in North Carolina.



*Jon Harkavy, left, is presented with the H. Brent McKnight Award by NCBA President Alan Duncan.*

The award seeks to recognize “those North

Carolina attorneys whose trustworthiness, respectful and courteous treatment of all people, enthusiasm for intellectual achievement and commit-

ment to excellence in work, and service to the profession and community inspire others.” Judge McKnight, former chair of the NCBA’s

Professionalism Committee, died in 2004 while serving on the US District Court for the Western District of North Carolina.

Before saying anything to you, I have to begin by keeping a promise. I need to read to you a letter I sent several months ago to Beth McKnight, Judge McKnight’s widow:

“Dear Mrs. McKnight,

“Last Friday evening I learned that the

North Carolina Bar Association is conferring on me the H. Brent McKnight Renaissance Lawyer Award. Aside from the surprise and gratitude I felt, my thoughts turned immediately to your family. So, before I record any public thanks to the Bar Association, I first

want to say to you and your children that I will cherish this award because it bears the name of someone I have always admired.

“Thank you for permitting me to express my regard for Judge McKnight. I accept this award with you and your family uppermost in

my thoughts.”

Now, thank you first to Nahomi Harkavy. Everything I have done as a lawyer is infused with her. Also, thank you first to my daughters, too, for their love, support, and inspiration. And, thank you to my parents for what they instilled in me—genetically and otherwise. Thank you to Ann Anderson for conspiring to nominate me for this award, and to Lisa Sheppard, the Professionalism Committee, and the Board of Governors (and Allen Head and the staff) for their role in conferring the award.

I accept this award in memory of Judge Richard T. Rives, whose moral courage in combatting racial segregation made him a truly heroic figure. In spite of his patrician upbringing in an old Southern family in Montgomery, Alabama, it was Judge Rives who authored *Browder v. Gayle*, better known as the Rosa Parks case, the one that made it possible for black citizens to come forward from the back of the bus. A footnote to this tribute: Just a couple of days ago you might have read about the federal judge who sought to get around the *Shelby* case (an awful Supreme Court decision) by relying on section 3 of the Voting Rights Act to make sure that certain counties in Alabama would still be subject to the statute’s reach. Well, that judge, Judge Callie Granade, happens to be Judge Rives’ granddaughter. The apple doesn’t fall very far from the tree, does it? And so, I accept this award in loving memory of Judge Rives.

I also accept this award in memory of Crystal Lee Sutton (or Crystal Lee Jordan, as she was previously known.) Crystal worked in a textile mill until she was fired for trying to speak out for workers trying to organize a union. You probably would recognize her, if you are a movie buff, as Norma Rae. Yes, Crystal Lee Sutton was my client when she later tried to eke out a mean existence going from job to job as a security guard and a maid, getting fired whenever her employers found out she was the real Norma Rae. Her moral courage in pursuing justice without reward was amazing, and I accept this award in her memory, too.

I also accept this award in memory of Jasper Alston Atkins, a name you probably don’t recognize. Well, his parents were the founders in the late 1800s of Winston-Salem State University. Jack Atkins was the first black Order of the Coif graduate of Yale Law School around 1920. He went to Oklahoma with his law degree to represent Indians whose rights

were being violated, but who couldn’t get representation by white lawyers. He had a successful practice there and later in Texas, but when his brother, who was president of Winston-Salem State, became ill, Jack Atkins gave up that practice to return to North Carolina. He didn’t have a law license here, but he pursued justice wherever he was. In fact, using his old manual typewriter, he was the one who filed a *pro se* complaint in federal court to desegregate The University of North Carolina in the early 1970s. And that is where I met Jack Atkins, as I became his lawyer in that case, along with some of my law partners. The case ultimately settled after Mr. Atkins died, and today the J. Alston Atkins lectureship is one of the legacies of the moral courage exemplified by his life. And so I also accept this award in memory of Jack Atkins.

I also accept this award in memory of my friend Julius Chambers. Earlier this week I participated in a program honoring Chambers’ life. I was fortunate enough to have litigated both with and against Chambers. In fact, in the very first case I litigated for a labor union here, Chambers had sued not only the employer, but also my client, a labor union. What can one do litigating against such a formidable icon? Well, my thought was to get on Chambers’ good side, so I made a motion to realign my client as a plaintiff. And the judge (I think it was Judge Gordon) agreed with me, and I got on Chambers’ side of the case and stayed there. We all know about Chambers’ courageous work pursuing equal opportunity for all our citizens despite his office being firebombed, his car blown up, and sticks of dynamite found at his home. But did you know that Chambers was first in his class in law school, and editor-in-chief of the law review at UNC-Chapel Hill in 1962? And did you know that in spite of these accomplishments, he was not invited to attend his own law school graduation banquet because he was not welcome at a segregated facility? And so, I accept this award in memory of Julius Chambers.

All of these people crossed paths with me and all pursued justice resolutely and with moral courage. It brings to my mind the sentiment of the early 19th century Transcendentalist Theodore Parker, whose words Dr. Martin Luther King Jr. crystallized and which are now sewn into the rug that President Obama has in the Oval Office today: “The arc of the moral universe is long, but it bends toward justice.” That’s what Dr.

King often said—it bends toward justice. But in thinking about that aphorism, it dawns on me that the arc of the moral universe doesn’t bend by itself. Nor does it bend because of some divine intervention. No, the arc of the moral universe bends toward justice when human beings make it happen.

And so, I also accept this award in honor of all those with whom I have practiced law, such as Hank Patterson and Mike Okun, whose devotion to the rights of working people is so exemplary. You would recognize many others who have been part of our firm, such as Tom Ross, the president of The University of North Carolina; Dave Douglas, the dean of the William & Mary Law School; Mike Curtis, the foremost expert in the nation on the 14th Amendment and the 39th Congress; Marty Geer, a judge on our court of appeals; Melinda Lawrence, the head of the Justice Center; Trip Van Noppen, the president of the nation’s leading environmental group, EarthJustice; Norman Smith, general counsel of the ACLU in North Carolina; and Burton Craige, general counsel of the Trial Lawyers (or whatever they are called now, Advocates for Justice, I think). And I also accept in honor of all of you here who take the time from your law practices to do the work of the Bar Association in service to the public.

In North Carolina the definition of a lawyer is set forth in our administrative code: “A lawyer is a representative of clients, an officer of the legal system, and a public citizen having special responsibility for the quality of justice...As a public citizen, a lawyer should seek improvement of the law, the administration of justice, and the quality of legal service rendered by the legal profession.”

If we simply follow this definition of a lawyer as it is written, the arc of the moral universe will continue to bend toward justice. And, it will continue to do so even in the face of an ill wind of injustice and incivility that has arisen in this state resulting in a profoundly disturbing disregard for the social compact that binds us all through the rule of law. I am confident that you will continue to act with moral courage against these mean spirited forces, and that you will stand fast for social justice in honor of Judge McKnight’s example.

Thank you so very much. ■

*Jonathan R. Harkavy is a partner with Patterson Harkavy, LLP. He limits his practice to dispute resolution, including arbitration, mediation, private judging, and neutral evaluation.*

# The Freudian Slip

JESSE H. MCCOY II

Wallace Reed made himself comfortable in the plush leather chair of his psychiatrist's office. He had long grown tired of these weekly meetings to dissect his thoughts and bring up vulnerable memories of the past. However, he had made a firm commitment to his fiancée, Debra. It was either this, or the relationship that he held as his highest prize in life would be walking out the door.

Dr. Edmundson entered in her classic way, five minutes late with a gray business suit and neon green blouse holding a cup of premium coffee. As usual, she apologized for her tardiness as she sat down and pressed a button on the tape recorder.

"Now Wallace, when we left off last week, I had asked you to return with three adjectives to describe your parents and their relationship. Have you completed this assignment?" she asked in her standard perky way, leaning in for an answer that she seemed to be way more interested in than she should be.

"Yeah, I thought about it. I suppose there's no chance of me getting out of this one?" he asked. As Dr. Edmundson shook her head, the brunette ball of hair that she held together with an ink pen slowly began to unravel. Walter kicked himself as he recounted the events that led him to that chair just four months earlier.

....

"Wallace, what the HELL!?" It was the statement that he heard at least a million times a day. The image of the casserole hitting the floor was just as attention-grabbing as the look of pain on Debra's face. He had to avoid her gaze to even imagine creating a plausible explanation for what she had seen. Yet, his brain chose not to work fast enough to manage the situation.

"So is this what you do with your time when you are working late?"

He had no response. The room was spinning. All he could see was a silky-soft pair of mahogany-colored legs running around the office and grabbing scattered articles of clothes.

"I'm so sorry, Mr. Reed. I thought the door was locked. I just..."

The other voice paled in comparison to that of Debra as she cursed his secretary in words that were untraditional and uncharacteristic of her conservative nature. How could he have let this happen? Why couldn't he think? Suddenly, Wallace's brain farted out the only thing it could process...

"Debra, I'm so sorry. But it's not what it looks like. I just..."

"Save the speech, Wallace. I get off of work early to surprise you with dinner and I caught you in the act. At your own office. The office that seems to always demand all of your time. Well silly me for thinking you actually had clients and was worth any salt as a professional. I guess it's safe to say that the wedding is off," Debra screamed through her tears while ripping the diamond ring off her finger and throwing it across the office towards him. Enjoy your floozy!"

"Baby, wait! I can explain..." pleaded Wallace, but it was too late. The office door had already slammed closed for the second time in just five minutes. Wallace just stood and stared as the steaming hot cheese casserole melted into the carpet.

....

Wallace begged, pleaded, and petitioned Debra to take him back. His only success was that he was able to get her to admit she needed some time for herself. But his confidence was shocked when he saw her out with one of his business competitors, Scott Thomas. He saw how she hugged on Scott, how she giggled seemingly at everything that he said

## The Results Are In!

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

to her, and how she rubbed her foot on his leg as they sat at the restaurant table. It made him sick to his stomach. But what could he do? He had set this course of events in motion. Eventually, Wallace resigned himself to put his complete faith into Debra's mercy. So he was beyond amazed when she said that she would take him back if he got counseling. She even recommended the psychiatrist, Dr. Edmundson. And now he was sitting in her office answering questions about his family and his thoughts, all in the hope of winning his woman back.

"Wallace, I'm still waiting. Tell me how you would describe your father," said Dr. Edmundson.

"Well, the three words I would use are absent, angry, and incarcerated. When I was young, I always heard him complaining about our family not having any money and kids being so expensive. Eventually that drove him to hate people and institutions that had money. This led him to attempt a bank robbery. He failed and was arrested. I have not seen or heard from him since. That was almost 25 years ago," explained Wallace.

"What about your mother?" asked Dr. Edmundson.

"She was an angel. A tough woman, but a smart woman."

"Yes, Wallace, but what three words

would you use to describe her?" asked Dr. Edmundson.

"Beautiful, intelligent, and deceased. Can we move on to another topic?"

Dr. Edmundson knew that she had hit a nerve. In order to fully assess the situation, she had to dig deeper.

"I'm sorry, Wallace. When did you lose your mother? How did she die?"

"I'd rather not go into it," Wallace said as small teardrops began rolling down his cheek. For Wallace, time had not healed the wound of losing his mother at such an early age. And as much as he wanted to find someone to beat up for this tragedy, there was no one to fight. Breast cancer had no eyes to blacken.

"We must explore this, Wallace. How did she die? How old were you when it happened?"

"Fine, she died of breast cancer when I was 12 years old. Most of what I remember about her last days were the numerous operations that the doctors performed in order to stabilize her condition. Bone marrow transplants and reconstructive surgeries, all torturing her until the day they had my uncle sit me down and explain that there was nothing more they could do. Who wants to die like that? All hooked up to tubes with no one there to hold your hand. I couldn't be the man she needed. I was too scared of accidentally breaking one of the tubes or wires and killing her. I didn't realize at the time that me being across the room and not hugging her probably did more to kill her than any cancer did," Wallace said.

"Well, since that time science has created and developed a greater understanding and greater treatment of cancerous diseases. We have made great strides..."

"Great strides!" snorted Wallace. "Great strides don't bring my mom back."

"Understood. Well, let's move on. Your uncle took you in when your mom became diagnosed. I believe you said that in a prior meeting. What was that like?" said Dr. Edmundson, eager to change the subject.

"My uncle is awesome! He taught me everything I know about business, life, and the ladies. My uncle was always so suave and debonair. The ladies couldn't resist."

"You idolize him. Interesting."

"What's so interesting?"

"Well...misplaced childhood adoration can also work to elevate one's own expectations out of life. You stated in our first meet-

ing that you were trying to save your relationship. But you have not addressed why you cheated in the first place. Maybe it was your internal desire to be more like your uncle. To conquer the women around you for your own selfish gain."

"I resent that, Doc!" chimed Wallace.

"It's just a theory. Anyway, tell me something about your secretary. You said her name is Sharisse, right? What was the connection there?"

"Look, Sharisse is a damn good secretary. I don't want any of our work minimized because of this one small indiscretion. She has always been a street smart, strong, feisty, takes-life-by-the-horns-type person."

"And you DO mean that literally. Is that correct?" asked Dr. Edmundson, facetiously.

"Very funny, Doc. All I meant was that over time it's easy to get complacent with conservative living. Sometimes you want something spontaneous. Debra used to be like that, but a few months before I proposed, she changed. I tried to talk to her about it, but she would never listen. Then Sharrise and I got caught up in a passionate moment. It was a stupid mistake on my part. I wish I could take it all back, but I simply can't. However, I will have you know that she has been released from my employ," said Wallace in a smug manner.

"Oh, so this woman loses her job because she slept with her boss. Interesting. Is that something else that your uncle taught you to do? On second thought, let's address that next week. It appears we have run out of time for this session." Had he not known better, Wallace would have thought that Dr. Edmundson was taking his mistake too personally.

...

Debra set two wine glasses and a bottle of shiraz on the coffee table. She thoroughly enjoyed her girls' night out sessions with her friend Lisa. When the doorbell rang, Debra grew giddy with excitement.

"Hey, girl! C'mon in. I can't wait to hear the new gossip!" Debra said smiling. There was a reason why she had referred Wallace to consult with Dr. Lisa Edmundson. Debra knew that Lisa was one of the most unethical psychiatrists in town, but only broke her oath for her friends. She also knew that it was one of the few friends she had that Wallace had not met yet. When Lisa arrived with the

recorder in hand, Debra grinned even wider.

"You know I brought what you really want to hear," said Lisa. "This fool is full of it. You probably want to fast forward the tape to minute 28, when he started crying during the interview. You did good to leave this jerk. Anyway, how are things with Scott?"

"Scott is a real gentleman. He's been patient with me and always spoils me with everything I could possibly ask for. I'm just glad that he doesn't know about this. He might think less of me. And thanks again for going through all of the trouble. You're such a good friend," Debra said as she hugged Lisa.

After sipping a few glasses of wine and laughing at Wallace on the tape, Debra began imitating Wallace's most intimate moments. Lisa laughed before providing critiques of Debra's faces and making her redo the performance. They had been meeting every week since Wallace began the counseling. They both knew that Debra had no intention of getting back with Wallace, but they needed something to laugh at for kicks. When they had finished this week's edition of the Wallace Reed show, Debra removed the tape and added it to her ever-growing collection. Lisa had a few more glasses of wine and shared a few more laughs before the phone began to ring. Debra rushed to answer it.

"Hello?...Hey sexy!...Yeah, we can meet. What time should I be there?...I can't wait to see you, Scott!"

Lisa laughed silently at her friend until Debra had hung up the phone.

"Ok, so obviously it is your cake time. I will make my way back to my house. I see that you like Scott, but try not to rush into things. I know you're just getting out of an engagement and all, but I don't want to see you get hurt again. Just take your time," Lisa advised. But Debra had already stopped listening and spun in circles of glee around the room. Lisa let herself out.

...

"What did you like about Debra?" asked Dr. Edmundson.

"She was so wholesome and kind-hearted. That's rare to find in a woman nowadays. Most of them are out for self. They try to date me for my money or the status that comes with being with me. But she never cared about all of that. And I want her back

CONTINUED ON PAGE 59

# Underage Drinking: A Guide for Parents

BY BILL BOST

*The Lawyer Assistance Program (LAP) has been receiving an increasing number of calls from lawyers who are struggling with their tween, teen, or young adult children's substance abuse problems. The LAP provides assistance in these circumstances and regularly guides lawyers from the intervention process through treatment and aftercare. The LAP can recommend effective treatment centers for the age, gender, and drug of choice of the child in question, and can assist the lawyer in getting help for himself or herself and the family while the child is in treatment and after the child returns home. One of our LAP volunteers feels passionately about helping other families identify the signs and symptoms in children early on, and offering suggestions for parents about how to address the issue with children. The purpose of this article is to offer some thoughts and guidance for parents in order that they might catch the problem earlier in the process.*

As summer approaches, our children are participating in formal and informal events to celebrate the end of school and approaching adulthood. These events frequently involve the abuse of alcohol and, too often, result in incidents with permanent or fatal consequences.

Parents spend inordinate amounts of time and money protecting our children from dangers, sending them to the best schools we can afford, buying them lessons and opportunities to enrich their lives, and doing other things to give them the best chance possible to be safe, to succeed, and to be happy.

When it comes to underage drinking by our 14 to 20 year olds, however, many of us do very little or nothing, even though abusive drinking by our children is a real threat—maybe the largest threat—to our dreams for them. In fact, many parents allow or condone unhealthy drinking among their teenagers and their friends. What can we do to change our thinking about and approach to underage and inappropriate drinking?

The first step is to discredit some common beliefs.

## It's Just a Little Drinking, How Bad Can It Be?

The line between “enough” and “too much” is a blurry one for middle-aged adults; a novice drinker almost certainly does not know it. Judgment and cognitive reasoning are impaired in young drinkers after only a small amount of alcohol consumption. And we have all seen the results too frequently.

Physical injury and death are at the top of the list. Legal problems are common. But there is more. Future employers, universities, and licensing agencies often will deny admission, jobs, and credentials to those convicted of alcohol-related crimes, preventing our children from going to college, and from participating in a number of desired professions. Unwanted pregnancies and related consequences of irresponsible sexual behavior undeniably disturb progress for both boys and girls. And the guilt and shame that follow alcohol-induced bad behavior can linger for years or a lifetime.

Equally important is the risk of alcohol and substance abuse problems later in life. There is a robust association between the age of an adolescent's first drink and the risk of alcohol abuse disorders over his or her lifetime. Simply put, the longer a teen puts off their initiation to alcohol use, the less likely they are to develop a problem with alcohol. In addition, the areas of the brain governing judgment, self-control, and emotional regulation are among the last to develop. One can easily see why waiting until these areas are more developed could be protective in regards to alcohol abuse.

## All Kids Do It

One of the most common myths about underage drinking, and the one cited by many parents as a reason for their inaction regarding alcohol use by their children, is “All kids do it.” This simply is not true.



Recently, Students Against Drunk Driving (SADD) published a report indicating that 50% of high school students consumed alcohol in the preceding 30 days. In SADD's view this is a very high number, considering that underage drinking is an illegal activity that carries significant penalties. But, more importantly for those parents and teenagers that believe drinking is “inevitable” for young people, this statistic shows that *a large number of teenagers did not use alcohol in the preceding month*. My experience is similar; I have found that in Raleigh a large number of teenagers do not drink at all.

While it may appear to be the case, not “everyone” is doing it. In any event, following the dangerous behavior of others has never been a justification for any action or inaction.

## If They Can Fight a War, They Should Be Able to Drink

Drinking is illegal for children under the age of 21. When we allow or condone underage drinking, we are choosing to violate or encourage the violation of a law with which we disagree. Thus, a more honest way for a parent to state this argument is as follows: “I disagree with the laws related to drinking, and so neither I nor my children should have to abide by them.”

This is a horrible message to teenagers. Are they always allowed to break laws with which

they do not agree? Which laws are right and which are wrong? Does it apply to other moral tenets? Who decides? What kind of society would we have if everyone only followed the laws with which they agree? Teenagers are smart and follow our lead in this area; the outcomes of their decisions regarding this issue often are tragic. Responsible parents cannot condone this type of behavior and thinking.

A related issue is parents who allow underage drinking in their homes. Clearly, allowing one's own children to drink at home is a decision with which I don't agree. It is one thing to allow your own children to drink at home; it is quite another to allow other children to drink at your home. A person who encourages and allows another's child to break a law that could cause the child harm arrogantly appropriates the parental authority of others. While I may be a strict and unreasonable parent, the idea that another parent would undermine my parenting decisions in such a manner is simply unacceptable. Good parents should not, in my opinion, tolerate it.

### **Teenagers Need an Opportunity to Learn to Drink Responsibly**

I agree wholly with this sentiment. The problem, however, arises in the prevailing view of what constitutes "responsible drinking."

In my opinion, "responsible drinking" is drinking that is unlikely to cause significant adverse consequences. Responsible drinking is *not* defined as the "average level of drinking of our peers," and it may vary for each individual. Underage drinking, like no other activity in which our children engage, carries a significant risk of creating impediments to future success and happiness. In only very limited circumstances can underage drinking be considered responsible.

