

THE NORTH CAROLINA STATE BAR

# JOURNAL

FALL  
2017



STATE  
*of the*  
NORTH CAROLINA  
JUDICIARY  
*justice for all*



IN THIS ISSUE

2017 State of the Judiciary *page 10*

The Role of Race in Jury Selection *page 13*

The Evolving Face of Mediation in NC *page 20*



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Jennifer R. Duncan

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# Contents

## FEATURES



- 10 2017 State of the North Carolina Judiciary**

*Remarks by Chief Justice Mark Martin*



- 13 The Role of Race in Jury Selection:  
A Review of North Carolina Appellate  
Decisions**

*By James E. Coleman Jr. and David C. Weiss*



- 18 Books of Significance—Simple Justice**

*By Jon Buchan*

- 20 The Dispute Resolution Commission  
and the Evolving Face of Mediation  
in NC**

*By Gary S. Cash*

- 24 Three Uncles at the Bar**

*By Matthew Phillips*

# Contents

## D E P A R T M E N T S

- 6** President's Message
- 8** State Bar Outlook
- 27** Trust Accounting
- 28** Legal Specialization
- 29** Legal Ethics

- 30** The Disciplinary Department
- 32** Lawyer Assistance Program
- 34** IOLTA Update
- 35** Proposed Ethics Opinions
- 42** Rule Amendments

## B A R   U P D A T E S

- 31** In Memoriam
- 46** Client Security Fund
- 47** Distinguished Service Award
- 48** Willoughby Nominated as VP
- 49** Law School Briefs

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# What's on Your Minds

BY MARK W. MERRITT

**O**ne of the great benefits of being a State Bar officer is that you get to travel all over the state to meet with lawyers and judges. In my almost three years as a State Bar officer, your officers have been to meetings as far east as Duck and as far west as Cullowhee. I have been struck by the congeniality of lawyers across this state, and I have been the beneficiary of your hospitality. You have not lived until you have eaten the fried quail at the Annual Buck Harris Dinner in Robeson County, which was held for the 73rd time last December and no doubt will be a great time again this year.

As I have traveled, I have tried to be an attentive listener to what the lawyers across our state have on their minds. Our lawyers and our courts are active participants in all phases of the life of our state, and I would be remiss if I did not share with you some of their insights and concerns. In so doing, I hope that you will take away from this article what I have taken away from all of you: that we live in challenging times, and that we have a lot of work to do.

## Respect for the Judiciary

Lawyers across the state have expressed concern to me over the lack of respect for the profession and for the judiciary. Many of these concerns are expressed privately and relate to what is happening in the political world. People have noticed that the only state employees who did not get raises were our judges, that the number of court of appeals judges was reduced, and that initiatives on judicial redistricting were undertaken without input from our judges, the AOC, or lawyers in general. I still find it remarkable that the percentage of the state budget dedi-

cated to the court system for 2015-2016 was 2.23 %. Our goal for many years has been to get to a modest 3% of the state's total budget. The result is a state that underpays its judges, and has lagged on needed technology upgrades due to chronic underfunding.

Politicians and citizens alike seem to have no reticence in criticizing our judges for what seems to be the judges doing their jobs. Our

courts are currently caught in the middle of separation-of-powers disputes between the executive and legislative branches. Our courts do not do that by choice, but their duty is to decide those issues consistent with how they interpret our North Carolina Constitution. The other branches of government should not use the courts as a punching bag when decisions do not come out as that

branch may like. To their credit, our judges stay above the fray. In reality, our judges are not really in a good place to defend themselves when others disparage them. That is where all of us come in. In our communities, lawyers need to continue our proud tradition of protecting judicial independence and defending our judges when unfair allegations are lodged against them for doing their jobs.

We also need to be better advocates for what matters to our profession. Lawyers should not take for granted that our citizens have respect for the rule of law, have respect for judicial independence, and have respect for the role of lawyers and judges in maintaining the ordered liberty that we all enjoy. We should all take note that fewer and fewer lawyers are running for public office and serving in our General Assembly. I think that is a real loss for our state. Lawyers know how to write laws, how to broker compromises, and how to get things done. It is critical that lawyers engage with elected officials in their communities and home districts to

educate them about the importance of an adequately funded judicial system, respect for our judges, and the crucial role of our judicial system.