Even if an argument can be made that underage teenagers should be permitted to drink despite the current laws, frequently these children drink to excess; that is, they drink irresponsibly. When thinking about how much is too much, consider this: How much Coke would our children have to drink at one sitting before we thought it strange or too much? Three 12-ounce cans? Four? Six? Certainly we would discourage, or even prohibit, a child from drinking a six-pack of Coke at one sitting, and we would likely consider professional help for a child who devoured a 12-pack in a short time period. Why do we treat alcohol differently? Certainly there is less danger in the Coke

than in the same amount of Budweiser.

### **But I Don't Know What to Do**

Many parents who desire to eliminate underage drinking in their homes are at a loss about what actions to take. Here are some with which to start.

#### *Get Honest and Become Willing*

Alcohol abuse is a condition of denial. The person who is abusing alcohol denies it, and the person who lives with the alcohol abuser denies the nature or severity of it. Honesty about the existence and nature of the problem is critical—when we name it and admit it to ourselves, then we can take action to address it.

The first step to addressing underage drinking is to determine whether a child has an alcohol abuse problem (which by definition means that he or she is drinking underage). Many parents already know; an unsure parent needs to know. The best way to find out is simply to ask—a child will in most circumstances provide an honest answer to an honest question. If he or she refuses to answer, a parent can assume he or she is drinking. Some children lie; we need to use our best judgment.

Knowing that our child has a problem is not the same as honesty about it. Many parents know their child has a problem, but deny it to themselves because admitting it would require action that may be unpleasant or unfamiliar. Honesty requires eliminating the denial, and admitting the problem to ourselves.

Once we are honest that a problem exists, the next step is to undertake a willingness to address the problem. Honesty about the problem without willingness to take action will accomplish very little.

Once we have honesty and willingness, there are a few steps that are simple to take to help our children refrain from drinking irresponsibly. These actions may not always work, but if nothing changes, then nothing changes.

#### *The First Steps*

First, a responsible parent should not ever purchase alcohol for an underage child, let a child drink in their proximity, provide him and his friends a safe-haven for drinking, or condone this behavior by the child's friends or the parents of the child's friends, and should have a discussion with other parents making that clear. These are very simple steps and are absolutes. A parent cannot be serious about curbing alcohol abuse without implementing these very simple measures.

### *Next Steps*

The next three steps are simple, but probably not too obvious. First, parents must refrain from drinking any alcoholic beverages around their children while they are between the ages of 15 and 20. It is impossible to encourage a child to change his or her drinking habits with a glass of Chardonnay in your hand. Children watch us and, when parents drink too much, the children are likely to do it, too. Find some parents of your child's friends who are willing to join you in this effort as it makes it easier. Those parents who will not change their drinking habits for a little while to help protect their or your children...well, that is a problem for another article.

Second, money is the fuel of alcohol and substance abuse. Children cannot go to the beach drinking for a week, buy beer, wine, or marijuana or other drugs, drive fancy cars, or go on wildly expensive prom dates, unless they have money. Stop giving it to them! Just stop, and ask their grandparents and cousins and aunts and uncles to stop as well. Easy cash is a huge part of the problem. A debit card with a very low balance works for their standard needs, and provides a record of where they are spending their money. How much will they drink if they don't have any pocket money or they have to choose between drinking and a new iPod or cell phone?

Third, always know where your children are and whether they are sober. It is unacceptable to pass our parenting duties to the parent down the street who is out of town or likely to allow the kids to drink at her house. Try the "four-hour rule," under which a child may not stay out of contact with his or her parents for more than four hours. Also, consider prohibiting overnight stays at the homes of other children; overnight stays at your house are fine. Wait up for your children at night, every night, and make sure that they meet a sober parent when they arrive home.

These measures cost nothing, but will probably save you money. They don't require a counselor and they can be implemented immediately. I suggest a loving discussion about these changes with your teenage child. It will be much easier if these rules are in place before your children become teenagers, but if not, help them understand that these changes are done out of love and concern for their welfare.

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# Profiles in Specialization—Matthew Ladenheim and Bill Bryner

BY DENISE MULLEN, ASSISTANT DIRECTOR OF LEGAL SPECIALIZATION

I recently talked with Matthew Ladenheim and Bill Bryner, newly certified as specialists in trademark law, about their certification and its impact on the practice of trademark law. Matthew served as chair of the Trademark Specialty Committee and led the effort to create the specialty. He attended Mary Washington University in Virginia for his undergraduate degree and Penn State University's Dickinson Law School. Following law school, he held a clerkship in the Washington State Supreme Court for a year before heading to North Carolina to begin his practice in trademark law. Bill completed his undergraduate degree at Brigham Young University and his law degree at Duke University. Upon graduation, he began working for the Winston-Salem firm that became Kilpatrick Townsend & Stockton. Several trademark projects landed in his lap and he found that he enjoyed the work.

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

**Matthew:** About four years ago I had several clients in a row come to me because bad advice from previous lawyers led them into litigation. This series of clients convinced me that lawyers who merely “dabble” in trademark law can get their clients into serious trouble. I mentioned this to David Sar, who was the vice-chair of the Bar Association's Intellectual Property Section at the time. We agreed that this situation was a concern for trademark lawyers. Unlike patent attorneys,<sup>1</sup> who identify themselves as being registered with the US Patent and Trademark Office (USPTO), dedicated trademark practitioners lack the ability to distinguish the specialized legal services they provide. David suggested that I gauge interest at the next section meeting. Shortly thereafter I found myself leading a State Bar committee in creating the new specialty.

**Bill:** Early on in the process, Matthew contacted me to see if I supported the creation of

the specialty. I assured him that he had my full support. He kept me in the loop throughout, and when the exam was offered for the first time, it was a no-brainer for me to apply.

**Q: How did the specialty committee write the first examination?**

**Matthew:** The process was significantly more intensive than I had anticipated. The Bar puts a great deal of emphasis on creating a transparent, fair, and statistically valid specialization exam. Throughout the entire process, our committee worked with Dr. Terry Ackerman, a specialist in exam drafting and statistics from the University of North Carolina at Greensboro. Dr. Ackerman led our committee in establishing everything from the content outline, to the question format, to the passing score and grading outlines.

**Q: Did the exam meet your expectations?**

**Bill:** Yes, I expected the exam to be straightforward and not designed to trick the examinees. I appreciated the fact that the content was based on practice and contained a broad range of subject matter. I felt that it was pitched at the right level of difficulty. It's a day-long exam, so that was a challenging day, but overall I thought the experience was good and the exam was fair.

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

**Matthew:** Absolutely, I feel that I'm a more well rounded practitioner today than I was three years ago before this process began. The exam drafting made me look at areas that I don't see in my practice on a daily basis. The members of the trademark specialty committee come from very different backgrounds, including firm size, location, and type of practice. That diversity was incredibly helpful as we prepared the exam questions. We learned a tremendous amount from each other.

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

**Bill:** I think of it largely as another mar-



Bryner



Ladenheim

keting arrow in my quiver. I am now one of a small number of lawyers certified in trademark law by the State Bar. Clients and potential clients should look at that and understand that it shows my commitment to this practice area.

**Matthew:** I also see certification being helpful to the practice of law in general. The entire purpose of trademark law is to prevent consumer confusion in the marketplace. Specialization will help further that purpose. Often members of the public, and members of the Bar, erroneously assume that an attorney who is licensed by the USPTO is necessarily proficient in trademark law. Specialization provides a mechanism that allows dedicated trademark practitioners to distinguish themselves from dabblers. I also believe certification will increase the quality of practice in our state—even seasoned trademark lawyers will benefit from the exercise of becoming board certified.

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

**Bill:** Thankfully my clients were not surprised; they believed in my ability to pass the exam. I have been pleasantly surprised by the welcoming and congratulations I received from colleagues who are certified in other practice areas as well.

**Q: How does your certification benefit your clients?**

**Matthew:** The process of creating the

exam led me to re-examine what I know and fill in the gaps. I would think that the same is probably true for those who studied for and took the exam. During the course of this process I developed a deeper relationship with the other committee members, which obviously gives me a wider network of lawyers with whom to collaborate and to whom I can make referrals with confidence. The networking opportunities, along with the deeper knowledge base, are benefits to all of our clients.

**Q: Are there any hot topics in trademark law now?**

**Bill:** One current topic is the decision of The Internet Corporation for Assigned Names and Numbers (ICANN) to allow more flexibility in top level domain names. In early 2012, ICANN began to accept applications for generic top level domain names so that a corporation could apply for a “dot anything” name and no longer be restricted to .com, .org, etc. It is anticipated that this could change the face of the internet and allow for more creativity and innovation, but it is a slow and ongoing process, and brand owners are rightly concerned about its implications.

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

**Matthew:** Beyond my participation on the specialization committee, I speak at CLE seminars, and follow some excellent trademark law blogs. The International Trademark Association (INTA) offers a broad range of resources, including educational and networking opportunities and online international legal guides and updates.

**Bill:** I am fortunate to also have good partners who communicate case developments and updates. We offer in-house CLE programs, and as a firm maintain a commitment to keep each other informed.

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

**Bill:** I think it is very important. There are a relatively small number of lawyers who practice trademark law exclusively, but a greater number who dabble under the radar. I saw the results of bad legal advice and wondered what the original lawyer was thinking. On one hand there’s a perception that intellectual property law is complicated, and on the other hand there’s a perception that trademark law must not be as complicated as patent law. It’s important for clients to be able to readily identify a level of genuine expertise in trademark law.

**Q: Is certification important in your region?**

**Matthew:** Yes, I think certification is

important in North Carolina, but it is also important beyond our region. In trademark law, so much of what we do involves federal law. I would guess that about half of my client base is in North Carolina and the other half is

spread throughout the country. Often my out-of-state clients find me because they are planning to file a lawsuit in North Carolina.

CONTINUED ON PAGE 62

### **Congratulations to North Carolina's 2013 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 25, 2013.*

#### **Bankruptcy**

Scott McKellar - Business and Consumer, Rocky Mount

#### **Appellate**

Richard Dietz, Winston-Salem

#### **Criminal**

R. Seth Banks - State, Burnsville  
William Bland - State, Goldsboro  
Mireille Clough - Federal/State, Winston-Salem  
Anthony Monaghan - State, Charlotte  
Brian Moore - State, Wilmington  
Lizmar Bosques Rosado - State, Winston-Salem  
William Willis - State, Mooresville  
Michael Reece - State, Smithfield

#### **Estate Planning**

Elinor Foy, Raleigh  
Sherwood Henderson, Kinston

#### **Family**

Matthew Arnold, Charlotte  
Ronnie Crisco, Mooresville  
Heather Forshey, Raleigh  
Teresa Hardison, Cary  
Lee Hawley, High Point  
Afi Johnson-Parris, Greensboro  
Lisa Kamarchik, Raleigh  
Laura Manfreda, Cary  
John Martin, Greenville  
Katie Miller, Charlotte  
Rhonda Moorefield, Asheville  
Stephen Robertson, Greensboro  
David Self, Huntersville  
Tonya Graser Smith, Charlotte

#### **Immigration**

P. Mercer Cauley, Charlotte

Jennifer Cory, Charlotte  
Helen Parsonage, Winston-Salem

#### **Real Property Law**

Laura Lamkin - Residential, Raleigh  
Robbie Parker - Commercial, Wilmington  
Elizabeth Zook - Commercial, Greensboro

#### **Social Security**

Andrea Farmer, Rutherfordton

#### **Trademark**

Anthony Biller, Cary  
William Bryner, Winston-Salem  
Pamela Chestek, Raleigh  
Art Debaugh, Winston-Salem  
Angela Doughty, New Bern  
John Evans, Sunnyvale, CA  
Kathryn Eyster, Raleigh  
Kimberly Gatling, Greensboro  
Jayne Hunter, Charlotte  
Sarah Keefe, Research Triangle Park  
Matthew Ladenheim, Charlotte  
Richard Matthews, Raleigh  
Sarah Nagae, Raleigh  
Susan Olive, Durham  
Zaneta Robinson, Winston-Salem  
David Sar, Greensboro  
Trevor Schmidt, Raleigh  
Jeff Schwartz, Charlotte  
Randal Springer, Winston-Salem  
Maury Tepper, Raleigh  
Edward Timberlake, Carrboro  
Neal Wolgin, Chapel Hill

#### **Workers' Compensation**

Doug Berger, Durham  
James Adam Bridwell, Raleigh  
Michael Brown, Pleasant Garden  
Kevin Bunn, Cary  
Karissa Davan, Cary  
Kathleen Dubois, Winston-Salem  
Kristin Henriksen, Charlotte  
John Landry, Raleigh  
Daniel McCullough, Charlotte  
Rod Sherman, Charlotte  
Bridget Shrader, Greensboro  
Joel Turner, Raleigh  
Justin Wraight, Greensboro

# Lawyers Receive Professional Discipline

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## Disbarments

**Rosiland T. Grant** of Ahoskie surrendered her license to practice law and was disbarred by the State Bar Council. Grant acknowledged that she misappropriated entrusted funds totaling at least \$8,000.

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## Suspensions & Stayed Suspensions

The DHC suspended **Robert Adams** of Hickory for four years. Adams mismanaged his trust account by commingling funds, failing to identify clients on disbursements, failing to maintain ledgers, and failing to reconcile quarterly. After serving two years active suspension, Adams may apply for a stay of the balance upon showing compliance with numerous conditions.

**D. Bernard Alston** of Henderson was suspended for five years by the DHC. Alston engaged in the unauthorized practice of law while he was serving a disciplinary suspension. At the end of the suspension, Alston may apply for reinstatement upon showing compliance with numerous conditions, including passing the bar exam.

The DHC suspended **William Belk** of Charlotte, a former district court judge, for three years. The Supreme Court removed Belk from office for lying to the Judicial Standards Commission. After serving 12 months active suspension, Belk may apply for a stay of the balance upon showing compliance with numerous conditions.

**James Dickey** of Atlanta, GA, was suspended from the practice of law in North Carolina for two years as reciprocal discipline after he was suspended for two years by the South Carolina Supreme Court. Dickey's misconduct included failure to diligently prosecute his client's case, failure to keep his client informed about the status of a matter, failure to participate in good faith in the fee dispute resolution process, falsifying evidence provided to an opposing party, engaging in dishonest conduct, and engaging in conduct that is prejudicial to the administration of justice. Dickey's reinstatement is conditioned on his reinstatement

in South Carolina.

**Edwin M. Hardy** of Washington was suspended for two years by the DHC. Hardy did not perform quarterly reconciliations of his trust account; did not deposit mixed funds consisting of attorney fees, court costs, and fines in a trust account; and did not consistently maintain sufficient funds in the trust account to cover bank charges. The suspension is stayed for three years contingent upon Hardy's compliance with numerous conditions.

The DHC suspended **John Hauser** of Raleigh for one year. Hauser submitted to the CLE Board an annual report form signed and dated February 27, 2012, and represented that this form was a copy of the original he had returned by the February 29, 2012, deadline. The form he returned was actually not mailed to him by the State Bar until March 14, 2012. The suspension is stayed for one year upon his compliance with numerous conditions.

The DHC suspended **William "Tripp" McKeny** of Salisbury for three years. McKeny mishandled entrusted funds and engaged in gross trust account mismanagement. After serving one year active suspension, McKeny may apply for a stay of the balance upon showing compliance with numerous conditions.

The DHC suspended **John M. McWilliam** of Garner for two years. McWilliam did not reconcile his trust account and did not supervise his firm's bookkeeper, as a result of which the bookkeeper misappropriated entrusted funds. The DHC suspended McWilliam for two years. The suspension is stayed for two years upon his compliance with numerous conditions.

The DHC suspended **Susan Saturno** of Ocean Isle for one year. Saturno signed her client's name on a document required by a lender and notarized her client's purported signature.

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## Show Cause Orders

In April 2010 the DHC suspended

**Willie D. Gilbert II** of Wilson for five years for mishandling client funds. The suspension was stayed for five years upon compliance with numerous conditions. The DHC concluded that Gilbert violated several conditions, including that he violated the Rules of Professional Conduct by making false or misleading statements to a tribunal, that he did not timely submit reports to the Office of Counsel, and that he did not timely pay membership dues. The DHC activated three years of the suspension.

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## Interim Suspensions

The DHC entered an order of interim suspension suspending the law license of **John W. Roebuck Jr.**, of Rockingham until the conclusion of all disciplinary matters related to his felony conviction of maintaining a dwelling or vehicle for the purpose of using, keeping, or selling a controlled substance.

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## Censures

The DHC censured **James T. Brown Jr.** of Goldsboro. Brown assisted others in criminal conduct by preparing HUD-1 Settlement Statements misrepresenting purchases as refinances. The DHC dismissed several alleged violations based on conduct not constituting a felony and not within six years of the date that the underlying grievance was opened.

**Robert J. Burford** of Raleigh was censured by the Grievance Committee. Burford disbursed funds to himself from his trust account without identifying the client from whose entrusted funds the disbursements were made, comingled his own funds with entrusted funds, and disbursed more for the benefit of a client than he held in trust for that client. Burford also did not maintain quarterly reconciliations and did not maintain all required client files and trust account ledgers.

The DHC censured **Curtis C. Osborne** of Charlotte. Osborne engaged in a conflict of interest, made a frivolous argument, and

was disruptive during a deposition.

**David J. Turlington III** of Boone was censured by the Grievance Committee. Turlington employed other attorneys' names and names of law firms in a keyword advertising campaign through Google's AdWords program. He continued this practice after publication of 2010 FEO 14, which states that an attorney's purchase or use of another attorney's name in an Internet search engine's keyword advertising program is dishonest. The committee also found Turlington knowingly made a false statement of material fact by claiming the inclusion of inappropriate keywords was inadvertent.

### Reprimands

**Cheri C. Patrick** of Durham was reprimanded by the Grievance Committee. Patrick and her client were sued by the client's ex-husband. Patrick had a conflict of interest and could not represent the client in the ex-husband's lawsuit. Nevertheless, Patrick prepared and sent to the client pleadings that the client filed *pro se*. Patrick knew or should have known that the unrepresented client would file the pleadings that Patrick prepared.

**Staten L. Wilcox** of Charlotte was reprimanded by the Grievance Committee. While settling a client's personal injury case, Wilcox instructed a staff member to sign the client's name on the release form and settlement checks and to execute a false notarization of the release form. The Grievance Committee took into account several mitigating factors, including that the client was not harmed, Wilcox did not act with a selfish motive, and Wilcox had practiced law for 35 years without prior discipline.

### Transfers to Disability Inactive Status

The chair of the Grievance Committee transferred **Thomas Clements** of Fayetteville to disability inactive status.

### Reinstatements

In 2009 the DHC suspended **Mark L. Bibbs** of Wilson for one year for misconduct related to substance abuse. The DHC stayed the suspension upon Bibbs' compliance with numerous conditions. In January 2013 the DHC activated the one-year suspension of Bibbs' license for violating the terms of the 2009 order. Although he was eligible to seek

reinstatement after three months, Bibbs chose to remain on active suspension for the entire year. Bibbs was reinstated by the secretary on January 6, 2014.

In 2008 the DHC suspended **Paul Erickson** of Asheville for five years. Erickson undertook to represent debtors at the behest of an unlawful debt relief service, followed that entity's instructions, and filed frivolous pleadings prepared by that entity. The DHC concluded that Erickson filed pleadings he knew to be false and contrary to established law. Erickson was reinstated by the secretary on October 25, 2013.

In July 2012 the DHC found that **Gary Lawrence** of Southport made sexual comments to and inappropriately touched three clients. He was suspended for three years. The order of discipline provided that Lawrence could apply for a stay of the suspension upon showing compliance with numerous conditions. After hearings on

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Thank you to Lawyers Mutual for sponsoring the NCSB-NCBA joint reception and dinner.

October 2, 2013, and January 10, 2014, the DHC reinstated Lawrence subject to numerous conditions.

### Clarification

The Winter 2013 *Journal* included an item reporting the disbarment of **David E. Duke** of Youngsville. *The order does not pertain to David M. Duke of Raleigh.* David M. Duke of Raleigh is a member of the State Bar in good standing. ■

### In Memoriam

**Lee Dossie Andrews**  
Greensboro, NC

**Shirley Jo Hastings Brown**  
Fletcher, NC

**James Foster Bullock**  
Fuquay Varina, NC

**Joseph Barrow Chambliss**  
Clinton, NC

**Theresa Poellnitz Clark**  
Fayetteville, NC

**Kenneth Boland Cruse**  
Rockwell, NC

**William Griffin Graves III**  
Chapel Hill, NC

**William Clyde Griffin Jr.**  
Ocracoke, NC

**Robert Ray Hayes**  
Graham, NC

**Robert Edward Hensley Jr.**  
Bradenton, FL

**George Lee Hudspeth**  
Jacksonville, FL

**Charles Thomas Johnson Jr.**  
Warrenton, NC

**Ralph Gubler Jorgensen**  
Tabor City, NC

**Sandra Moody King**  
Asheville, NC

**Mary Ann Conaboy Mills**  
Pinehurst, NC

**Frank J. Murphy Jr.**  
Charlotte, NC

**Dallas Morris Pounds**  
Lumberton, NC

**James Lee Seay**  
Raleigh, NC

**Henry Bascom Shore**  
Yadkinville, NC

**Henry Lee Sloan III**  
Charlotte, NC

**Henry Bascom Smith Jr.**  
Monroe, NC

**Cathie St. John-Ritzen**  
Asheville, NC

**John Richard Sutton Sr.**  
Candler, NC

**Daniel L. Taylor**  
Troutman, NC

# Friends in High Places

BY SUZANNE LEVER

An inquiry currently under consideration by the Ethics Committee contemplates whether the Rules of Professional Conduct permit a lawyer and a judge to “connect” on LinkedIn and, if so, whether either one can “endorse” the other.