## The Effect of Technology

A repeated question to State Bar officers is how the State Bar will deal with the emerging technologies that affect how legal services are provided. These include the online provision of legal services, the use of cloud technology to store information, the use of artificial intelligence to evaluate information and provide legal analysis, and the use of technology platforms to connect clients and lawyers for a fee. These are hard questions to answer because technology is evolving not only rapidly, but in ways that can be disruptive and unpredictable.

We face other realities. The consuming public wants to be able to use better and more readily available technology to procure legal services. The consuming public has a desire for unbundled legal services and more often wants a legal question answered than a long-term relationship with a lawyer. There is also the reality that the State Bar governs the regulation of lawyers and their conduct, and not the development and deployment of technologies that may affect the legal profession.

Our regulatory efforts to date with respect to technological change have been not to stand in the way of any technology that holds out the prospect of helping lawyers interact with clients and provide their services more efficiently. We have also tried to make sure that no new technology or service used by lawyers threatens the ability of a lawyer to exercise his or her independent judgment, or the ability to protect the attorney-client privilege and confidentiality of client information. In many practice areas, we see that the competence required of lawyers under the Rules of Professional Conduct will necessarily include technical competence of information technology.



These technologies may seem threatening, but they also hold great promise for lawyers. The ability to use technology platforms to connect clients who have needs to lawyers who need work is a concept that our profession should embrace. The successful lawyer of the 21st Century may very well be the one that is an early adopter of new technology. The State Bar will continue to monitor technological change and provide guidance on how new technologies can be used professionally, ethically, and in the public interest. We will also continue to protect the consuming public from those individuals and companies who attempt to provide services that they are not qualified or licensed to give. We will continue to need your input on how to face the challenges presented by rapid changes in technology.

## The Demographics of our State Matter to the Profession

Our travel around the state shows that in many ways North Carolina is a contradiction. North Carolina is now the country's ninth most populous state. Between 1996 and 2015, the state's population grew 37.4% from 7,307,658 to 10,042,802. The problem is that the growth has been uneven. Some parts of North Carolina are among the fastest growing in the country, but many of our counties are losing population, particularly in our rural areas.

You may ask why this matters to the legal profession. The problem is simple—as population declines in an area, there is little incentive for new lawyers to move there. This is especially true if the new lawyer is saddled with heavy debt from college and law school, and needs the higher income that can only be obtained in a growing urban area to pay that debt. From 2004 to 2015, four of the state's 44 prosecutorial districts saw a net decrease in their populations of practicing lawyers. Lawyers in many of the rural communities lament that new lawyers are not coming in to replace lawyers as they retire. As the State Bar looks at demographic trends, there is a real concern that this lawyer depopulation in many areas of the state will accelerate. We all know that as any area loses its professional infrastructure of lawyers, doctors, and accountants, it makes it even harder to attract new businesses that would support those professionals.

There is no easy solution to this problem. Technology may enable lawyers to practice in

rural areas and serve clients in urban areas over the newly developing platforms that connect lawyers and clients. At some point, North Carolina may need to consider how we provide incentives for lawyers to move to underserved areas, or face a reality that many of our citizens will lack geographic proximity to lawyers.

## There is an Opioid Epidemic that We Ignore at Our Peril

I could not help but notice that on June 27, Governor Cooper announced the kickoff of North Carolina's Opioid Action Plan. That came as no surprise to me. As the officers travel to our district bar meetings across the state, I make it a practice to ask the judges what changes they are seeing in their courts. One judge stated to me that opioids and methamphetamine are rotting out the core of rural North Carolina. That kind of statement gets your attention, but other judges and many criminal lawyers have expressed the same sentiment. Our state has a growing drug problem with respect to opioids. In announcing his plan, Governor Cooper noted that opioid overdoses have claimed more than 12,000 lives in North Carolina since 1999, and that deaths from overdoses are up 800%.

The governor has introduced a plan to tackle this problem through education, engagement, and the development of new strategies to provide effective interventions for opioid abusers, many of whom got addicted while taking prescription opioids. Part of this process will involve how the crim-

inal justice system works with law enforcement to effectively address what is the medical condition of drug addiction. As lawyers, we need to support these important efforts and think creatively about how our criminal justice system can be part of the solution.