LinkedIn is one of a number of professional networking websites. My (very basic) understanding of the website is that it allows registered members to maintain a list of contact details for people with whom they have established “connections.” Members can invite another member or even a nonmember to become a connection. Members can communicate with their connections on the website, and can also provide “endorsements” for their connections.

A LinkedIn member has the option of displaying a “skills & expertise” section within his or her profile. The member can select specific skills to be listed. Examples include: commercial litigation, family law, trial practice, contract negotiation, appeals, etc. A LinkedIn member may endorse another member for any of the skills listed, or even add a new item to another member’s “skills & expertise” section. For example, it is possible for a LinkedIn member to endorse a family lawyer for the skill and expertise of “patent prosecution.”

A member who is being endorsed by another member is notified of the endorsement and has the ability to reject the endorsement entirely or to pick and choose specific endorsements to be displayed. The endorsed member may also subsequently edit the “skills & expertise” section to “hide” selected endorsements.

The current draft of the proposed opinion (which is still being considered by the Ethics Committee) provides that a lawyer may accept an invitation to connect from a judge and may also send an invitation to connect to a judge. The opinion cautions, however, that if the lawyer represents clients in proceedings before a judge who invites the lawyer to connect on LinkedIn, the lawyer must “not

engage in conduct prejudicial to the administration of justice; not state or imply an ability to influence improperly a government agency or official; and avoid *ex parte* communications with the judge regarding the legal matter or issue the judge is considering.” (This would be a good time to point out the North Carolina State Bar Ethics Committee does not opine on the actions of members of the judiciary. Rather, the North Carolina Judicial Standards Commission has this responsibility. Therefore, our opinion only addresses the actions of the lawyer in these scenarios.)

The more controversial aspect of the proposed opinion pertains to the issue of endorsements between judges and lawyers. Rule 8.4(e) of the Rules of Professional Conduct provides that it is professional misconduct for a lawyer to “state or imply an ability to influence improperly a government agency or official.” If a lawyer accepts an endorsement from a judge as to the lawyer’s skills and expertise in the area of “trial practice” and displays the endorsement on the lawyer’s LinkedIn profile, does this indicate that lawyer has the ability to influence the judge improperly?

The current draft provides that a lawyer may not accept an endorsement from a judge unless the lawyer believes that he or she will

never represent a client in a matter before the judge, except as permitted by the North Carolina Code of Judicial Conduct pertaining to political campaigns. The draft further provides that a lawyer may endorse a judge only in the context of judicial political campaigns.

At the recent meeting of the Ethics Committee, this particular proposed opinion was tabled so that the committee could solicit comments from members of the Bar. Here are some issues the Ethics Committee is still considering:

- What responsibility does a LinkedIn member have to remove any endorsements made by—or for—a colleague who subsequently becomes a judge?
- If one lawyer in a firm is prohibited from accepting endorsements from a judge, are all lawyers in the firm similarly prohibited?
- Should the proposed opinion have a broad application to other types of social media, such as Facebook?
- Ethics opinions allow a lawyer to appear before a judge who is a current client with full disclosure and consent of all parties. Is an endorsement by a judge on LinkedIn substantially different?

CONTINUED ON PAGE 38



# IOLTA Grants Hold Steady for Another Year

## Income

IOLTA income earned in 2013 was received and entered through the end of January. We can report that the income from IOLTA accounts continues to decrease as many banks are re-certifying their comparability rates at lower levels. For the 2013 year, income from IOLTA accounts declined by 9%. Our total income did receive a boost from two cy pres awards during 2013 totaling over \$650,000.

We are continuing to work with the NC Equal Access to Justice Commission (EAJC) to educate lawyers and judges about the North Carolina statute that sets out a procedure for distributing class action residuals equally to the Indigent Person's Attorney Fund and to the North Carolina State Bar for the provision of civil legal services for indigents. An updated manual on *Cy Pres and Other Court Awards* published by the EAJC is available on the NC Equal Access to

Justice website, [ncequalaccesstojustice.com](http://ncequalaccesstojustice.com), and the NC IOLTA website, [nciolta.org](http://nciolta.org).

## 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 almost \$2.4 million in reserve funds over three years, grants have dramatically decreased (by over 40%). For 2013 we were able to keep grants steady at the 2012 level of \$2.3 million without using any additional funds from reserve because of a large cy pres award (\$1.2 million) received in 2012. We were also able to add funds to our reserve, bringing it to just under \$1 million. The reserve funds and the additional income from cy pres awards received in 2013 allowed the trustees to keep grants steady at \$2.3 million again for 2014, though we will have to take funds from reserve to meet that figure.

## 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 2012-13 was \$3.5 million, decreased from over \$5 million in 2010-11 due to reductions to both the appropriated funds and the filing fee allocations. The Equal Access to Justice Commission, the legal aid programs, and the NCBA continue to work to sustain and improve the funding for legal aid.

## New Access to Justice Coordinator

NC IOLTA and the NC Equal Access to Justice Commission began sharing a staff person in January 2014. Mary Irvine is a recent graduate of UNC Law School and has worked for both the UNC Center on Work Poverty and Opportunity and for the NC Network of Grantmakers. ■

## Lawyer Assistance Program (cont.)

### *The Really Hard, but Necessary, Steps*

The family and outside counseling play important roles.

A teenage child who does not drink in this culture can be very lonely. As drinking friends disappear, it is important to replace them with supporting and loving people. It is critical for parents to provide company and support to their teenager who is alone because he or she is doing the right thing. This means more than providing frozen pizza on Saturday night before parents go out to dinner with their friends. It means actively providing alcohol-free events and entertainment for their child. It means encouraging and rewarding good behavior. It means focusing on the child's needs almost exclusively—just for a little while until the new way of life sets in. Healthy discussions about alcohol and feelings will occur during these

events without a lot of effort—angry and unlikable children often will become easier to handle as well. Without parental support, it will be difficult for a child to accomplish a change in drinking habits.

Finally, alcohol abuse is a family problem, that is, it arises from the behavior of the family as a system. Accordingly, it is important for the members of a family with a teenager who abuses alcohol to get some professional help from counselors or therapists, with two caveats. First, I believe that a counselor in these matters should have extensive experience with substance abuse issues, or even be a recovered alcoholic. And second, an hour a week with a counselor will not provide the kind of change that is required. Daily willingness to make changes to accomplish this important goal is the only way that it will happen. For parents who have a child in active addiction of any form, it is imperative to attend some kind of week-long family program with Al-Anon support to follow in order to best help the child recover.

## We Are Not Helpless!

Parents spend a lot of time, effort, money, and energy to keep our children safe. Alcohol abuse during late teens is a common source of injury and agony, and our society seems to condone and endorse it more and more. We are not helpless in preventing it. Please consider the steps outlined above to eliminate underage drinking from your home and to ensure a bright future for your children. ■

*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](http://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 Tony Porrett (for Raleigh and down east) at 919-719-9267.*

# E-Recording and Trust Accounts: Timing is Everything

BY PETER BOLAC

This past year the Wake County Register of Deeds joined the numerous other counties that accept electronic recording of documents. According to Electronic Documents Logistics (EDL), an e-recording provider, there are at least 23 counties<sup>1</sup> in North Carolina that accept fee-based documents via electronic recording. The State Bar has received inquiries from lawyers asking how they can use this service, which benefits both lawyers and clients in terms of efficiency, while staying in compliance with the trust accounting requirements in the Rules of Professional Conduct. The most common inquiry is as follows:

A real estate law firm would like to begin recording documents electronically. The law firm proposes to electronically provide documents to an authorized service company, which would then transmit the documents to the appropriate register of deeds.

At the end of a closing, the law firm would wire the money shown on the settlement statement for recording fees and excise taxes to the account established with the company. The company would then submit the documents to the register of deeds for same day recording using the money from the account to pay the recording fees and taxes, and their service fee.

**Question:** Is the law firm's proposal permissible under the North Carolina State Bar's trust accounting rules?

**Answer:** No, because of the timing. The funds transferred from the lawyer's trust account to the third party account remain client funds entrusted to the lawyer until they are paid to the clerk or register of deeds. Therefore, if client funds are transferred to the third-party account *before* the company withdraws funds from the account to pay recording fees, taxes, and service fees, then that account must be maintained as a trust account subject to all of the provisions of Rule 1.15 of the Rules of Professional Conduct. This is because the funds still

belong to the client and must be handled as "entrusted funds" under the Rules.

But wait, do not despair! A 2010 South Carolina Ethics Advisory Opinion accurately explains the solution to this dilemma:

[A] way to avoid this [dilemma] would be if the recording account contained the lawyer's own funds which were being advanced for the recording of the documents. Then the contents of the account would not be client funds or legal fees at all, but the lawyer's own funds. The lawyer would then be reimbursed for these advanced costs by a disbursement from the client trust account once recording had been accomplished. Rule 1.8(e) specifically permits a lawyer to advance court costs and expenses of litigation, but prohibits a lawyer from providing a client with any other financial assistance. The payment of recording and transfer fees would be analogous to court costs and expenses of litigation, which are routinely permitted to be advanced in other areas of the law...As long as the lawyer ensures that the shared account does not contain legal fees or client funds, the lawyer could participate in the clerk or register's e-recording procedure without violating any of the lawyer's ethical obligations.<sup>2</sup>

Remember, the lawyer must insure that the settlement statement accurately reflects the lawyer's handling of the trust funds.<sup>3</sup> The settlement statement should reflect the payment to the lawyer as reimbursement for advancing the recording costs via the third party recorder.

E-recording is here to stay, and it provides a great service to lawyers and their clients.<sup>4</sup> If lawyers follow these procedures, they should be able to use this service and maintain compliance with the Rules of Professional Conduct. ■

*Peter Bocal is the State Bar's district bar liaison and trust account compliance counsel.*

## Endnote

1. According to EDL's unofficial list, the following counties accept e-recording of fee-based documents: Alexander, Avery, Buncombe, Caldwell, Davidson, Durham, Forsyth, Gaston, Guilford, Harnett, Haywood, Iredell, Johnston, McDowell, Mecklenburg, New Hanover, Onslow, Pamlico, Pitt, Robeson, Rowan, Wake, Yancey.
2. South Carolina Bar, Ethics Advisory Opinion, 10-02 (2010).
3. See North Carolina State Bar Ethics Opinion RPC 86 (1990).
4. For more information on e-recording in Wake County, visit the register of deeds website at [rod.wakegov.com](http://rod.wakegov.com).

**NOTE:** Judicial Districts randomly selected for audit for the first quarter of 2014 are District 7, composed of Edgecombe, Nash and Wilson counties, and District 9, composed of Franklin, Granville, Vance and Warren counties. Get fraud alerts and trust account information on Twitter! Follow @TrustAccountNC.

## Legal Ethics (cont.)

The Ethics Committee would like to "connect" with the members of the bar—young or old, PC or Mac—and get your thoughts on these, or other, issues pertaining to the use of LinkedIn or similar professional networking websites by lawyers. You may email your comments to Lanice Heidbrink at [Lheidbrink@ncbar.gov](mailto:Lheidbrink@ncbar.gov).

All comments received prior to the next meeting of the Ethics Committee will be provided to committee members for consideration and will be included in the meeting agenda. *Note that all Ethics Committee meetings are public and comments will become part of the public records of the State Bar.* ■

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

# Amendments Pending Approval of the Supreme Court

At its meetings on October 25, 2013, and January 24, 2014, 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 2013 and Winter 2013 editions of the *Journal* or visit the State Bar website):

## Proposed Amendments to the Rules on Classes of Membership

27 N.C.A.C. 1A, Section .0200, Membership - Annual Membership Fees

The proposed amendments allow an inactive member of the State Bar to be designated as “retired” in the State Bar membership records and to hold himself or herself out as a “Retired Member of the State Bar.”

## Proposed Amendments to the Rules for Judicial District Bars

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

The proposed amendments exempt members who are on active military duty or newly admitted to the bar from the obligation to pay a judicial district bar annual membership fee. The proposed amendments also require judicial district bars that assess mandatory membership fees for the first time after 2013 to adopt a fiscal year of July 1- June 30.

## Proposed Amendments to the Model Bylaws for Judicial District Bars

27 N.C.A.C. 1A, Section .1000, Model Bylaws for Use by Judicial District Bars

The proposed amendments reflect recent changes to N.C. Gen. Stat. §7A-142, which allows members of a judicial district bar to participate in the selection of nominees to be considered by the governor when filling a vacant district court judgeship in the district.

## Proposed Amendments to the Rules and Regulations Governing the CLE Program

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

.1600, Regulations Governing the Administration of the Continuing Education Program

The proposed amendments make the following changes to the rules and regulations for the CLE program: change the name of the professionalism requirement for new lawyers from “New Admittee Professionalism Program” to “Professionalism for New Attorneys Program” (PNA Program); specify that the PNA Program may be presented by live webcast or by video replay if one hour of every six hours of programming is live; revise the accredited sponsor rule to reflect accurately the process that is used to approve programs presented by accredited sponsors; permit the accreditation of a product-specific technology course if there is a nexus to the practice of law and certain other conditions are met; increase the number of CLE credits that may be taken online each year from 4 to 6; correct a typographical error that implies that more than 6 hours of computer-based CLE may be carried-over to the next calendar year; and clarify that webcasting is a live simultaneous broadcast that is not subject to the restrictions on video replay presentations.

## Proposed Amendments to The Plan of Legal Specialization

27 N.C.A.C. 1D, Section .1700, The Plan of Legal Specialization; Section .1800, Hearing and Appeal Rules of the Board of Legal Specialization

The proposed amendments add trademark law to the official list of recognized specialties and allow denial of a re-grading petition by the chair of the Board of Legal Specialization upon a finding that insufficient points are at issue to justify re-grading the examination.

## Proposed Amendments to the Rules for Registration of Interstate and International Law Firms

27 N.C.A.C. 1E, .0200, Registration of Interstate and International Law Firms

The proposed amendments require any law firm filing a certificate of authority to transact business in North Carolina with the

secretary of state to register with the State Bar as an interstate or international law firm.

## Proposed Amendments to the Rules for the Paralegal Certification Program

27 N.C.A.C. 1G, Section .0100, The Plan for Certification of Paralegals, and Section .0200, Rules Governing Continuing Paralegal Education

The proposed amendments to the Plan for Certification of Paralegals clarify the current duties of the Paralegal Certification Committee; allow certified paralegal members of the board to be reappointed by the council at the end of their terms without nomination by vote of all active certified paralegals; provide additional standards for certification relative to misconduct based on dishonesty, fraud, deceit, or misrepresentation; and expand the standards for qualified paralegal studies programs to include institutional members of national accrediting agencies recognized by the United States Department of Education.

The proposed amendments to the rules on continuing paralegal education (CPE) allow stress management courses to be approved for CPE.

## Proposed Amendments to Administrative Rules to Delete References to the “Judicial Surcharge”

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

In 2013 the General Assembly eliminated the judicial surcharge, which the State Bar had previously been obligated to collect from its members for distribution to the State Board of Elections. In consequence of the elimination of the surcharge, the council determined that it was necessary to delete all references to the surcharge from the State Bar’s administrative rules on inactive status and administrative suspension. Since these amendments are necessitated by legislative action, the rule amendments will not be published. The following is a list of the affected rules in Chapter 1D, Section .0900 of the State Bar rules: Rule .0901(b); Rule .0902(b)(7) and (j); Rule .0903(a)(1)(A); and Rule .0904(d)(6)(B) and (h).

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# Amendments with Respect to Which Supreme Court Submission is Deferred

At its meeting on October 25, 2013, the council voted to adopt amendments to Rule 1.17 and Rule 7.3 of the Rules of Professional Conduct for transmission to the North Carolina Supreme Court for approval (for the complete text see the Fall 2013 edition of the *Journal* or visit the State Bar website). However, at its meeting on January 24, 2014, the council determined that submission of the proposed amendments to these rules should be deferred until after the publication of the amendments to the Rules of Professional Conduct proposed by the Study Committee on (ABA) Ethics 20/20. The Study Committee's proposed amendments to the Rules of Professional Conduct can

be found elsewhere in this edition of the *Journal*. The Study Committee recommends amendments to Rule 1.17 and Rule 7.3. Although the amendments to Rule 1.17 and Rule 7.3 proposed by the Study Committee will not impact the amendments to the rules already approved by the council, the council determined that all amendments to these rules should be submitted to the Supreme Court at one time. The amendments already approved by the council are described below.

## Proposed Amendments to Rules of Professional Conduct

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

The proposed amendments to Rule 1.17, *Sale of a Law Practice*, clarify that a sole practitioner who sells his or her law firm to another lawyer may continue to work for the firm. The proposed amendments also explain the disclosure requirements if the purchaser continues to use the name of the firm. The proposed amendments to Rule 7.3, *Direct Contact with Potential Clients*, specify that the advertising notice on written targeted communications soliciting professional employment must be conspicuous and must match in size, color, and type the largest and widest of the fonts used on the envelope or written communication.

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## Proposed Amendments

At its meeting on January 24, 2014, the council voted to publish the following proposed rule amendments for comment from the members of the bar:

### Proposed Amendments to the Procedures for Reinstatement from Inactive Status and Administrative Suspension

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

These proposed amendments were originally published after the October 25, 2013, meeting of the council. At its January 24, 2013, meeting, the council determined that a recent proposed amendment to the CLE rules permitting a member to take up to 6.0 CLE credits per year online should be incorporated into the requirements for reinstatement from inactive status and administrative suspension. This change does not impact the proposed amendments that were published after the October meeting and which accomplish the following: eliminate the three different CLE requirements for reinstatement from inactive status and administrative suspension (the application of which depends

upon when the member's status changed) in favor of one standard that will apply to all petitioners for reinstatement without regard to when the petitioner was transferred to inactive or suspended status, and make March 10, 2011, the effective date for the requirement of passage of the bar exam if the petitioner was administratively suspended for seven years or more.

### .0902 Reinstatement from Inactive Status

(a) Eligibility to Apply for Reinstatement

...

(c) Requirements for Reinstatement

(1) Completion of Petition.

...

(2) CLE Requirements for Calendar Year Before Inactive.

Unless the member was exempt from such requirements pursuant to Rule .1517 of this subchapter or is subject to the requirements in paragraph (c)(5)(6) of this rule, the member must satisfy the minimum continuing legal education requirements, as set forth in Rule .1518 of this subchapter, for the calendar year

immediately preceding the calendar year in which the member was transferred to inactive status, (the "subject year"), including any deficit from a prior calendar year that was carried forward and recorded in the member's CLE record for the subject year.

(3) Character and Fitness to Practice.

...

~~(4) CLE Requirements For Members Granted Inactive Status Prior to March 10, 2011.~~

[Effective for all members who are transferred to inactive status on or after January 1, 1996, through March 9, 2011.] If more than 2 years have elapsed between the date of the entry of the order transferring the member to inactive status and the date the petition is filed, the member must complete 15 hours of continuing legal education (CLE) approved by the Board of Continuing Legal Education pursuant to Rule .1519 of this subchapter. Of the required 15 CLE hours, 3 hours must be earned by attending courses in the areas of professional responsibility and/or professionalism. The CLE hours must be com-

pleted within one year prior to the filing of the petition.

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

~~[Effective for all members who are transferred to inactive status on or after March 10, 2011.]~~ If more than 1 ~~but less than 7~~ **year has** elapsed between the date of the entry of the order transferring the member to inactive status and the date that the petition is filed, the member must complete 12 hours of approved CLE for each year that the member was inactive **up to a maximum of 7 years.** The CLE hours must be completed within 2 years prior to filing the petition. For each 12-hour increment, ~~4~~ **6** hours may be taken online; 2 hours must be earned by attending courses in the areas of professional responsibility and/or professionalism; and 5 hours must be earned by attending courses determined to be practical skills courses by the Board of Continuing Legal Education or its designee. If during the period of inactivity the member complied with mandatory CLE requirements of another state where the member is licensed, those CLE credit hours may be applied to the requirements under this provision without regard to whether they were taken during the 2 years prior to filing the petition.

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

~~[Effective for all members who are transferred to inactive status on or after March 10, 2011.]~~ If 7 years or more have elapsed between the date of the entry of the order transferring the member to inactive status and the date that the petition is filed, the member must obtain a passing grade on a regularly scheduled North Carolina bar examination. **A member subject to this requirement does not have to satisfy the CLE requirements in paragraphs (c)(2) and (c)(4).**

(A) Active Licensure in Another State. Each year of active licensure in another state during the period of inactive status shall offset one year of inactive status for the purpose of calculating the 7 years necessary to actuate this provision. If the member is not required to pass the bar examination as a consequence of offsetting, the member shall satisfy the CLE requirements set forth in paragraph (c)(5)(4) for each year that the member was inactive up to a maximum of 7 years.

(B) Military Service. Each calendar year in which an inactive member served on full-time, active military duty, whether for the entire calendar year or some portion thereof, shall offset one year of inactive status for the purpose of calculating the 7 years necessary to actuate the requirement of this paragraph. If the member is not required to pass the bar examination as a consequence of offsetting, the member shall satisfy the CLE requirements set forth in paragraph (c)(5)(4) for each year that the member was inactive up to a maximum of 7 years. ~~(6)(7)~~ Payment of Fees, Assessments and Costs

**.0904 Reinstatement from Suspension**

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

...  
(d) Requirements for Reinstatement  
(1) Completion of Petition

...  
(2) CLE Requirements for Calendar Years Before Suspended

Unless the member was exempt from such requirements pursuant to Rule .1517 of this subchapter or is subject to the requirements in paragraph (d)(4) of this rule, the member must satisfy the minimum continuing legal education (CLE) requirements, as set forth in Rule .1518 of this subchapter, for the calendar year immediately preceding the year in which the member was suspended (the "subject year"), including any deficit from a prior year that was carried forward and recorded in the member's CLE record for the subject year. The member shall also sign and file any delinquent CLE annual report form.

**(3) Additional CLE Requirements If Suspended Less Than 7 Years**

If more than 1 ~~but less than 7~~ **year has** elapsed between the effective date of the suspension order and the date upon which the reinstatement petition is filed, the member must complete 12 hours of approved CLE for each year that the member was suspended **up to a maximum of 7 years.** The CLE must be completed within 2 years prior to filing the petition. For each 12-hour increment, ~~4~~ **6** hours may be taken online; 2 hours must be earned by attending courses in the areas of professional responsibility and/or pro-

*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.**

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

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

**[Effective for all members who are administratively suspended on or after March 10, 2011.]** If 7 years or more have elapsed between the effective date of the suspension order and the date that the petition is filed, the member must obtain a passing grade on a regularly scheduled North Carolina bar examination. **A member subject to this requirement does not have to satisfy the CLE requirements in paragraphs (d)(2) and (d)(3).**

(A) Active Licensure in Another State. Each year of active licensure in another state during the period of suspension shall offset one year of suspension for the purpose of calculating the 7 years necessary to actuate this provision. If the member is not required to pass the bar examination as a consequence of offsetting, the member shall satisfy the CLE requirements set forth in paragraph (d)(3) for each year that the member was suspended up to a maximum of 7 years.

CONTINUED ON PAGE 45

# Committee Issues Opinions Supportive of Mentoring and of *Pro Bono* Service by Government Lawyers

## Council Actions

At its meeting on January 24, 2014, the State Bar Council adopted the ethics opinions summarized below:

### 2013 FEO 2

#### *Providing Defendant with Discovery During Representation*

Opinion rules that if, after providing a criminal client with a summary/explanation of the discovery materials in the client's file, the client requests access to the entire file, the lawyer must afford the client the opportunity to meaningfully review all of the relevant discovery materials unless the lawyer believes it is in the best interest of the client's legal defense not to do so.

### 2013 Formal Ethics Opinion 13

#### *Disbursement Against Funds Credited to Trust Account by ACH and EFT*

Opinion rules that a lawyer may disburse immediately against funds that are credited to the lawyer's trust account by automated clearinghouse (ACH) transfer and electronic funds transfer (EFT) despite the risk that an originator may initiate a reversal.

### 2013 Formal Ethics Opinion 15

#### *Return of Records to Client upon Termination of Representation*

Opinion rules that records relative to a client's matter that would be helpful to subsequent legal counsel must be provided to the client upon the termination of the representation, but may be provided in an electronic format if readily accessible to the client without undue expense.

## Ethics Committee Actions

At its meeting on January 23, 2014, the Ethics Committee voted to send the following proposed opinions to subcommittees for further study: Proposed 2013 FEO 12, *Disclosure of Settlement Terms to Former Lawyer Asserting a Claim for Fee Division*, and Proposed 2013 FEO 14, *Representation*

*of Parties to a Commercial Real Estate Loan Closing*. The Ethics Committee also voted to publish three new proposed opinions. The comments of readers on the proposed opinions are welcomed.

At its October 24, 2013, meeting, the committee voted to send proposed 2013 FEO 8, *Responding to the Mental Impairment of Firm Lawyer*, to the staff for revisions to be considered by the committee at its meeting in January 2014. Unfortunately, this item was not considered by the committee at the January meeting, but will be considered by the committee at its April meeting.

### Proposed 2014 Formal Ethics Opinion 1 Protecting Confidential Client Information when Mentoring January 23, 2014

*Proposed opinion discusses actions necessary to protect confidential client information when mentoring law students and lawyers.*

**Note:** This opinion applies to mentoring relationships established informally, outside the context of a mentoring program of a bar organization or law school, as well as to formal mentoring relationships established through a bar organization or law school. However, the opinion does not apply to law students certified under the Rules Governing the Practical Training of Law Students (27 N.C.A.C 1C, Section .0200) or to lawyers supervising such students. In addition, this opinion does not apply to lawyers, employees, or law clerks being mentored or supervised by a lawyer within the same firm. See Rule 5.1-5.3.

### Inquiry #1:

May a lawyer who is mentoring a law student allow the student to observe confidential client consultations between the lawyer and the lawyer's client?

### Opinion #1:

Yes. The lawyer may allow the law student to observe the consultation so long as the student signs a confidentiality agreement and the lawyer's client gives his or her informed consent, confirmed in writing.

Rule 1.6(a) of the Rules of Professional Conduct provides that a lawyer shall not reveal information acquired during the professional relationship with a client unless (1) the client gives informed consent; (2) the disclosure is impliedly authorized; or (3) one of the exceptions set out in Rule 1.6(b) applies. "Informed consent" is defined by Rule 1.0(f) as denoting "the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation appropriate to the circumstances."

The attorney-client privilege prohibits a lawyer from testifying as to confidential communications between the lawyer and the client for the purpose of legal representation. *State v. McIntosh*, 336 NC 517, 523, 444 S.E.2d 438, 441 (1994). The privilege is fundamental to the client-lawyer relationship and the trust that underpins that relationship. To seek the client's informed consent, the lawyer must research the law relating to the attorney-client privilege and explain to the client what effect the law student's presence during the consultation may have on the attorney-client privilege, including a potential waiver of the privilege. The lawyer must also explain any other adverse effect on the client's interests. ABA Standing Comm. on Ethics and Prof'l Resp., Formal Op. 98-411 (1988). The lawyer must not ask for consent unless, in his professional opinion, either the attorney-client privilege will not be waived by the presence of the law student, or a potential waiver of the attorney-client privilege will cause minimal, or no, detriment to the client's interests such that to ask

for consent is reasonable.

Pursuant to Rule 1.0(c), “confirmed in writing” in this context “denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent.”

### **Inquiry #2:**

If a lawyer is mentored by a lawyer in a different law firm, do the requirements in Opinion #1 apply when the lawyer-mentee observes a client consultation between the lawyer-mentor and a client or when the lawyer-mentor observes the lawyer-mentee conducting such a consultation with his client?

### **Opinion #2:**

Yes. The lawyer conducting the consultation must evaluate the effect of the observing lawyer’s presence on the attorney-client privilege. If the lawyer concludes that, in his professional opinion, either the attorney-client privilege will not be waived by the presence of the other lawyer, or a potential waiver of the attorney-client privilege will cause minimal, or no, detriment to the client’s interests such that to ask for consent is reasonable, the lawyer may ask the client to consent to the observation. The lawyer must obtain the client’s informed consent confirmed in writing.

The lawyer conducting the consultation must also obtain an agreement from the observing lawyer to maintain the confidentiality of the information as well as an agreement that the observing lawyer will not engage in adverse representations. Rule 1.7 and Rule 1.9.

Both lawyers should check for conflicts of interest in advance of the consultation. Rule 1.7 and Rule 1.9.

### **Inquiry #3:**

When a lawyer seeks advice from a lawyer-mentor on the representation of a client of the lawyer, what actions should be taken to protect confidential client information?

### **Opinion #3:**

If possible, the lawyer should try to obtain guidance without disclosing client information, which can be done by using a hypothetical. If the consultation is general and does not involve the disclosure of client

information, no client consent is necessary and the lawyers do not have to comply with the requirements set out in Opinion #2.

If the consultation is intended to help the lawyer-mentee comply with the ethics rules, no client consent is necessary and the lawyers do not have to comply with the requirements set out in Opinion #2. Rule 1.6(b)(5) provides that a lawyer may reveal protected client information to the extent the lawyer reasonably believes necessary “to secure legal advice about the lawyer’s compliance with [the Rules of Professional Conduct].” Pursuant to Comment [10] to Rule 1.6:

A lawyer’s confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer’s personal responsibility to comply with [the Rules of Professional Conduct.] In most situations, disclosing information to secure such advice will be impliedly authorized for the lawyer to carry out the representation. Even when the disclosure is not impliedly authorized, paragraph (b)(5) permits such disclosure because of the importance of a lawyer’s compliance with the Rules of Professional Conduct.

If the consultation does not involve advice about the lawyer’s compliance with the Rules of Professional Conduct, a hypothetical is not practical, or making the inquiry risks disclosure of information relating to the representation, the lawyer-mentee must comply with the requirements set out in Opinion #2.

Both the lawyer-mentee and the lawyer-mentor should avoid the creation of a conflict of interest with any existing or former clients by virtue of the mentoring relationship. For example, the lawyer-mentee should not consult with a lawyer he knows has represented the opposing party in the past without first ascertaining that the matters are not substantially related and that the opposing party is not represented in the current matter by the lawyer-mentor. Similarly, the lawyer-mentor should obtain information sufficient to determine that the lawyer-mentee’s matter is not one affecting the interests of an existing or former client. Rule 1.7 and Rule 1.9.

### **Inquiry #4:**

Is a lawyer prohibited from subpoenaing a law student, lawyer-mentee, or lawyer-mentor to obtain information about a client consultation in which the attorney-client privilege may have been waived because of

## *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.

the presence of such third parties?

### **Opinion #4:**

Yes. Mentoring is critical to the development of competent legal skills in both law students and lawyers—especially new lawyers. If lawyers who want to serve as mentors cannot rely upon their colleagues to refrain from taking advantage of a potential waiver of the privilege, there is a risk that no lawyers will be willing to serve as mentors. This would be a detriment to the bar and, ultimately, consumers of legal services. Therefore, it would be prejudicial to the administration of justice in violation of Rule 8.4(d) for a lawyer to subpoena a law student, lawyer-mentee, or lawyer-mentor to obtain information that would be protected by the attorney-client privilege but for an

## 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 31, 2014.

## 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.

inadvertent waiver as a consequence of a mentoring relationship.

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### Proposed 2014 Formal Ethics Opinion 2 Dual Representation of Trustee and Secured Creditor in Contested Foreclosure January 23, 2014

*Proposed opinion rules that a lawyer may not represent both the trustee and the secured creditor in a contested foreclosure proceeding.*

#### Inquiry:

A law firm has entered into a contract with an independent corporation to serve as substitute trustee in any foreclosure proceeding initiated by the law firm. No member of

the law firm, or anyone related to any member of the law firm, has any affiliation with or financial interest in the corporation.

May the law firm represent the corporation serving as the trustee in a contested foreclosure proceeding, while also representing the secured creditor in the proceeding?

#### Opinion:

No. As noted in NC Gen. Stat. §45-21.16(c), a trustee on a deed of trust is "a neutral party and, while holding that position in the foreclosure proceeding, may not advocate for the secured creditor or for the debtor in the foreclosure proceeding." Because of the conflict between the neutral, fiduciary role of trustee and the role of an advocate for one of the parties to a contested foreclosure, a number of ethics opinions hold that a lawyer serving as a trustee in a contested foreclosure proceeding may not represent the secured creditor or the debtor in the proceeding. 2008 FEO 11 (listing opinions).

By extension, a lawyer representing the trustee in a contested foreclosure proceeding is also prohibited from representing the secured creditor or the debtor in the proceeding. This is because the lawyer must advise the trustee on maintaining a neutral role, and this representation would be materially limited by the advocacy required to represent either the secured creditor or the debtor. In fact, 2008 FEO 11 specifically prohibits the simultaneous representation in a contested foreclosure proceeding of the secured creditor and a corporate trustee specifically created by the lawyer's firm to serve in this capacity. 2008 FEO 11, Opinion #5.

The Ethics Committee has recognized a limited exception to the prohibition on representation of the secured creditor by a lawyer for the trustee in a contested foreclosure proceeding. This exception permits joint representation of both the trustee and the secured creditor, but not in the contested foreclosure itself. In 2004 FEO 3, a lawyer proposed to represent both the secured creditor and the trustee in an unfair debt collection action filed by the borrower against the secured creditor and the trustee. To enjoin the pending foreclosure proceeding, the trustee was named as a party-defendant in the action. The opinion holds that the lawyer may represent both the secured creditor and the trustee as codefendants in this separate, tangential lawsuit brought by the borrower if the lawyer determines that his representation

will not be impaired, and both the secured creditor and the trustee give informed consent. 2004 FEO 3 (applying a conflict of interest analysis under Rule 1.7).

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### Proposed 2014 Formal Ethics Opinion 3 Pro Bono Legal Services Provided by Government and Public Sector Lawyers January 23, 2014

*Proposed opinion encourages government lawyers to engage in pro bono representation unless prohibited by law from doing so.*

#### Inquiry:

May a lawyer who works for the government or the public sector (hereafter "government lawyer") provide *pro bono* legal services to private individuals and organizations pursuant to Rule 6.1?

#### Opinion:

Yes, if the government lawyer is not otherwise prohibited by law from engaging in the private practice of law.

All lawyers have a professional responsibility to provide legal services to those who are unable to pay as stated in Rule 6.1:

Every lawyer has a professional responsibility to provide legal services to those unable to pay. A lawyer should aspire to render at least (50) hours of *pro bono* public legal services per year. In fulfilling this responsibility, the lawyer should:

(a) provide a substantial majority of the (50) hours of legal services without fee or expectation of fee to:

- (1) persons of limited means;
- (2) charitable, religious, civic, community, governmental, and educational organizations in matters that are designed primarily to address the needs of persons of limited means; or
- (3) individuals, groups, or organizations seeking to secure or protect civil rights, civil liberties, or public rights, or charitable, religious, civic, community, governmental, and educational organizations in matters in furtherance of their organizational purposes, where the payment of standard legal fees would significantly deplete the organization's economic resources or would be otherwise inappropriate.

...

Some government lawyers, however, are

prohibited by statute from engaging in the private practice of law. *See, e.g.*, NC Gen. Stat. §84-2 (“No justice, judge, magistrate, full-time district attorney, full-time assistant district attorney, public defender, assistant public defender, clerk, deputy, or assistant clerk of the General Court of Justice, register of deeds, deputy, or assistant register of deeds, sheriff, or deputy sheriff shall engage in the private practice of law.”) and NC Gen. Stat. §7A-754 (“Neither the chief administrative law judge nor any administrative law judge may engage in the private practice of law...”).

A government lawyer is subject to the requirements of the Rules of Professional Conduct when providing *pro bono* legal services. Although the *pro bono* legal services may be very different from the legal work that the government lawyer performs for his or her employer, the government lawyer must provide competent and diligent representation. *See* Rule 1.1 and Rule 1.3. Therefore, the government lawyer must ensure that he or she has the training necessary to represent the *pro bono* client competently. In addition, the government lawyer must communicate to the *pro bono* client that, in the course of providing *pro bono* legal services, the lawyer is not acting on behalf of a government agency or office but in his or her private capacity. *See* Rule 1.2 and Rule 1.4.

A government lawyer must also avoid conflicts of interests that may arise when providing *pro bono* legal services to private persons or entities. *See* Rule 1.7. The Arizona State Bar opined that the unique position of a lawyer employed by the government suggests that a heightened level of scrutiny for possible conflicts of interest is warranted when a government lawyer engages simultaneously in the private practice of law, albeit on a *pro bono* basis. *Az. State Bar, Ethics Op. 93-08 (1993)*. The government lawyer must examine whether his or her employer and/or any public body that the government lawyer represents has an interest in the *pro bono* matter. If so, and the interests of the prospective private client are adverse to the government, or the government lawyer’s representation of either the government or the prospective private client will be materially limited, the lawyer must decline the representation unless both the government and the prospective client give informed consent. *See* Rule 1.7. Similarly, if the government lawyer formerly represented

a public body in the same matter or a matter that is substantially related to the proposed *pro bono* representation, the government lawyer is prohibited from taking on the *pro bono* representation if it would be adverse to formerly represented public body unless this former client gives informed consent. *See* Rule 1.9. Because of the potential for conflicts to arise, it is recommended that a government lawyer limit his or her *pro bono* activities to practice areas that are unrelated to the lawyer’s government work.

Government and public sector lawyers must abide by the confidentiality rule. Rule 1.6(a) provides that a lawyer shall not reveal information acquired during the professional relationship with a client unless the client gives informed consent, the disclosure is impliedly authorized to carry out the representation, or the disclosure is permitted by an exception set forth in paragraph (b) of the rule. If the government lawyer is prohibited by his or her employer from entering into a confidentiality agreement with a private person or entity, the lawyer may not provide *pro bono* legal services to private clients. Nevertheless, the government lawyer may still find opportunities to provide *pro bono* service by participating in activities for improving the law, the legal system, or the legal profession. *See* Rule 6.1(b)(2).

If a government lawyer intends to provide *pro bono* services outside the context of a legal services organization or a nonprofit organization, before doing so the lawyer would be wise to consult with a liability insurance carrier to determine whether to carry malpractice insurance. If the government lawyer will be providing *pro bono* services under the auspices of a legal services organization or other nonprofit or charitable organization, the government lawyer would be wise to determine whether the legal services or nonprofit organization has liability insurance that will cover the government lawyer’s *pro bono* activities.

Government agencies and public sector offices are encouraged to adopt internal policies that will facilitate *pro bono* legal service by government lawyers. These policies should address, *inter alia*, the definition of *pro bono*, the types of *pro bono* services to be performed, conflicts of interests, use of the employer’s resources such as support staff and office equipment, and whether *pro bono* legal services are to be provided during working hours or after. ■

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## Rule Amendments (cont.)

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

(4) Character and Fitness to Practice  
...

### Proposed Amendments to Criminal Law Standards in The Plan of Legal Specialization

27 NCAC 1D, Section .2500, Certification Standards for the Criminal Law Specialty

The proposed amendment reduces the number of opposing counsel and judges that must be listed as peer references on an application for certification in criminal law.

#### .2505 Standards for Certification as a Specialist

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

(a) Licensure and Practice

...

(d) Peer Review

(1) ...

(4) Each applicant must provide for reference and independent inquiry the names and addresses of the following: (i) ten lawyers and judges who practice in the field of criminal law and who are familiar with the applicant’s practice, and (ii) opposing counsel and the judge in last ~~ten~~ **eight** serious (Class G or higher) felony cases tried by the applicant.

(5) ...

(e) Examination ... ■

# Proposed Amendments to the Rules of Professional Conduct

APPROVED FOR PUBLICATION BY THE STATE BAR COUNCIL  
JANUARY 24, 2014

## Executive Summary of Recommended Amendments to the North Carolina Rules of Professional Conduct

*North Carolina State Bar Study Committee on Ethics 20/20*

### Introduction

In 2009, the American Bar Association (ABA) appointed the ABA Ethics 20/20 Commission to review the ABA Model Rules of Professional Conduct and the US system of lawyer regulation in the context of advances in technology and global legal practice. At its annual meeting in August 2012 and mid-year meeting in 2013, the ABA House of Delegates adopted ten resolutions upon the recommendation of the Ethics 20/20 Commission. Six of the resolutions amended the ABA Model Rules of Professional Conduct to address issues of technology, outsourcing, and lawyer mobility. The remaining resolutions amended or adopted model practice rules in response to the globalization of the practice of law, multi-jurisdictional practice, and cross border practice.

In March 2013, then State Bar President M. Keith Kapp appointed a special committee of State Bar councilors to study the ABA's actions and to make recommendations to the State Bar Council on whether the North Carolina State Bar should follow the ABA's lead. The committee, called the "Study Committee on Ethics 20/20," is chaired by Mark W. Merritt. The following councilors serve on the committee: Barbara R. Christy, G. Thomas Davis Jr., R. Lee Farmer, Margaret M. Hunt, Michael L. Robinson, and John M. Silverstein. Alice Neece Mine is counsel to the committee.