## Parting Thoughts

This article reflects what is on the minds of the lawyers around the state, but it is only part of the story. In discussing these various issues with lawyers, there is also a real sense of resolve. There is increased awareness that our judges and judicial system need greater support. There is increased understanding that technology is not to be feared, but needs to be learned and utilized. There is a realization that our changing demographics present challenges, but also may present opportunities to come up with new ways to interact with clients, allocate resources, or provide incentives to address emerging challenges.

My interactions with lawyers have given me confidence that we have the ability to address these issues. If we can turn the growing sense of resolve into action and engagement, I am optimistic that our profession will play a leading role in helping North Carolina meet these many challenges. ■

*Mark W. Merritt began serving as vice chancellor and general counsel at UNC-Chapel Hill in September 2016. Prior to that time, he practiced law in Charlotte as a litigator at Robinson Bradshaw. He is an alumnus of UNC-Chapel Hill and the University of Virginia School of Law.*

## Speakers Bureau Now Available

Speakers on topics relative to the North Carolina State Bar's regulatory mission are available at no charge for presentations in North Carolina to lawyers and to members of the public. Topics include the State Bar's role in the regulation of the legal profession; the State Bar's disciplinary process; how the State Bar provides ethical guidance to lawyers; the Lawyer Assistance Program of the State Bar; the Client Security Fund; IOLTA: Advancing Justice for more than 20 Years; LegalZoom, HB 436, and updating concepts of the practice of law; and anti-trust questions for the regulation of the practice of law in North Carolina. Requests for speakers on other relevant topics are welcomed. For more information, call or email Lanice Heidbrink at the State Bar: 919-828-4630 or lheidbrink@ncbar.gov.

The purpose of the Speakers Bureau is to provide information about the State Bar's regulatory functions to members of the Bar and members of the public. Speakers will not be asked to satisfy the requirements for CLE accreditation; therefore, sponsors of CLE programs are encouraged to look elsewhere for presenters.

# Getting Real

BY L. THOMAS LUNSFORD II

**F**or much of her career as a board-certified psychiatrist, my wife Julie struggled with the notion that she might not be a “real” doctor. Treating people with maladies that usually could not be tested for, observed, or cured with therapies that often seemed to be no more than conversation, she wondered whether her classmates, with their x-rays, scalpels, and Range Rovers, might have somehow been more legitimate as physicians. Although she sometimes prescribed controlled substances of one sort or another, and even shocked a few people, to good effect, the science underpinning those treatments was not always well understood and the outcomes seemed less predictable than hip replacement or dermabrasion. She wondered whether she really knew what she was doing. Fortunately for all concerned, Julie was able to supplement scant science with healing art in abundance. She successfully treated, and really helped, most of the people who found their way into her clinic, and made a modest living and a great reputation in so doing. Still, her professional self-doubt persisted, I think, until she finally found her true calling as a teacher at the medical school at her alma mater. There she found validation and identity in the society of academic colleagues and, especially, as mentor to dozens of novice physicians, almost all of whom see her clearly and correctly as a “real” and outstanding doctor.

In much the same way, I have had my doubts as to whether I, the executive director of the State Bar, am a “real” lawyer. While I have had a law degree and a license since the Carter administration, and actual-



ly represented clients in various matters many times in a previous life, I have long since abandoned any pretense of actual lawyering, preferring pretifogger and pontification to professional practice. That is not to suggest that I am not proud to be a lawyer or desire not to be regarded as such. To the contrary, I am always happy to

remind people of my membership in the State Bar and to have them assume that I am competent as an attorney. And I suspect that most folks do indeed make that assumption, at least until I am invited to opine on a legal subject. Regrettably, the unmasking engendered thereby is usually awkward and unpleasant, and has over time caused me to question whether I am in

any meaningful sense still to be reckoned a lawyer.

I am, therefore, extremely happy to report that, like my wife, I have recently been validated professionally—and by a couple of unimpeachable sources: the American Institute of Family Law Attorneys (AIOFLA) and Avvo.

Back in the spring I was thrilled to receive, quite out of the blue, a letter from AIOFLA (“an impartial third-party attorney rating and invitation only legal organization”) advising me that I had “been selected for membership as one of the ‘Ten Best Attorneys’ for North Carolina.” I was further advised that my selection was a “significant achievement” owing to my having been “formally nominated by the institute, clients, and/or a fellow attorney,” having “attained the highest degree of professional achievement” in my field of law, and having garnered “an impeccable client satisfaction rating.”