The committee has completed its review of the Ethics 20/20 amendments to the ABA Model Rules. Based upon that review, the

committee recommends amendments to 13 of the North Carolina Rules of Professional Conduct (the NC Rules). The proposed amended rules follow this executive summary, which highlights and explains the proposed changes to the NC Rules. In most instances, the proposed amendments are relatively minor adjustments to the NC Rules to insure that the NC Rules are responsive to advances in technology, and to increases in outsourcing and lawyer mobility.

### Rule 1.0, *Terminology*

The proposed amendments to Rule 1.0, the rule that defines certain terms used throughout the NC Rules, are limited to an expansion of the definition of "writing" and "written" to include embedded data (or metadata) and "electronic communications."

### Rule 1.1, *Competence*

The proposed amendments to Rule 1.1 on the duty of competence address outsourcing. They are limited to the addition of two new paragraphs to the commentary to the rule that explain a lawyer's duty when retaining or contracting with lawyers outside the lawyer's firm to provide assistance with the provision of legal services to a client. The proposed comments emphasize the need to obtain informed consent from the client and set forth factors for determining whether it is reasonable to retain lawyers outside the firm to assist with the representation.

There is also a proposed amendment to the comment on "maintaining competence" to alert lawyers to the need to keep abreast of the benefits and risks associated with technology.

### Rule 1.4, *Communication*

The proposed amendments to Rule 1.4 on the duty to communicate with a client are limited to the addition of a sentence to the

comment that states that a lawyer should discuss with a client how the client and lawyer will communicate during the client-lawyer relationship. The sentence also recognizes that a lawyer should respond to client communications in a timely manner. The purpose of this comment is to encourage lawyers to address, early in the relationship, the many alternatives for communication that exist due to changes in technology.

### Rule 1.6, *Confidentiality*

Two significant amendments to Rule 1.6, on the duty of confidentiality, are recommended. One amendment adds an exception to the duty that would allow a lawyer to disclose confidential client information to detect conflicts of interest that arise because of a lawyer's change of employment or because of changes in the composition of a law firm. The other amendment specifies that there is no strict liability for inadvertent disclosure of client confidences: a lawyer has only a duty to "make reasonable efforts" to prevent the inadvertent or unauthorized disclosure of confidential client information. This is a codification of the standard that currently appears in a number of North Carolina formal ethics opinions. See RPC 133 and RPC 215.

To clarify the proposed amendments to the black letter rule, two new paragraphs in the commentary are also proposed. The new comments explain the exception to the duty of confidentiality that allows disclosure to detect conflicts when a lawyer moves or the composition of a law firm changes. In addition, amendments to an existing comment are proposed to explain that unauthorized or inadvertent disclosure of confidential client information is not a violation of the duty of confidentiality if the lawyer has made reasonable efforts to prevent access or disclosure. Factors to be considered in determining whether the

lawyer's efforts were reasonable are set forth in the proposed amendments to the comment.

### **Rule 1.17, *Sale of a Law Practice***

The recommended proposed amendments to the comment to Rule 1.17, *Sale of a Law Practice*, are minor and for the sole purpose of clarifying existing language in the comment. For example, one amendment adds a cross reference to another rule.

Amendments to Rule 1.17 were approved by the State Bar Council at the October 2013 annual meeting. Submission of those proposed amendments to the North Carolina Supreme Court for approval has been deferred by the council until the Ethics 20/20 proposed amendments to Rule 1.17 are finally considered by the council. The amendments proposed by the Study Committee on Ethics 20/20 will not impact the amendments already approved by the council. (See the "Rule Amendments" article elsewhere in this edition of the *Journal* for further information on the status of these prior proposed amendments to Rule 1.17.)

### **Rule 1.18, *Duties to Prospective Client***

Rule 1.18, *Duties to Prospective Client*, currently contemplates that an initial consultation with a prospective client will take place over the telephone or in-person. Proposed amendments to the rule broaden the language to incorporate communications with a prospective client electronically. For example, email to a lawyer sent by a visitor to the lawyer's website or blog might qualify as a consultation with the lawyer under the rule unless, as the comment warns, the lawyer does not take steps to notify the visitor otherwise.

The comment to the rule similarly requires amendment to expand its scope to electronic communications from prospective clients. Proposed amendments to the comment will specify circumstances that indicate whether communications with a prospective client constitute a "consultation." The comment explains when a lawyer has an affirmative obligation to warn a person that a communication with the lawyer will not create a client-lawyer relationship and that information conveyed to the lawyer will not be treated as confidential.

### **Rule 4.4, *Respect for Rights of Third Persons***

Amendments to the comment to Rule

4.4, *Respect for Rights of Third Persons*, are recommended to specify that the duty to notify the sender that a "writing" was inadvertently sent applies to electronic communications, electronically stored information, and to metadata. The amended comment references 2009 FEO 1, an existing ethics opinion on metadata, for the principle that a lawyer who receives an electronic communication from an opposing party or the party's lawyer must refrain from searching for or using confidential information found in the communication's metadata.

### **Rule 5.3, *Responsibilities Regarding Nonlawyer Assistants***

The proposed amendments to this rule include an amendment to the title of the rule to expand its reach to "nonlawyer assistance." No amendments to the substance of the rule are recommended. However, amendments to the comment address the increasingly common practice of outsourcing work by specifying that the duties in the rule extend to "nonlawyers outside the firm who work on firm matters." Two new comments on the supervision of nonlawyers outside the firm are proposed. One comment discusses the risk of unauthorized disclosure of confidential client information when work is outsourced, and lists factors to be considered when determining what steps should be taken to manage the risk.

### **Rule 5.5, *Unauthorized Practice of Law***

An amendment to the title of Rule 5.5 is recommended to indicate that the rule not only addresses the unauthorized practice of law, but it also sets forth some "safe harbors" for lawyers engaged in multijurisdictional practice.

The recommended amendments to Rule 5.5 are more extensive than for any other rule. This is due, in part, to the committee's determination—independent of any amendments adopted by the ABA—that the safe harbors for limited practice by out-of-state lawyers should be separated into three paragraphs reflecting categories with specific limitations. Therefore, one of the key changes to the rule is structural. In addition, the committee determined that the rule should specify that foreign lawyers who are employed as in-house counsel are not engaged in unauthorized practice.

Three paragraphs in the revised rule set forth the three categories of limited practice

as follows:

- Paragraph (c) allows a lawyer admitted to practice in another US jurisdiction, and who is not suspended or disbarred in any jurisdiction, to appear or participate in matters that arise out of or are reasonably related to the lawyer's representation of a client in the lawyer's home jurisdiction. If pro hac vice admission is required, the lawyer may not engage in the limited practice without being so admitted. Lawyers in this category are prohibited by Rule 5.5(b)(1) from establishing an office or other systematic and continuous presence in North Carolina for the practice of law.

- Paragraph (d) allows a lawyer admitted in a US or foreign jurisdiction, and not suspended or disbarred from practice in any jurisdiction, to establish an office or systematic and continuous presence in North Carolina if the lawyer's legal activities in North Carolina are limited to providing legal services to the lawyer's employer. Services performed by a foreign lawyer may not include advice about the laws of North Carolina, another US jurisdiction, or the United States unless the advice is based upon the advice of a lawyer who is licensed in the relevant US jurisdiction.

- Paragraph (e) sets forth the existing "safe harbor" for limited practice by a lawyer who has applied to the North Carolina Board of Law Examiners for admission by comity, and who is not suspended or disbarred from practice in any jurisdiction. The proposed amendments clarify that such a lawyer may establish an office or other systematic presence in North Carolina for the practice of law.

New paragraph (i) explains that a foreign lawyer allowed to engage in limited practice under paragraph (d) must be a member in good standing of a recognized legal profession in the foreign jurisdiction.

There are numerous proposed amendments to the comment. Many of these amendments are proposed to bring the comment to the North Carolina rule more in line with the comment to ABA Model Rule 5.5, although the current differences between the commentaries have existed for some time and are not due to the recent Ethics 20/20 amendments. The committee believes that the comment to the Model Rule is clearer and more thorough and should, therefore, replace the NC comment where appropriate. There are also new comments that explain

the three “safe harbor” paragraphs described above.

### **Rule 7.1, *Communications Concerning a Lawyer’s Services***

A minor amendment to the comment to Rule 7.1, *Communications Concerning a Lawyer’s Services*, is recommended to clarify that the prohibition on statements that are likely to create unjustified expectations protects not only prospective clients, but also the public in general.

### **Rule 7.2, *Advertising***

A number of amendments to the comment to Rule 7.2, *Advertising*, are recommended to update the comment to reflect that much advertising now occurs over the Internet or other forms of electronic communication. Substantial amendments to comment [5] provide guidance on when a lawyer may pay others for generating leads over the Internet. The comment is consistent with holding in Ethics Decision 2012-4 (October 26, 2012).

As with the comment to Rule 7.1, there are a number of minor amendments to Rule 7.2’s commentary to emphasize that the rule protects the public in general and not just prospective clients.

### **Rule 7.3, *Direct Contact with Potential Clients***

A significant amendment to Rule 7.3’s title is proposed. It is recommended that the subject matter of the rule—solicitation—be explicitly stated in the title. Recommended amendments to the comment also clarify that the rule addresses solicitation. A new opening comment explains the difference between in-person solicitation and communications that are directed to the general public. As with the amendments to the commentary for Rules 7.1 and 7.2, amendments to the Rule 7.3’s commentary add references to forms of electronic communication where necessary to explain the rule’s reach, and replace references to “potential clients” and “clients” with references to “the public” or “a person” to emphasize that the prohibitions in the rule protect the public in general.

Amendments to Rule 7.3 were approved by the State Bar Council at the October 2013 annual meeting. Submission of those proposed amendments to the North Carolina Supreme Court for approval has

been deferred by the council until the Ethics 20/20 proposed amendments to Rule 7.3 are finally considered by the council. The amendments proposed by the Study Committee on Ethics 20/20 will not impact the amendments already approved by the council. (See the “Rule Amendments” article elsewhere in this edition of the *Journal* for further information about the status of these prior proposed amendments to Rule 7.3.)

### **Rule 8.5, *Disciplinary Authority; Choice of Law***

The recommended amendment to comment [5] of Rule 8.5, *Disciplinary Authority; Choice of Law*, recognizes that a lawyer and a client may enter into a written agreement to specify a particular jurisdiction for the purpose of determining what jurisdiction’s rules of professional conduct will be applied to the lawyer’s conduct if the agreement was obtained with the client’s informed consent and that consent is confirmed in writing.

## **Proposed Amendments to the North Carolina Rules of Professional Conduct** 27 N.C.A.C. 2

### **1.0: Terminology**

(a) ...

(o) “Writing” or “written” denotes a tangible or electronic record of a communication or representation, **and any data embedded therein (commonly referred to as metadata)**, including handwriting, typewriting, printing, photostating, photography, audio or video recording, and **e-mail electronic communications**. A “signed” writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

#### **Comment**

*Confirmed in Writing*

[1] ...

*Screened*

[8] ...

[9] The purpose of screening is to assure the affected parties that confidential information known by the personally disqualified lawyer remains protected. The personally disqualified lawyer should acknowledge the obligation not to communicate with any of the other lawyers in the firm with respect to the matter. Similarly, other lawyers in the firm who are working on the matter should

be informed that the screening is in place and that they may not communicate with the personally disqualified lawyer with respect to the matter. Additional screening measures that are appropriate for the particular matter will depend on the circumstances. To implement, reinforce, and remind all affected lawyers of the presence of the screening, it may be appropriate for the firm to undertake such procedures as a written undertaking by the screened lawyer to avoid any communication with other firm personnel and any contact with any firm files or other **materials information, including information in electronic form**, relating to the matter, written notice and instructions to all other firm personnel forbidding any communication with the screened lawyer relating to the matter, denial of access by the screened lawyer to firm files or other **materials information, including information in electronic form**, relating to the matter and periodic reminders of the screen to the screened lawyer and all other firm personnel.

[10] ...

### **Rule 1.1 Competence**

A lawyer shall not handle a legal matter that the lawyer knows or should know he or she is not competent to handle without associating with a lawyer who is competent to handle the matter. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.

#### **Comment**

*Legal Knowledge and Skill*

[1] ...

#### **Retaining or Contracting with Other Lawyers**

**[6] Before a lawyer retains or contracts with other lawyers outside the lawyer’s own firm to provide or assist in the provision of legal services to a client, the lawyer should ordinarily obtain informed consent from the client and must reasonably believe that the other lawyers’ services will contribute to the competent and ethical representation of the client. See also Rules 1.2 (allocation of authority), 1.4 (communication with client), 1.5(e) (fee division), 1.6 (confidentiality), and 5.5(a) (unauthorized practice of law). The reasonableness of the decision to retain or contract with other lawyers outside the lawyer’s own firm will depend upon the circumstances, including the education, experience, and reputation**

of the nonfirm lawyers; the nature of the services assigned to the nonfirm lawyers; and the legal protections, professional conduct rules, and ethical environments of the jurisdictions in which the services will be performed, particularly relating to confidential information.

[7] When lawyers from more than one law firm are providing legal services to the client on a particular matter, the lawyers ordinarily should consult with each other and the client about the scope of their respective representations and the allocation of responsibility among them. See Rule 1.2. When making allocations of responsibility in a matter pending before a tribunal, lawyers and parties may have additional obligations that are a matter of law beyond the scope of these Rules.

#### *Maintaining Competence*

~~[6]~~[8] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with the technology relevant to the lawyer's practice, engage in continuing study and education, and comply with all continuing legal education requirements to which the lawyer is subject.

[Re-numbering remaining paragraphs]

#### **Rule 1.4 Communication**

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(f), is required by these Rules;

(2) ...

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

#### **Comment**

[1] ...

#### *Communicating with Client*

[4] A lawyer's regular communication with clients will minimize the occasions on which a client will need to request information concerning the representation. When a client makes a reasonable request for information, however, paragraph (a)(4) requires prompt compliance with the request, or if a prompt response is not feasible, that the lawyer, or a member of the lawyer's staff, acknowledge receipt of the request and advise the client when a response may be

expected. ~~Client telephone calls should be promptly returned or acknowledged. A lawyer should address with the client how the lawyer and the client will communicate, and should respond to or acknowledge client communications in a reasonable and timely manner.~~

...

#### **Rule 1.6 Confidentiality of Information**

(a) A lawyer shall not reveal information acquired during the professional relationship with a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information protected from disclosure by paragraph (a) to the extent the lawyer reasonably believes necessary:

(1) ...

(6) ...; ~~or~~

(7) ...; ~~or~~

(8) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

~~(d)~~ (d) ...

Comment

[1] ...

#### *Detection of Conflicts of Interest*

[17] Paragraph (b)(8) recognizes that lawyers in different firms may need to disclose limited information to each other to detect and resolve conflicts of interest, such as when a lawyer is considering an association with another firm, two or more firms are considering a merger, or a lawyer is considering the purchase of a law practice. See Rule 1.17, Comment [8]. Under these circumstances, lawyers and law firms are permitted to disclose limited information, but only once substantive discussions regarding the new relationship have occurred. Any such disclosure should ordinarily include no more than the identity of the persons and entities involved in a matter, a brief summary of the general issues involved,

and information about whether the matter has terminated. Even this limited information, however, should be disclosed only to the extent reasonably necessary to detect and resolve conflicts of interest that might arise from the possible new relationship. Moreover, the disclosure of any information is prohibited if it would compromise the attorney-client privilege or otherwise prejudice the client (e.g., the fact that a corporate client is seeking advice on a corporate takeover that has not been publicly announced; that a person has consulted a lawyer about the possibility of divorce before the person's intentions are known to the person's spouse; or that a person has consulted a lawyer about a criminal investigation that has not led to a public charge). Under those circumstances, paragraph (a) prohibits disclosure unless the client or former client gives informed consent. A lawyer's fiduciary duty to the lawyer's firm may also govern a lawyer's conduct when exploring an association with another firm and is beyond the scope of these Rules.

[18] Any information disclosed pursuant to paragraph (b)(8) may be used or further disclosed only to the extent necessary to detect and resolve conflicts of interest. Paragraph (b)(8) does not restrict the use of information acquired by means independent of any disclosure pursuant to paragraph (b)(8). Paragraph (b)(8) also does not affect the disclosure of information within a law firm when the disclosure is otherwise authorized, such as when a lawyer in a firm discloses information to another lawyer in the same firm to detect and resolve conflicts of interest that could arise in connection with undertaking a new representation. See Comment [5].

#### *Acting Competently to Preserve Confidentiality*

~~[17]~~[19] Paragraph (c) requires a lawyer ~~must~~ to act competently to safeguard information acquired during the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1, and 5.3. The unauthorized access to, or the inadvertent or unauthorized disclosure of, information acquired during the professional relationship with a client does not constitute a violation of paragraph (c)

if the lawyer has made reasonable efforts to prevent the access or disclosure. Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use). A client may require the lawyer to implement special security measures not required by this Rule, or may give informed consent to forgo security measures that would otherwise be required by this Rule. Whether a lawyer may be required to take additional steps to safeguard a client's information to comply with other law—such as state and federal laws that govern data privacy, or that impose notification requirements upon the loss of, or unauthorized access to, electronic information—is beyond the scope of these Rules. For a lawyer's duties when sharing information with nonlawyers outside the lawyer's own firm, see Rule 5.3, Comments [3]-[4].

~~[18]~~[20] When transmitting a communication that includes information acquired during the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the client's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule. Whether a lawyer may be required to take additional steps to comply with other law, such as state and federal laws that govern data privacy, is beyond the scope of these Rules.

[Re-numbering remaining paragraphs]

#### Rule 1.17 Sale of a Law Practice

A lawyer or a law firm may sell or purchase a law practice, or an area of law practice, including good will, if the following conditions are satisfied:

(a) The seller ceases to engage in the private practice of law, or in the area of practice that has been sold, from an office that is within a one-hundred (100) mile radius of the purchased law practice, except the seller may work for the purchaser as an independent contractor and may provide legal representation at no charge to indigent persons or to members of the seller's family;

(b) ...

Comment

[1] ...

[8] Negotiations between seller and prospective purchaser prior to disclosure of information relating to a specific representation of an identifiable client no more violate the confidentiality provisions of Rule 1.6 than do preliminary discussions concerning the possible association of another lawyer or mergers between firms, with respect to which client consent is not required. *See* Rule 1.6(b)(8). Providing the purchaser access to ~~client-specific detailed~~ information relating to the representation, ~~and to the~~ such as the client's file, however, requires client consent. The Rule provides that before such information can be disclosed by the seller to the purchaser the client must be given actual written notice of the contemplated sale, including the identity of the purchaser, and must be told that the decision to consent or make other arrangements must be made within 30 days. If nothing is heard from the client within that time, consent to the sale is presumed.

...

#### Rule 1.18 Duties to Prospective Client

(a) A person who ~~discusses~~ consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

(b) Even when no client-lawyer relationship ensues, a lawyer who has ~~had discussions with~~ learned information from a prospective client shall not use or reveal that information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client.

(c) ...

#### Comment

[1] Prospective clients, like clients, may disclose information to a lawyer, place documents or other property in the lawyer's custody, or rely on the lawyer's advice. A lawyer's ~~discussions~~ consultations with a prospective client usually are limited in time and depth and leave both the prospective client and the lawyer free (and sometimes required) to proceed no further. Hence, prospective clients should receive some but not all of the protection afforded clients.

[2] ~~Not all persons who communicate information to a lawyer are entitled to protection under this Rule. A person becomes a prospective client by consulting with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter. Whether communications, including written, oral, or electronic communications, constitute a consultation depends on the circumstances. For example, a consultation is likely to have occurred if a lawyer, either in person or through the lawyer's advertising in any medium, specifically requests or invites the submission of information about a potential representation without clear and reasonably understandable warnings and cautionary statements that limit the lawyer's obligations, and a person provides information in response. In such a situation, to avoid the creation of a duty to the person under this Rule, a lawyer has an affirmative obligation to warn the person that a communication with the lawyer will not create a client-lawyer relationship and information conveyed to the lawyer will not be confidential or privileged. See also Comment [4]. In contrast, a consultation does not occur if a person provides information to a lawyer in response to advertising that merely describes the lawyer's education, experience, areas of practice, and contact information, or provides legal information of general interest. A person who communicates~~ Such a person is communicating information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, and is thus not a "prospective client" within the meaning of paragraph (a). Moreover, a person who communicates with a lawyer for the purpose of disqualifying the lawyer is not a "prospective client."

[3] ...

[4] In order to avoid acquiring disqualifying information from a prospective client, a lawyer considering whether or not to undertake a new matter should limit the initial ~~interview~~ consultation to only such information as reasonably appears necessary for that purpose. Where the information indicates that a conflict of interest or other reason for non-representation exists, the lawyer should so inform the prospective client or decline the representation. If the prospective client wishes to retain the lawyer, and if consent is possible under Rule 1.7, then consent from all affected present or former clients must be obtained before accepting the representation.

[5] A lawyer may condition ~~conversations~~ a consultation with a prospective client on the person's informed consent that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter. *See* Rule 1.0(f) for the definition of informed consent. If the agreement expressly so provides, the prospective client may also consent to the lawyer's subsequent use of information received from the prospective client.

[6] ...

#### Rule 4.4 Respect for Rights of Third Persons

(a) ....

(b) A lawyer who receives a writing relating to the representation of the lawyer's client and knows or reasonably should know that the writing was inadvertently sent shall promptly notify the sender.

#### Comment

[1] ...

[2] Paragraph (b) recognizes that lawyers sometimes receive writings that were mistakenly sent or produced by opposing parties or their lawyers. *See* Rule 1.0(o) for the definition of "writing," which includes electronic communications and metadata. A writing is inadvertently sent when it is accidentally transmitted, such as when an electronic communication or letter is mis-addressed or a document or electronically stored information is accidentally included with information that was intentionally transmitted. If a lawyer knows or reasonably should know that such a writing was sent inadvertently, then this rule requires the lawyer promptly to notify the sender in order to permit that person to take protective measures. This duty is imputed to all

lawyers in a firm. Whether the lawyer who receives the writing is required to take additional steps, such as returning the ~~original~~ writing, is a matter of law beyond the scope of these rules, as is the question of whether the privileged status of a writing has been waived. Similarly, this Rule does not address the legal duties of a lawyer who receives a writing that the lawyer knows or reasonably should know may have been ~~wrongfully~~ inappropriately obtained by the sending person. *See* Rule 1.0(o) for the definition of "writing." Metadata in electronic documents creates an obligation under this Rule only if the receiving lawyer knows or reasonably should know that the metadata was inadvertently sent to the receiving lawyer. A lawyer who receives an electronic communication from the opposing party or the opposing party's lawyer must refrain from searching for or using confidential information found in the metadata embedded in the communication. *See* 2009 FEO 1.

[3] Some lawyers may choose to return a writing or delete electronically stored information unread, for example, when the lawyer learns before receiving the writing that it was inadvertently sent ~~to the wrong address~~. Whether the lawyer is required to do so is a matter of law. When return of the writing is not required by law, the decision voluntarily to return such a writing or delete electronically stored information is a matter of professional judgment ordinarily reserved to the lawyer. *See* Rules 1.2 and 1.4.

#### Rule 5.3 Responsibilities Regarding Nonlawyer ~~Assistants~~ Assistance

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm or organization shall make reasonable efforts to ensure that the firm or organization has in effect measures giving reasonable assurance that the nonlawyer's conduct is compatible with the professional obligations of the lawyer;

(b) ...

#### Comment

~~[2]~~[1] Paragraph (a) requires lawyers with managerial authority within a law firm or organization to make reasonable efforts ~~to establish internal policies and procedures designed to provide~~ to ensure that the firm

has in effect measures giving reasonable assurance that nonlawyers in the firm and nonlawyers outside the firm who work on firm matters will act in a way compatible with the professional obligations of the lawyer ~~Rules of Professional Conduct. *See* Comment [6] to Rule 1.1 (retaining lawyers outside the firm) and Comment [1] to Rule 5.1 (responsibilities with respect to lawyers within a firm).~~ Paragraph (b) applies to lawyers who have supervisory authority over the work of a nonlawyer such nonlawyers within or outside the firm. Paragraph (c) specifies the circumstances in which a lawyer is responsible for the conduct of a nonlawyer such nonlawyers within or outside the firm that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer.

[+][2] ...

#### *Nonlawyers Outside the Firm*

[3] A lawyer may use nonlawyers outside the firm to assist the lawyer in rendering legal services to the client. Examples include the retention of an investigative or paraprofessional service, hiring a document management company to create and maintain a database for complex litigation, sending client documents to a third party for printing or scanning, and using an Internet-based service to store client information. When using such services outside the firm, a lawyer must make reasonable efforts to ensure that the services are provided in a manner that is compatible with the lawyer's professional obligations and, depending upon the risk of unauthorized disclosure of confidential client information, should consider whether client consent is required. *See* Rule 1.1, cmt. [7]. The extent of this obligation will depend upon the circumstances, including the education, experience, and reputation of the nonlawyer; the nature of the services involved; the terms of any arrangements concerning the protection of client information; and the legal and ethical environments of the jurisdictions in which the services will be performed, particularly with regard to confidentiality. *See also* Rules 1.1 (competence), 1.2 (allocation of authority), 1.4 (communication with client), 1.6 (confidentiality), 5.4(a) (professional independence of the lawyer), and 5.5(a) (unauthorized practice of law). When retaining or directing a nonlawyer outside the firm, a lawyer should communicate directions appropriate under the circumstances to give

reasonable assurance that the nonlawyer's conduct is compatible with the professional obligations of the lawyer.

[4] Where the client directs the selection of a particular nonlawyer service provider outside the firm, the lawyer ordinarily should agree with the client concerning the allocation of responsibility for monitoring as between the client and the lawyer. See Rule 1.2. When making such an allocation in a matter pending before a tribunal, lawyers and parties may have additional obligations that are a matter of law beyond the scope of these Rules.

[3][5] ...

#### Rule 5.5 Unauthorized Practice of Law; Multijurisdictional Practice of Law

(a) A lawyer shall not practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction.

(b) A lawyer who is not admitted to practice in this jurisdiction shall not:

- (1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or
- (2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

(c) A lawyer admitted to practice in another United States jurisdiction, ~~but not in this jurisdiction, and not disbarred or suspended from practice in any jurisdiction,~~ does not engage in the unauthorized practice of law in this jurisdiction if the lawyer's conduct is in accordance with these Rules and:

- (1) the lawyer is authorized by law or order to appear before a tribunal or administrative agency in this jurisdiction or is preparing for a potential proceeding or hearing in which the lawyer reasonably expects to be so authorized; ~~or~~
- (2) ~~other than engaging in conduct governed by paragraph (1):~~

~~(A) the lawyer provides legal services to the lawyer's employer or its organizational affiliates and the services are not services for which pro hac vice admission is required; a lawyer acting pursuant to this paragraph is not subject to the prohibition in Paragraph (b)(1);~~

~~(B)(2) the lawyer acts with respect to a matter that arises out of or is otherwise reasonably related to the lawyer's repre-~~

sentation of a client in a jurisdiction in which the lawyer is admitted to practice and the lawyer's services are not services for which pro hac vice admission is required;

~~(C)(3) the lawyer acts with respect to a matter that is in or is reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the lawyer's services arise out of or are reasonably related to the lawyer's representation of a client in a jurisdiction in which the lawyer is admitted to practice and are not services for which pro hac vice admission is required; or~~

~~(D)(4) the lawyer is associated in the matter with a lawyer admitted to practice in this jurisdiction who actively participates in the representation and the lawyer is admitted pro hac vice or the lawyer's services are not services for which pro hac vice admission is required; or.~~

(A) A lawyer admitted to practice in another United States jurisdiction or in a foreign jurisdiction, and not disbarred or suspended from practice in any jurisdiction, or the equivalent thereof, does not engage in the unauthorized practice of law in this jurisdiction and may establish an office or other systematic and continuous presence in this jurisdiction for the practice of law if the lawyer's conduct is in accordance with these Rules and:

~~(2)(A)(1) the lawyer provides legal services to the lawyer's employer or its organizational affiliates; and the services are not services for which pro hac vice admission is required; and, when the services are performed by a foreign lawyer and require advice on the law of this or another US jurisdiction or of the United States, such advice is based upon the advice of a lawyer who is duly licensed and authorized by the jurisdiction to provide such advice; a lawyer acting pursuant to this paragraph is not subject to the prohibition in Paragraph (b)(1); or~~

~~(E)(2) the lawyer is providing services limited to federal law, international law, the law of a foreign jurisdiction or the law of the jurisdiction in which the lawyer is admitted to practice, or the lawyer is providing services that the lawyer is author-~~

ized by federal or other law or rule to provide in this jurisdiction.

(e) A lawyer admitted to practice in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, does not engage in the unauthorized practice of law in this jurisdiction and may establish an office or other systematic and continuous presence in this jurisdiction for the practice of law if the lawyer's conduct is in accordance with these Rules, ~~(F) the lawyer is the subject of a pending application for admission to the North Carolina State Bar by comity, having never previously been denied admission to the North Carolina State Bar for any reason, and the lawyer satisfies the following conditions:~~

~~(i)(1) is licensed to practice law in a state with which North Carolina has comity in regard to admission to practice law;~~

~~(ii)(2) is a member in good standing in every jurisdiction in which the lawyer is licensed to practice law;~~

~~(iii)(3) has satisfied the educational and experiential requirements prerequisite to comity admission to the North Carolina State Bar;~~

~~(iv)(4) is domiciled in North Carolina;~~

~~(v)(5) has established a professional relationship with a North Carolina law firm and is actively supervised by at least one licensed North Carolina attorney affiliated with that law firm; and~~

~~(vi)(6) gives written notice to the secretary of the North Carolina State Bar that the lawyer intends to begin the practice of law pursuant to this provision, provides the secretary with a copy of the lawyer's application for admission to the State Bar, and agrees that the lawyer is subject to these rules and the disciplinary jurisdiction of the North Carolina State Bar. A lawyer acting pursuant to this provision is ~~not subject to the prohibition in Paragraph (b)(1);~~ may not provide services for which pro hac vice admission is required, and shall be ineligible to practice law in this jurisdiction immediately upon being advised that the lawyer's application for comity admission has been denied.~~

~~(d)(f) A lawyer shall not assist another person in the unauthorized practice of law.~~

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

~~(f)(h) ...~~

(i) For the purposes of paragraph (d), the foreign lawyer must be a member in good

standing of a recognized legal profession in a foreign jurisdiction, the members of which are admitted to practice as lawyers or counselors at law or the equivalent, and are subject to effective regulation and discipline by a duly constituted professional body or a public authority.

**Comment**

[1] A lawyer may regularly practice law only in a jurisdiction in which the lawyer is ~~admitted~~ authorized to practice. The practice of law in violation of lawyer-licensing standards of another jurisdiction constitutes a violation of these Rules. This Rule does not restrict the ability of lawyers authorized by federal statute or other federal law to represent the interests of the United States or other persons in any jurisdiction.

[2] There are occasions in which lawyers admitted to practice in another United States jurisdiction, but not in ~~this jurisdiction North Carolina~~, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis will engage in conduct in this jurisdiction North Carolina under circumstances that do not create ~~significant~~ an unreasonable risk to the interests of their clients, the courts, or the public. ~~Paragraphs (c), (d), and (e) identify~~ Paragraphs (c), (d), and (e) identify ~~six~~ seven situations in which the lawyer may engage in such conduct without fear of violating this Rule. All such conduct is subject to the duty of competent representation. See Rule 1.1. Rule 5.5 does not address the question of whether other conduct constitutes the unauthorized practice of law. The fact that conduct is not included or described in this Rule is not intended to imply that such conduct is the unauthorized practice of law. With the exception of ~~paragraph (c)(2)(A)(d) and (f)(e)~~ paragraphs (c)(2)(A)(d) and (f)(e), this Rule does not authorize a US or foreign nothing in this Rule is intended to authorize a lawyer to establish an office or other systematic and continuous presence in this jurisdiction North Carolina without being admitted to practice here. Presence may be systematic and continuous even if the lawyer is not physically present in this jurisdiction. ~~Such a~~ A lawyer not admitted to practice in North Carolina must not hold out to the public or otherwise represent that the lawyer is admitted to practice law in ~~this jurisdiction North Carolina~~. See also Rules 7.1(a) and 7.5(b). However, a lawyer admitted to practice in another jurisdiction

who is partner, shareholder, or employee of an interstate or international law firm that is registered with the North Carolina State Bar pursuant to 27 N.C.A.C. 1E, Section .0200, may practice, subject to the limitations of this Rule, in the North Carolina offices of such law firm.

[3] Paragraphs (c), (d), and (e) apply to lawyers who are admitted to practice law in any United States jurisdiction, which includes the District of Columbia and any state, territory, or commonwealth of the United States and, where noted, any foreign jurisdiction. The word "admitted" in paragraphs (c), (d)(2), and (e) contemplates that the lawyer is authorized to practice in the jurisdiction in which the lawyer is admitted and excludes a lawyer who while technically admitted is not authorized to practice because, for example, the lawyer is on inactive status.

[4] Paragraphs (c), (d), and (e) do not authorize communications advertising legal services in North Carolina by lawyers who are admitted to practice in other jurisdictions. Nothing in these paragraphs authorizes a lawyer not licensed in this jurisdiction to solicit clients in North Carolina. Whether and how lawyers may communicate the availability of their services in this jurisdiction are governed by Rules 7.1-7.5.

~~[3]~~[5] Lawyers not admitted to practice generally in ~~the jurisdiction North Carolina~~ may be authorized by law or order of a tribunal or an administrative agency to appear before the tribunal or agency. Such authority may be granted pursuant to formal rules or law governing admission pro hac vice or pursuant to informal practice of the tribunal or agency. Under paragraph ~~(b)(1)(c)(1)~~, a lawyer does not violate this Rule when the lawyer appears before such a tribunal or agency. Nor does a lawyer violate this Rule when the lawyer engages in conduct in anticipation of a proceeding or hearing, such as factual investigations and discovery conducted in connection with a litigation or administrative proceeding, in which an out-of-state lawyer has been admitted or in which the lawyer reasonably expects to be admitted. ~~Nothing in paragraph (c)(1) is intended to authorize a lawyer not licensed in this jurisdiction to solicit clients in this jurisdiction.~~

~~[4] When lawyers appear or anticipate appearing before a tribunal or administrative~~

~~agency with authority to admit the lawyer to practice pro hac vice, their conduct is governed by paragraphs (a) and (c)(1) and not by (c)(2). Paragraph (c)(2) authorizes a lawyer to engage in certain conduct other than making or preparing for appearances before such a tribunal. For example, paragraph (c)(2)(A) recognizes that some clients hire a lawyer as an employee in circumstances that may make it impractical for the lawyer to become admitted to practice in this jurisdiction. Given that these clients are unlikely to be deceived about the training and expertise of these lawyers, lawyers may act on behalf of such a client without violating this Rule. The lawyer may also act on behalf of the client's commonly owned organizational affiliates but only in connection with the client's matters.~~

~~[5]~~[6] Paragraph (c)(2)(2)(B) recognizes that the complexity of many matters requires that a lawyer whose representation of a client consists primarily of conduct in a jurisdiction in which the lawyer is admitted to practice, also be permitted to act on the client's behalf in other jurisdictions in matters arising out of or otherwise reasonably related to the lawyer's representation of the client. This conduct may involve negotiations with private parties, as well as negotiations with government officers or employees, and participation in alternative dispute-resolution procedures. This provision also applies when a lawyer is conducting witness interviews or other activities in this jurisdiction in preparation for a litigation or other proceeding that will occur in another jurisdiction where the lawyer is either admitted generally or expects to be admitted pro hac vice.

~~[6]~~[7] Paragraph (c)(3)(2)(C) permits a lawyer admitted to practice law in another jurisdiction to perform services on a temporary basis in ~~this jurisdiction North Carolina~~ if those services are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, and if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice. The lawyer, however, must obtain admission pro hac vice in the case of a court-annexed arbitration or mediation or otherwise if court rules or law so require.

~~[7]~~[8] Paragraph (c)(4)(2)(D) recognizes that association with a lawyer licensed to practice in ~~this jurisdiction North Carolina~~

is likely to protect the interests of both clients and the public. The lawyer admitted to practice in ~~this jurisdiction~~ North Carolina, however, may not serve merely as a conduit for an out-of-state lawyer but must actively participate in and share actual responsibility for the representation of the client. If the admitted lawyer's involvement is merely pro forma, then both lawyers are subject to discipline under this Rule.

[9] Paragraphs (d) and (e) identify three circumstances in which a lawyer who is admitted to practice in another jurisdiction, or a foreign jurisdiction, and is not disbarred or suspended from practice in any jurisdiction or the equivalent thereof, may establish an office or other systematic and continuous presence in North Carolina for the practice of law. Except as provided in these paragraphs, a lawyer who is admitted to practice law in another jurisdiction and who desires to establish an office or other systematic or continuous presence in North Carolina must be admitted to practice law generally in North Carolina.

[10] Paragraph (d)(1) applies to a lawyer who is employed by a client to provide legal services to the client or its organizational affiliates, i.e., entities that control, are controlled by, or are under common control with the employer. This paragraph does not authorize the provision of personal legal services to the employer's officers or employees. The paragraph applies to in-house corporate lawyers, government lawyers, and others who are employed to render legal services to the employer. The lawyer's ability to represent the employer outside the jurisdiction in which the lawyer is licensed generally serves the interests of the employer and does not create an unreasonable risk to the client and others because the employer is well situated to assess the lawyer's qualifications and the quality of the lawyer's work.

[11] Paragraph (d)(2) recognizes that a lawyer may provide legal services in a jurisdiction in which the lawyer is not licensed when authorized to do so by federal or other law, which includes statute, court rule, executive regulation, or judicial precedent.

~~[8]~~[12] Paragraph (e)(2)(F) permits a lawyer who is awaiting admission by comity to practice on a provisional and limited basis if certain requirements are met. As used in this paragraph, the term "professional rela-

tionship" refers to an employment or partnership arrangement.

~~[9]~~[13] ...

~~[10]~~[14] Lawyers may also provide professional advice and instruction to non-lawyers whose employment requires knowledge of law; for example, claims adjusters, employees of financial or commercial institutions, social workers, accountants, and persons employed in government agencies. In addition, a lawyer may counsel non-lawyers who wish to proceed pro se. However, a lawyer may not assist a person in practicing law in violation of the rules governing professional conduct in that person's jurisdiction.

~~[11]~~[15] Paragraphs (g) and (h) clarify the limitations on employment of a disbarred or suspended lawyer. In the absence of statutory prohibitions or specific conditions placed on a disbarred or suspended ~~attorney~~ lawyer in the order revoking or suspending the license, such individual may be hired to perform the services of a law clerk or legal assistant by a law firm with which he or she was not affiliated at the time of or after the acts resulting in discipline. Such employment is, however, subject to certain restrictions. A licensed ~~attorney~~ lawyer in the firm must take full responsibility for, and employ independent judgment in, adopting any research, investigative results, briefs, pleadings, or other documents or instruments drafted by such individual. The individual may not directly advise clients or communicate in person or in writing in such a way as to imply that he or she is acting as ~~an attorney~~ a lawyer or in any way in which he or she seems to assume responsibility for a client's legal matters. The disbarred or suspended ~~attorney~~ lawyer should have no communications or dealings with, or on behalf of, clients represented by such disbarred or suspended ~~attorneys~~ lawyer or by any individual or group of individuals with whom he or she practiced during the period on or after the date of the acts which resulted in discipline through and including the effective date of the discipline. Further, the employing ~~attorney~~ lawyer or law firm should perform no services for clients represented by the disbarred or suspended ~~attorney~~ lawyer during such period. Care should be taken to ensure that clients fully understand that the disbarred or suspended ~~attorney~~ lawyer is not acting as ~~an attorney~~ a lawyer, but merely as a law clerk or lay employee. Under some cir-

cumstances, as where the individual may be known to clients or in the community, it may be necessary to make an affirmative statement or disclosure concerning the disbarred or suspended ~~attorney's lawyer's~~ status with the law firm. Additionally, a disbarred or suspended ~~attorney~~ lawyer should be paid on some fixed basis, such as a straight salary or hourly rate, rather than on the basis of fees generated or received in connection with particular matters on which he or she works. Under these circumstances, a law firm employing a disbarred or suspended ~~attorney~~ lawyer would not be acting unethically and would not be assisting a nonlawyer in the unauthorized practice of law.

~~[12]~~[16] An attorney A lawyer or law firm should not employ a disbarred or suspended ~~attorney~~ lawyer who was associated with such ~~attorney~~ lawyer or firm at any time on or after the date of the acts which resulted in the disbarment or suspension through and including the time of the disbarment or suspension. Such employment would show disrespect for the court or body which disbarred or suspended the ~~attorney~~ lawyer. Such employment would also be likely to be prejudicial to the administration of justice and would create an appearance of impropriety. It would also be practically impossible for the disciplined lawyer to confine himself or herself to activities not involving the actual practice of law if he or she were employed in his or her former office setting and obliged to deal with the same staff and clientele.

#### **Rule 7.1 Communications Concerning a Lawyer's Services**

(a) A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services....

(b)...

#### **Comment**

[1] ...

[3] An advertisement that truthfully reports a lawyer's achievements on behalf of clients or former clients may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client's case. Similarly, an unsubstantiated comparison of the lawyer's services or fees with the services or fees of other lawyers may be misleading if presented with such specificity as would lead a reasonable person to

conclude that the comparison can be substantiated. The inclusion of an appropriate disclaimer or qualifying language may preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead ~~a prospective client~~ **the public**.

[4] ...

### Rule 7.2 Advertising

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

(b) A lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may

(1) pay the reasonable costs of advertisements or communications permitted by this Rule;

(2) pay the usual charges of a not-for-profit lawyer referral service that complies with Rule 7.2(d), or a prepaid or group legal services plan that complies with Rule 7.3(d); and

(3) pay for a law practice in accordance with Rule 1.17.

(c) ...

### Comment

[1] To assist the public in **learning about and** obtaining legal services, lawyers are permitted to make known their services not only through reputation, but also through organized information campaigns in the form of advertising. Advertising involves an active quest for clients, contrary to the tradition that a lawyer should not seek clientele. However, the public's need to know about legal services can be fulfilled in part through advertising. This need is particularly acute in the case of persons of moderate means who have not made extensive use of legal services. The interest in expanding public information about legal services ought to prevail over considerations of tradition. Nevertheless, advertising by lawyers may entail the risk of practices that are misleading or overreaching.

[2] This Rule permits public dissemination of information concerning a lawyer's name or firm name, address, **email address, website,** and telephone number; the kinds of services the lawyer will undertake; the basis on which the lawyer's fees are determined, including prices for specific services and payment and credit arrangements; a lawyer's foreign language ability; names of references and, with their consent, names of clients regularly represented; and other information that might

invite the attention of those seeking legal assistance.

[3] Questions of effectiveness and taste in advertising are matters of speculation and subjective judgment. Television, **the Internet, and other forms of electronic communication** are ~~is now one of~~ **among** the most powerful media for getting information to the public, particularly persons of low and moderate income; prohibiting television, **Internet, and other forms of electronic** advertising, therefore, would impede the flow of information about legal services to many sectors of the public. Limiting the information that may be advertised has a similar effect and assumes that the bar can accurately forecast the kind of information that the public would regard as relevant. But see Rule 7.1(b) for the disclaimer required in any advertisement that contains a dramatization: ~~Electronic media, such as the Internet, can be an important source of information about legal services, and lawful communication by electronic mail is permitted by this Rule. But and~~ see Rule 7.3(a) for the prohibition against ~~the a~~ solicitation of ~~a prospective client~~ **through a real-time electronic exchange initiated by the lawyer that is not initiated by the prospective client.**

[4] Neither this Rule nor Rule 7.3 prohibits communications authorized by law, such as notice to members of a class in class action litigation.

### *Paying Others to Recommend a Lawyer*

[5] **Except as permitted under paragraphs (b)(1)-(b)(3), lawyers** ~~Lawyers~~ are not permitted to pay others for **recommending the lawyer's services or for** channeling professional work **in a manner that violates Rule 7.3. A communication contains a recommendation if it endorses or vouches for a lawyer's credentials, abilities, competence, character, or other professional qualities.** Paragraph (b)(1), however, allows a lawyer to pay for advertising and communications permitted by this Rule, including the costs of print directory listings, on-line directory listings, newspaper ads, television and radio airtime, domain-name registrations, sponsorship fees, ~~banner ads~~ **Internet-based advertisements,** and group advertising. A lawyer may compensate employees, agents, and vendors who are engaged to provide marketing or client-development services, such as publicists, public-relations personnel, business-development staff, and website designers. **Moreover, a lawyer may pay others for generating client leads, such as Internet-based client leads, as**

**long as the lead generator does not recommend the lawyer, any payment to the lead generator is consistent with Rule 1.5(e) (division of fees) and 5.4 (professional independence of the lawyer), and the lead generator's communications are consistent with Rule 7.1 (communications concerning a lawyer's service). To comply with Rule 7.1, a lawyer must not pay a lead generator if the lead generator states, implies, or creates an impression that it is recommending the lawyer, is making the referral without payment from the lawyer, or has analyzed a person's legal problems when determining which lawyer should receive the referral. See also Rule 5.3 for the (duties of lawyers and law firms with respect to the conduct of nonlawyers); Rule 8.4(a) (duty to avoid violating the Rules through the acts of another) who prepare marketing materials for them.**

[6] A lawyer may pay the usual charges of a prepaid or group legal services plan or a not-for-profit lawyer referral service. A legal services plan is defined in Rule 7.3(d). Such a plan assists ~~prospective clients~~ **people who seek** to secure legal representation. A lawyer referral service, on the other hand, is any organization that holds itself out to the public as a lawyer referral service. Such referral services are understood by ~~lawyers~~ **the public** to be consumer-oriented organizations that provide unbiased referrals to lawyers with appropriate experience in the subject matter of the representation and afford other client protections, such as complaint procedures or malpractice insurance requirements. Consequently, this Rule only permits a lawyer to pay the usual charges of a not-for-profit lawyer referral service.

[7] A lawyer who accepts assignments or referrals from a prepaid or group legal service plan or referrals from a lawyer referral service must act reasonably to assure that the activities of the plan or service are compatible with the lawyer's professional obligations....Legal service plans and lawyer referral services may communicate with ~~prospective clients~~ **the public,** but such communication must be in conformity with these Rules....

### Rule 7.3 ~~Direct Contact with Potential Solicitation of Clients~~

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

**NOTICE TO LAWYERS WHO  
WERE PARTICIPATING  
ATTORNEYS IN TRAFFICSTOP**

TrafficStop is no longer registered to operate in North Carolina. Consequently, no North Carolina licensed attorney can participate as a participating attorney in this plan.

gain, unless the person contacted:

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

(b) A lawyer shall not solicit professional employment from a potential client by written, recorded or electronic communication or by in-person, telephone or real-time electronic contact even when not otherwise prohibited by paragraph (a), if:

- (1) the ~~potential client~~ **target of the solicitation** has made known to the lawyer a desire not to be solicited by the lawyer; or
- (2) the solicitation involves coercion, duress, harassment, compulsion, intimidation, or threats.

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

- (1) Written Communications. ...
- (d) ...

(e) For purposes of this rule, a ~~potential client~~ **is a person with whom a lawyer would like to form a client-lawyer relationship.**

**Comment**

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

**is automatically generated in response to Internet searches.**

~~{1}[2]~~ There is a potential for abuse **when a solicitation involves inherent** in direct in-person, live telephone, or real-time electronic contact by a lawyer with ~~someone a prospective client~~ **known to need legal services.** These forms of contact ~~between a lawyer and a prospective client~~ **subject the layperson a person** to the private importuning of the trained advocate in a direct interpersonal encounter. The ~~prospective client~~ **person**, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult fully to evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer's presence and insistence upon being retained immediately. The situation is fraught with the possibility of undue influence, intimidation, and over-reaching.

~~{2}[3]~~ This potential for abuse inherent in direct in-person, live telephone, or real-time electronic solicitation of ~~potential clients~~ **justifies its prohibition, particularly since lawyer because lawyers have advertising and written and recorded communication permitted under Rule 7.2** offer alternative means of conveying necessary information to those who may be in need of legal services. ~~Advertising and written and recorded~~ **In particular, communications which may can be mailed or autodialed or transmitted by email or other electronic means that do not involve real-time contact and do not violate other laws governing solicitations. These forms of communications and solicitations** make it possible for a ~~potential client~~ **the public** to be informed about the need for legal services, and about the qualifications of available lawyers and law firms, without subjecting ~~the potential client~~ **the public** to direct in-person, telephone or real-time electronic persuasion that may overwhelm ~~the client's~~ **a person's** judgment.

~~{3}[4]~~ The use of general advertising and written, recorded or electronic communications to transmit information from lawyer to ~~potential client~~ **the public**, rather than direct in-person, live telephone or real-time electronic contact, will help to assure that the information flows cleanly as well as freely. The contents of advertisements and communications permitted under Rule 7.2 can be permanently recorded so that they cannot be disputed and may be shared with others who know the lawyer. This potential for informal

review is itself likely to help guard against statements and claims that might constitute false and misleading communications, in violation of Rule 7.1. The contents of direct in-person, live telephone, or real-time electronic ~~conversations between a lawyer and a potential client~~ **contact** can be disputed and may not be subject to third-party scrutiny. Consequently, they are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false and misleading.

~~{4}[5]~~ There is far less likelihood that a lawyer would engage in abusive practices against ~~an individual who is a former client, or a person~~ **with whom the lawyer has a close personal or family relationship, or in situations in which the lawyer is motivated by considerations other than the lawyer's pecuniary gain. Nor is there a serious potential for abuse when the person contacted is a lawyer.** Consequently, the general prohibition in Rule 7.3(a) and the requirements of Rule 7.3(c) are not applicable in those situations. Also, paragraph (a) is not intended to prohibit a lawyer from participating in constitutionally protected activities of public or charitable legal-service organizations or bona fide political, social, civic, fraternal, employee or trade organizations whose purposes include providing or recommending legal services to its members or beneficiaries.

~~{5}[6]~~ But even permitted forms of solicitation can be abused. Thus, any solicitation which contains information which is false or misleading within the meaning of Rule 7.1, which involves coercion, duress, harassment, compulsion, intimidation, or threats within the meaning of Rule 7.3(b)(2), or which involves contact with a ~~potential client~~ **someone** who has made known to the lawyer a desire not to be solicited by the lawyer within the meaning of Rule 7.3(b)(1) is prohibited. Moreover, if after sending a letter or other communication ~~to a client~~ **as permitted by Rule 7.2 the lawyer receives no response, any further effort to communicate with the potential client recipient of the communication** may violate the provisions of Rule 7.3(b).

~~{6}[7]~~ This Rule is not intended to prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a group or pre-paid legal plan for their members, insureds,

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## John B. McMillan Distinguished Service Award

**Julius E. Banzet III**, a native of Warrenton, NC, earned his undergraduate degree from the University of North Carolina in 1960, and his law degree from UNC Law School in 1962. After graduation, Mr. Banzet returned to Warrenton to begin his career at the firm established by his father and uncle, Banzet and Banzet, where he remains today in what is now known as Banzet, Thompson & Styers, PLLC. Throughout his over 50 years of practice, Mr. Banzet established himself as an outstanding attorney, mentor, community leader, and exemplary member of the North Carolina Bar. He has served on the North Carolina State Bar Council, the North Carolina Dispute Resolution Commission, the NC Electronic Recordation Notarization Advisory Council, the local Morehead Scholarship committee, and countless other boards. Mr. Banzet also served as the town attorney for Norlina for 36 years before stepping down in 2011. A man of integrity, ethics, and a sense of duty, Mr. Banzet is the model example of a small town lawyer and a deserving recipient of the John B. McMillan Distinguished Service Award.

**Roy W. Davis Jr.** earned his undergraduate degree from Davidson College in 1952, and graduated *cum laude* from UNC Law School in 1955. While at UNC Law School, Mr. Davis was selected for the Order of the Coif. In 1960 Mr. Davis began practicing in Asheville with the Van Winkle Law Firm, where he has practiced for over 50 years. Mr. Davis is a past president of the North Carolina State Bar, past vice-president of the North Carolina Bar Association, a past member of the ABA House of Delegates, and is currently a member of the Board of Law Examiners. Mr. Davis is also a past president of the 28th Judicial District Bar, where he was honored with the Bar's Centennial award in 2003. In addition to his service to the bar, Mr. Davis is also very active with Pisgah Legal Services, serving on the board, as president, and recently as a co-chair of a capitol campaign to raise money for adequate office facilities for volunteer attorneys. In 2009 Mr. Davis was the recipient of the Chief Justice's

Award for Professionalism, which is "presented annually to an individual or organization whose contributions have demonstrated the highest commitment to genuine professionalism and the highest standards of legal ethics." Mr. Davis' promotion of ethical, professional, and courteous conduct among members of the bar, coupled with his *pro bono* work and service to the legal profession, make him a role model in western North Carolina and a deserving recipient of the John B. McMillan Distinguished Service Award.

**Tommy W. Jarrett** earned his undergraduate degree from the University of North Carolina in 1965, and his law degree from UNC Law School in 1967. After graduation, Mr. Jarrett served as a captain, judge advocate, in the United States Marine Corps. After service, Mr. Jarrett began his practice in the 8th Judicial District with the firm of Dees, Smith, Powell, Jarrett, Dees, & Jones, where he has practiced for over 40 years. Mr. Jarrett was a State Bar councilor in the 1980s, and served as president of the North Carolina State Bar in 1990. He also served seven years on the Disciplinary Hearing Commission, including five years as the vice-chair. Mr. Jarrett has been influential to countless attorneys in the 8th Judicial District, so much so that in 1992 the 8th district bar created the Tommy W. Jarrett Award to be given to an attorney that has shown great leadership both in the bar and the community. In 2001 Mr. Jarrett was inducted in the North Carolina Bar Association's General Practice Hall of Fame. In addition to his service to the bar, Mr. Jarrett has also given his time and energy to improve equal access to justice for the community. He served as county commissioner from 1988 to 1992, leading the county to build a new courthouse and jail complex. Mr. Jarrett's commitment to *pro bono* service and mentoring, in addition to the accolades listed above, make him a deserving recipient of the John B. McMillan Distinguished Service Award.

**James "Jimbo" S. Perry** earned his undergraduate degree from the University of North Carolina in 1977, and his law degree from

UNC Law School in 1980. After graduation, Mr. Perry began his career as an assistant US attorney for the Eastern District of North Carolina, before returning to his hometown of Kinston. Mr. Perry currently practices litigation at the law firm of Perry, Perry & Perry in Kinston. Mr. Perry has long held the goal of serving all classes, ages, and races where there is a need, and much of his time is given freely without charge. In addition to his practice as an attorney, Mr. Perry has served on the Lenoir County Board of Education and the Salvation Army's Board of Administration. Mr. Perry is the founder of the Kinston Fellows Program, which is designed for young adults to come to Kinston for ten months to learn "how to do real life." Mr. Perry currently employs some of the young adults that came to Kinston because of the program and ultimately chose the law as a profession. Mr. Perry is a mentor to those in the program, and to countless lawyers in the 8th Judicial District. Often the voice of reason, Mr. Perry fosters civility and respect among members of the bar and is an inspiration to both the local profession and the community. For his exemplary service to the profession, Mr. Perry 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](http://ncbar.gov). Please direct questions to Peter Bolac at the State Bar office, (919) 828-4620. ■

## Client Security Fund Reimburses Victims

At its January 23, 2014, meeting, the North Carolina State Bar Client Security Fund Board of Trustees approved payments of \$318,224.38 to 15 applicants who suffered financial losses due to the misconduct of North Carolina lawyers.

The payments authorized were:

1. An award of \$356 to a former client of Tonya Ford of Durham. The board found that Ford was retained to prepare estate documents for a client and her husband. Ford was disbarred at the time she was retained and therefore accepted a fee under a false pretense. Ford was disbarred on April 15, 2011. The board previously reimbursed one other Ford client \$250.
2. An award of \$7,084.75 to a former client of Nancy Green of Charlotte. The board found that funds were wired to Green to make bids on real property being sold at auctions for her client. Upon Green's death, she still should have been holding funds for her client in her trust account. Green's trust account balance was insufficient to pay all of her clients' obligations. Green died on June 20, 2012.
3. An award of \$2,000 to a former client of W. Rickert Hinnant of Winston-Salem. The board found that Hinnant was retained to represent a client in a medical negligence case. The client paid \$2,000 to Hinnant either as costs or as a fee that was in addition to Hinnant's contingency fee. Hinnant failed to provide any valuable legal service after receiving that payment. Hinnant was disbarred on July 15, 2011. The board previously reimbursed five other Hinnant clients a total of \$13,500.
4. An award of \$4,000 to a former client of Jimmy Joyner Jr. of Graham. The board found that Joyner was appointed to represent a client on one of his two criminal charges. However, the client's father paid Joyner to represent the client. Joyner failed to provide any valuable legal service for the fee paid. Joyner admitted to a judge that, although he was court appointed, he had been paid for the representation. The judge ordered Joyner to refund the fee to the client, but Joyner failed to do so. Joyner was transferred to disability inactive status on October 10, 2011. The board previously reimbursed two other Joyner clients a total of \$25,481.
5. An award of \$602 to former clients of Robert Mebane of Rutherfordton. The board found that Mebane handled the closing of the clients' home purchase. Mebane failed to pay the title insurer from the closing proceeds. Due to misappropriation, Mebane's trust account balance is insufficient to pay all of his clients' obligations. Mebane was disbarred on July 1, 2012.
6. An award of \$31,289 to former sellers of real property to two clients of Robert Mebane. The board found that Mebane handled the closing of his clients' purchase of their home. Mebane failed to pay the seller proceeds to the sellers. Due to misappropriation, Mebane's trust account balance is insufficient to pay all of his clients' obligations.
7. An award of \$100,000 each to two former clients of Don Sam Neill of Hendersonville. The board found that Neill was retained to, among other things, assist in the sale of real estate that the clients, who are brothers, inherited from their parents. The proceeds of the sale were to be equally split between the applicants. Neill received the \$372,961.83 in sale proceeds and appropriated it to his own use. Neill was disbarred on June 17, 2011.
8. An award of \$4,371.50 to an applicant who suffered a loss caused by Jason Price of Norwood. The board found that Price was retained to handle a client's real estate closing. Price failed to disburse a commission check to the applicant from the closing proceeds prior to his trust account being frozen by the State Bar's injunction. Due to misappropriation, Price's trust account balance is insufficient to pay all of his clients' obligations. Price was disbarred on October 21, 2011. The board previously reimbursed two other Price clients a total of \$27,953.04.
9. An award of \$26,009.63 to a former client of J. Neal Rodgers of Charlotte. The board found that Rodgers was retained to handle a personal injury matter. Rodgers settled the matter and received the settlement proceeds. Rodgers failed to make all the proper disbursements prior to his trust account being frozen by the State Bar's injunction. Due to misappropriation, Rodgers' trust account balance is insufficient to pay all of his clients' obligations. Rodgers was disbarred on May 25, 2012.
10. An award of \$5,000 to a former client of Michelle Shepherd of West Jefferson. The board found that Shepherd handled a real estate closing for her client. Shepherd retained funds from the sale proceeds as a paving escrow. Due to misappropriation, Shepherd's trust account balance was insufficient to satisfy all of her clients' obligations. Shepherd was disbarred on July 25, 2008. The board previously reimbursed several other Shepherd clients and applicants a total of \$668,386.96.
11. An award of \$5,000 to a former client of John E. Tate Jr. of Hendersonville. The board found that Tate was retained to handle a client's personal injury matter. Tate received a med pay check for his client and deposited it into his trust account. Tate failed to disburse the check to the client or pay any medical provider on the client's behalf before surrendering his license due to admitted misappropriation. Tate's trust account is insufficient to pay all of clients' obligations. Tate was disbarred on March 23, 2012.
12. An award of \$2,886.50 to a former client of W. Darrell Whitley of Lexington. The board found that Whitley was retained to handle a client's personal injury matter. Whitley settled the matter without the client's knowledge or consent. Whitley never paid any of the settlement to the client or anyone on the client's behalf. Due to misappropriation, Whitley's trust account balance is insufficient to pay all of his clients' obligations. Whitley died on December 6, 2011. The board previously reimbursed several other Whitley clients and applicants a total of \$625,180.24.

13. An award of \$27,030 to a former client of W. Darrell Whitley. The board found that Whitley was retained to handle a client's workers' compensation claim. Whitley settled the matter and made two disbursements to the client. There should have been funds remaining in the trust

account for the client after Whitley's death. Due to misappropriation, Whitley's trust account balance is insufficient to pay all of his clients' obligations.

14. An award of \$2,595 to a former client of Nancy Wooten of Winston-Salem. The board found that Wooten was retained

to handle a client's domestic matter. Upon Wooten's death, it was determined that Wooten had not provided valuable legal services for the fee paid. Wooten died on April 19, 2012. The board previously reimbursed two other Wooten clients a total of \$19,854.62. ■

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## The Freudian Slip (cont.)

so bad. Will I ever get over her?" asked Wallace.

"I see some of your uncle's chauvinistic attitude has rubbed off on you. So all women just want money and status now?" asked Dr. Edmundson.

"Well...yeah! It has been my experience. I have only met two women in life who didn't. One was Debra. The other was this girl name Sarah that I dated my senior year of college. I thought I would marry her. We went on trips together, lived together, and practically held ourselves out as a couple. She was great."

"So why didn't you marry her?"

"Came home early and found her in bed with my best friend at the time. He was a Wall Street investment banker and was only in town for the weekend to visit me. I was devastated."

"I'm sure you were," said Dr. Edmundson sarcastically. "Is that why you did the same thing to your fiancée?"

"It's not that simple. I understand how Debra must feel because I've been there. But I also understand that I love her and I hurt her very deeply. But I'm also here trying to work things out to get her back. I'm willing to do whatever it takes," responded Wallace.

"Why are you fighting this hard for her? I mean, wouldn't it be easier to just hire back Sharrise and have your indiscriminate office trysts whenever you want?"

"Look, I appreciate Sharrise, but I don't love her. I love Debra Wilson. She's my angel," Wallace said adamantly.

"Well, that ends our session today. I will see you again Tuesday of next week," replied Dr. Edmundson.

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Lisa waited at the door, but saw no signs

of anyone being home. As she stared through Debra's open curtains, she saw that there was no wine set up. Debra must have canceled on her without calling. As she turned towards her car, she saw a well-polished black Sports Jaguar ease up into the driveway. The driver side door opened, revealing Scott Thomas. He quickly walked to the passenger door, pressed a release button, and assisted Debra in her exit. Lisa was thoroughly impressed with his chivalry. The two smooched a few times before he walked Debra up to the porch.

When they reached the top of the steps, Debra introduced Lisa to Scott. Lisa immediately noticed Debra's low-cut blouse and mini-skirt. She had not seen Debra this free in years. Scott kissed Debra's hand before walking to the trunk of his car.

"Wow. I guess you got over Wallace quickly," Lisa giggled. "In four short months, you went from dating a loser to hitting the jackpot." Lisa frowned a little before looking back in Scott's direction. She seemed nervous. Suddenly, Scott returned with a box of expensive Swiss chocolates and a rose.

"I know this is hardly fitting for an anniversary gift, but I just wanted to tell you, happy one year anniversary," Scott announced. Confused, Lisa turned to Debra. But when she saw Debra accept the gift and kiss Scott, a queasy feeling crept into her stomach. Her brain began to race for viable solutions to her misunderstanding. Wallace had been visiting her religiously on a weekly basis for four months, ever since his indiscretion. Now Debra was getting showered with gifts for a one-year anniversary.

"Um, Debra. What is this?"

"Scott and I are planning a wedding for next month. We figure a year of dating is long enough to hide and sneak around," replied Debra.

"What?!? Are you serious right now? You

were engaged a year ago. To Wallace..."

"Well, you know, you have to assess your options at all times. I knew that Scott had way more money and status than Wallace did. This might be my shot at the perfect life."

"But Debra, we've been friends for years and you've had me doing these evaluations of Wallace for the past four months. Why?"

"I meant to tell you. It must have slipped my mind. But essentially I didn't want to break up with Wallace until I knew I was locked in with Scott. I practically pushed him to Sharrise so that I could have my out. You know how it goes, girl. These men do it all the time. Why shouldn't we?" responded Debra. Lisa felt sick.

"How could you do this to Wallace?" Lisa asked.

"You're the professional with the license. If Wallace ever finds out about this, I've got a stockpile of recorded conversations that will be sufficient to take your license away for breaking all sorts of ethics rules. Honestly, I'm disappointed in you," said Debra.

Lisa ran to her car with tears streaming down her face. As she sped out of the driveway, she saw Debra smiling her wholesome conservative smile and waving. She could not stand what she had done. In the quest to escape, her cell phone began to ring. Then a voicemail.

"Doc, this is Wallace. I can't stop thinking about Debra. I don't know what else I have to do to rebuild the trust she had in me. Do you have any ideas? Call me back!" said Wallace's distraught voice. ■

*McCoy is a native of Durham, North Carolina, and a proud graduate of Florida A&M University and North Carolina Central University School of Law. McCoy currently serves as a staff attorney with Legal Aid of North Carolina. He can be reached at [mccoy-law@att.net](mailto:mccoy-law@att.net).*

## Law School Briefs

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

### Campbell University School of Law

**Campbell Law Unveils Flexible Enrollment Option**—Campbell Flex, a flexible enrollment option, will begin with the fall 2014 semester. A premium option of study for area residents looking to pursue alternative career paths, Campbell Flex enables students to earn a Juris Doctor by taking fewer hours each semester than required by the full-time program.

Students enrolled in Campbell Flex will attend the same classes, taught by the same full-time and adjunct faculty members, that traditional Campbell Law students experience. Campbell Flex students will also enjoy the same access to law school amenities, including academic support, the law library, student organizations, and career services.

**Campbell Law Announces Mentorship Program**—The Campbell Law Connections mentorship program will partner students with practicing legal professionals, exposing students to valuable learning opportunities and experiences. Students will develop meaningful professional relationships and a more thorough understanding of the responsibilities and ethics demanded by the practice under the tutelage of a mentor. The program is a joint endeavor between Campbell Law and the Wake County Bar Association.

**West Elevated to Assistant Dean of External Relations**—Megan West, a 2010 Campbell Law graduate, has been elevated to assistant dean of external relations. She will oversee the alumni relations, career services, communications, and development departments. She will also manage the Campbell Law Connections mentorship program beginning with the fall 2014 semester.

**Bridges Promoted to Assistant Dean of Administration**—Ulmer Zack “Zeke” Bridges III, a 2003 Campbell Law graduate,

has been promoted to assistant dean of administration. He will serve as the law school’s chief financial officer and oversee human resources, the physical facility, technology, student life, and *pro bono* services. Bridges previously served the law school as director of mentorship, establishing the Connections mentorship program and managing the program through the spring 2014 pilot phase.

### Charlotte School of Law

**Introducing the Jump Start Program**—Charlotte School of Law is excited to introduce the Jump Start Program—a unique program designed for students who would like to begin their law school experience and fulfill certain degree requirements during the summer before they begin their first fall semester of classes. Students will take three courses, all of which are required for the JD degree. Students who enter into the Jump Start Program will have the opportunity to participate in select *pro bono* and community service projects, with the goal of fulfilling some or all of the Access to Justice service hour requirements for graduation.

**Students Win Regional Best Draft Award**—Charlotte School of Law students Porsha Daniels, Brenda West, and Mimi Wang won a regional Best Draft award at the Third Annual Intellectual Property LawMeet held at Suffolk University Law School in Boston, Massachusetts. The competition asked law students to represent one of two sides in drafting and negotiating a joint development agreement for a promising new 3D printing technology.

**Students Change Lives through High School Teaching Experience**—Students in Assistant Dean of Academic Affairs Kama Pierce’s Advanced Legal Studies course just finished working with several classes at Harding University High School to improve the high school students’ critical reading, reasoning, and writing skills. The experience helped prepare the law school students for their current assignment of teaching a Legal Studies course to Johnson C. Smith

University pre-law students.

**December Recognition and Hooding Ceremony**—Ninety-eight members of the Charlotte School of Law December Class of 2013 were recognized for their outstanding achievements at a special Recognition and Hooding Ceremony held on Friday, December 20 in the Halton Theater at Central Piedmont Community College. Allan Head, executive director of the North Carolina Bar Association, gave the keynote address.

### Duke Law School

**Wrongful Convictions Clinic Client Pardoned by NC governor**—LaMonte Armstrong, whose conviction in a 1988 Greensboro murder case was called into question by new evidence uncovered by Duke Law’s Wrongful Convictions Clinic, was granted a pardon of innocence by North Carolina Governor Pat McCrory on December 23. Armstrong’s release and pardon resulted from years of work by clinic faculty, a team of Duke Law students and alumni, and an assistant district attorney and police detective willing to re-examine evidence when presented with credible questions about the case. Clinic Co-director James Coleman called Armstrong’s exoneration process a good model for innocence cases in the future.

**Duke Launches Center for Innovation Policy**—Duke Law’s new Center for Innovation Policy facilitates the identification and implementation of laws and policies that nurture innovation, an important driver of economic growth in developed countries. Prof. Arti Rai, an internationally recognized expert in intellectual property law, administrative law, and health policy, and Prof. Stuart Benjamin, a leading scholar of telecommunications law, administrative law, and the First Amendment, bring deep experience in the policy arena to their leadership of the center. The center’s inaugural conference, held on November 22 in Washington, DC, focused on innovation in the biopharmaceutical sector.

**Wintersession Course for 1Ls Highlights Corporate Lawyers' Role**—A new course in Wintersession, Duke's early-January session of short courses focused on professional skills training, gave first year law students an overview of the way businesses are structured and regulated, and the lawyer's role in advising clients and facilitating transactions. The course, designed to give 1Ls a window into what a corporate lawyer does day-to-day, was taught by members of the Duke Law faculty and four lawyers who focus on domestic and cross-border transactions, mergers, antitrust, and corporate law at Hogan Lovells in Washington and New York.

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### Elon University School of Law

**Luke Bierman named dean**—Elon University has named Luke Bierman, a highly accomplished attorney and national leader in experiential legal education, to be the next dean of Elon Law. Bierman will join Elon Law as dean and professor of law on June 1, 2014, succeeding George R. Johnson Jr., who is stepping down as dean after five years of service and will continue to serve as a full-time Elon Law faculty member.

Bierman is currently associate dean for experiential education and distinguished professor of practice of law at Northeastern University School of Law. Bierman previously served as general counsel for the Office of the New York State Comptroller from 2007 to 2010. He was executive director of the Institute for Emerging Issues at North Carolina State University, where he held the rank of associate professor of political science. He founded the Justice Center and directed the Judicial Division at the American Bar Association, and served as chief attorney for the appellate division of the New York Supreme Court in Albany, where he also clerked for the court's presiding justice and an associate justice.

"Professor Bierman's record of innovation in legal education, his depth of executive experience in the practice of law, and his accomplishments in forming and managing strategic partnerships that link higher education with the public, private, and nonprofit sectors make him the ideal person to lead Elon Law," said Leo M. Lambert, Elon University president.

Bierman earned his master's degree and doctorate in political science from the State University of New York at Albany, a juris

doctor degree from the Marshall-Wythe School of Law of the College of William and Mary, where he was a member of the William and Mary *Law Review*, and a bachelor's degree in social sciences, *magna cum laude* and Phi Beta Kappa, from Colgate University.

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### North Carolina Central University School of Law

**Connecting Law and Social Services**—Like many students at North Carolina Central University School of Law, Mrs. Glenna Boston, Class of '14, brings rich experience from another field to her study of law. As a former child welfare social worker, Boston understands the interplay between the judicial system and child protection services. She also knows that this subject matter is not sufficiently examined in most graduate programs in social work or law. Hence, she planned and led a project in NCCU's Family Law Clinic last fall in which law students coached students studying social work in the art of writing reports for and testifying in court. Law School Dean Phyllis Craig-Taylor praised the program: "It exemplifies the school's commitment to our mission of truth and service."

"The common goal for everyone involved was to work toward the best interests of the child, regardless of who you represented," said Boston. "That was a different vantage point for the law students."

Similarly, Boston said the social work students needed to understand their legal reporting requirements in cases of child dependency, abuse, and neglect. NCCU Law invited graduate social work students from North Carolina State University to a full-day workshop on topics such as Title IV-E funding, the courtroom structure, and the relationship between state and federal law. NCCU also offered a seminar on the preparation of court reports.

The social work students were required to prepare documentation for a true-to-life child abuse case and submit it for review and feedback from Judge Nancy Gordon, District 14, Judge Beverly Scarlett, District 15B, and Angie Stephenson, North Carolina assistant attorney general. They presented their testimony in a mock trial at the Durham County Courthouse, with Judge Scarlett presiding.

"It was such a success, we intend to repeat this initiative with NCCU social

work students this spring," said Assistant Clinical Professor Nakia Davis.

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### University of North Carolina School of Law

**Pro Bono Fall and Winter Break Projects**—Forty-six students spent fall break participating in a new project called "Fall Breakthrough." Students worked with supervising attorneys from Legal Aid of North Carolina (LANC) offices in Durham, Pittsboro, Greensboro, and Fayetteville on projects ranging from health insurance enrollment to criminal record expungement. Twenty-one students from UNC collaborated with Legal Aid of NC over winter break to run a free legal clinic for residents of the Cherokee Reservation in Cherokee, NC.

**CDO Launches New Alumni Program**—UNC School of Law's Career Development Office has launched a program that pairs students with practicing attorneys to give them a head start on career building. Last fall select students had the opportunity to meet with an alumnus in an area of practice that interests them to learn more about the alumnus' experiences. More sessions are planned for the spring.

**Conference on "Navigating the Fog of War"**—*The North Carolina Journal of International Law and Commercial Regulation (NCILJ)* hosted a conference on the emerging issues in the law of armed conflict and international security, featuring former Guantanamo prosecutor Col. Morris Davis, on January 31. For more information: [law.unc.edu/journals/ncilj/symposium](http://law.unc.edu/journals/ncilj/symposium).

**CLE Programs**—Recent and upcoming CLE programs include the Festival of Legal Learning, Chapel Hill, February 14-15; The 2014 ABC's of Banking Law, Charlotte, April 2; the 2014 Banking Institute, Charlotte, April 3. Visit [law.unc.edu/cle](http://law.unc.edu/cle).

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### Wake Forest University School of Law

*The National Jurist* announced in its January 2014 issue that Wake Forest Law School Dean Blake D. Morant once again ranks among its 2013 list of the most influential people in legal education, in part due to his commitment to making sure that law schools continue to evolve to meet today's challenges. And it is the future success of Wake Forest Law students that is the impetus behind Dean Morant's two recent national appointments: president-elect of the American Association of Law Schools and

The Federal Judicial Center Foundation Board. Dean Morant was appointed to the Federal Judicial Center Foundation Board by US Supreme Court Chief Justice John G. Roberts Jr. Morant's five-year term began October 24, 2013. "I think both appointments provide Wake Forest Law students with greater, institutional acclaim," said Morant, who was elected as president-elect at the AALS Annual Meeting in New York City on January 4. "The position of president-elect of AALS, which entails more interface in Washington, DC, and law schools nationally, will provide opportunities for greater interface with our DC program and foster exchanges with institutions more broadly. The Federal Judicial Center Foundation Board provides less direct effect, but will enable us to establish contacts with the judiciary that could lead to programs hosted at the campus, and an expanded network for students."

Wake Forest Law Professor Steve Virgil, who is director of the law school's Community Law and Business Clinic, has been named executive director of experiential education for Wake Forest Law. "In this new role, Steve will work to coordinate and integrate our current and future experiential opportunities throughout the law school," explained Suzanne Reynolds, executive associate dean for academic affairs. "The role will both support existing programs, including our clinics, internships, externships, and practicum extensions, and will look for new opportunities for meaning experiential education." ■

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## Legal Specialization (cont.)

Being able to identify myself as a specialist is a great way to let potential clients, from North Carolina and beyond, know that I dedicate my practice to this area of the law.

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

**Matthew:** I think that the days of a traditional general practice are probably numbered. As the law continues to become more complicated, lawyers will naturally gravitate toward specialized fields. I wouldn't dream of taking on a DUI case because I might do the client more harm than good. By the same token, I firmly believe that legal matters involving trademarks are best left to

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## Proposed Amendments— Ethics 20/20 (cont.)

beneficiaries, or other third parties for the purpose of informing such entities of the availability of and details concerning the plan or arrangement which the lawyer or lawyer's firm is willing to offer. This form of communication is not directed to ~~a potential client~~ people who are seeking legal services for themselves. Rather, it is usually addressed to an individual acting in a fiduciary capacity seeking a supplier of legal services for others who may, if they choose, become potential clients of the lawyer. Under these circumstances, the activity which the lawyer undertakes in communicating with such representatives and the type of information transmitted to the individual are functionally similar to and serve the same purpose as advertising permitted under Rule 7.2.

[Re-numbering remaining paragraphs]

### Rule 8.5 Disciplinary Authority; Choice of Law

(a) Disciplinary Authority. ...

(b) Choice of Law. In any exercise of the disciplinary authority of North Carolina, the rules of professional conduct to be applied shall be as follows:

(1) for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits,

unless the rules of the tribunal provide otherwise; and

(2) for any other conduct, the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct. A lawyer is not subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur.

### Comment

...

[5] When a lawyer's conduct involves significant contacts with more than one jurisdiction, it may not be clear whether the predominant effect of the lawyer's conduct will occur in a jurisdiction other than the one in which the conduct occurred. So long as the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect will occur, the lawyer is not subject to discipline under this Rule. With respect to conflicts of interest, in determining a lawyer's reasonable belief under paragraph (b)(2), a written agreement between the lawyer and client that reasonably specifies a particular jurisdiction as within the scope of that paragraph may be considered if the agreement was obtained with the client's informed consent confirmed in the agreement.

... ■

lawyers who dedicate their practice to that area of the law.

**Bill:** As the law continues to grow, I see a greater push toward specialization and even subspecialties within a practice area like trademark law. This allows us all to draw on the expertise of others and not reinvent the wheel every time an issue surfaces. This provides better service to clients and a better use of financial resources.

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

**Matthew:** The process will absolutely make you a better lawyer. From day one to year 15, there are still things to learn and ways to grow in your practice. Certification will encourage you to continue to improve and to be better today than you were yesterday.

**Bill:** I have already encouraged colleagues to pursue the certification this year. The benefits far outweigh the costs, and as a career enhancement, it should be a simple decision to pursue something that will enable you to market your professional accomplishments to the public. It is nice to be able to say that I am one of a few lawyers in the state recognized as a specialist in this area. The State Bar says so. ■

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

### Endnote

1. A lawyer who is admitted to engage in patent practice before the U.S. Patent and Trademark Office may use the designation "Patent Attorney". Rule 7.4 of Rules of Professional Conduct, cmt. [3].



**LAWYERS  
MUTUAL**

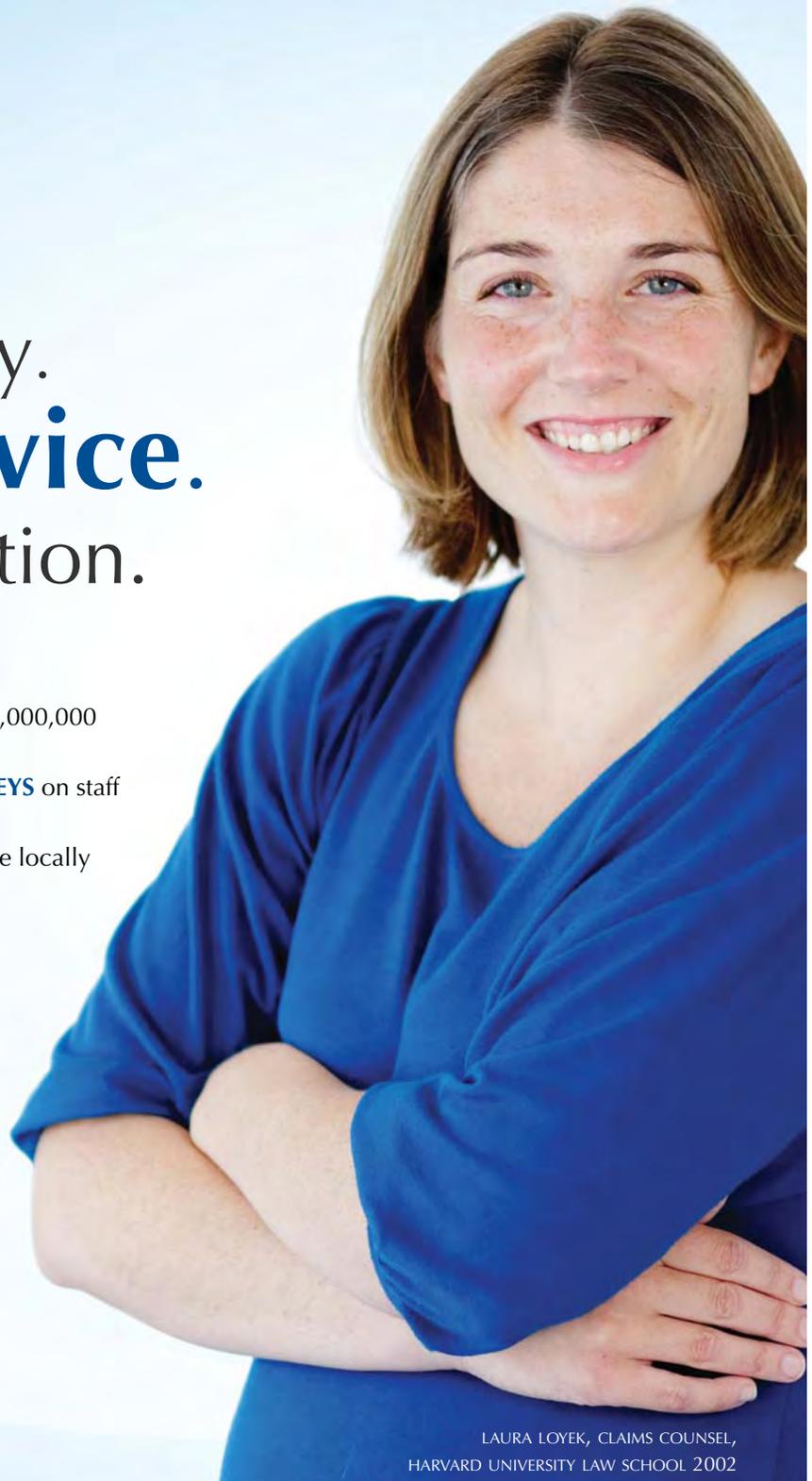
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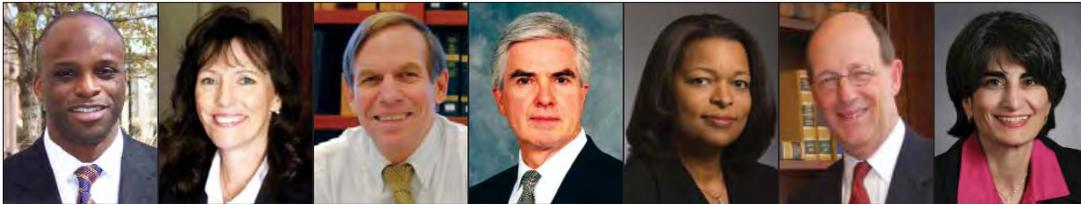


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