My selection based on these criteria was

especially gratifying in light of the fact that I participated in my one and only family law case—a custody dispute, to be precise—while I was in private practice in Burlington back in the late 70s. Although I didn’t think much about it at the time, my performance in that matter must have made a very powerful impression on the institute, my client, and/or a fellow attorney. Anyway, given the relatively small amount of data available concerning my career and ability as a family lawyer, I think my selection is particularly noteworthy. It bespeaks an almost prophetic brand of legal archeology. Just as a mighty dinosaur might be reconstructed from a single fossilized bone, my surpassing expertise as a family lawyer seems to have been convincingly extrapolated from a few days of domestic litigation light-years ago. Perhaps the folks in Cooperstown ought to take another look at my stats from Little League.

Of course, the institute has to cover its costs. Hence, the modest fee I am being asked to pay to be listed as one of the ten best on their website and to receive a “Ten Best Attorney” custom engraved plaque. Since I don’t actually practice family law anymore, I am still on the fence about signing up—the commercial advantage, as opposed to the psychic benefits of membership, being somewhat doubtful for a man in my position of public trust. Still and all, I must tell you that I am very tempted. This sort of recognition could be quite useful when I sit down with the Finance Committee in December and negotiate my salary for next year. They’ll know that if I don’t get what I deserve, I can “walk” and make a boatload of money handling equitable distribution cases for wealthy clients.

And, as if that weren’t enough, it appears that my status as a “very good” lawyer has recently been confirmed by no less an authority than the Avvo corporation. This came to my attention recently when I

became aware of a study being conducted by the State Bar's Ethics Committee regarding, among other things, the ethical implications of a lawyer's "claiming" his or her online "profile" generated by Avvo—initially from information in the public record and later from data supplied by the lawyer—for the ostensible benefit of consumers of legal services.<sup>1</sup> Incidentally, I learned that these profiles include "ratings" of the subject lawyers that are assigned by Avvo in accordance with a rather mysterious proprietary algorithm. My personal ethics guru, Alice Mine, suggested to me that I might find it interesting and "fun" to see what my unclaimed profile looked like. She also challenged me to claim my profile in order to determine whether I could improve my standing in the profession by elaborating upon my many professional accomplishments. So I did.

I went to the Avvo website and searched for myself. Within a matter of moments my unedited profile appeared along with a photograph, supposedly of me but actually of someone else—a retired judge with whom I share one of my names.<sup>2</sup> Knowing the judge to be a lawyer of great integrity who would never intentionally "squat" on or otherwise infringe upon someone else's online profile, I guessed that there must have been some mistake on Avvo's part. Fearing that this error might be indicative of a wholesale misreading of the public record where I was concerned, I resolved to carefully scrutinize the rest of my profile. I'm glad I did. While it was accurately reported that I was licensed in 1978 and that I had never been found guilty of professional misconduct, it was inaccurately stated that I devote 34% of my practice to divorce and separation matters, 33% to elder law, and the other 33% to family law generally. Although I am recognized by at least one authority as one the ten best family lawyers in the state, I do not, as noted above, actually practice family law, so the percentages seemed a bit off. Other than the correct recitation of my business address and the phone number at the State Bar, there really was no other pertinent information, right or wrong, cited in my as yet unclaimed profile. Somewhat surprisingly, this relatively sparse professional biography earned me an Avvo rating of 6.7 which, according to the scale supplied by Avvo on its website, indicated that I was a

"good lawyer." For curiosity's sake, I then searched for the judge's profile, which I also found to be unclaimed. From it I learned that he had been licensed for 44 years and had never been disciplined. This record of service to the public and the profession earned him a rating of 6.5. Not quite as good as mine, of course, but, then again, he probably hadn't made any top ten lists. He also didn't have a profile photograph, although I would have been glad to lend him mine.

I then took the fateful step of claiming my profile. I clicked on the appropriate icon and supplied my email address and—voila—I was a claimant, and at no cost to me or the State Bar. I was thereafter invited to "edit" my profile. My first editorial action was to grudgingly delete the judge's picture. Although my profile was all the poorer for its loss, I was relieved to see that my rating was not consequently diminished. Even without the sober likeness of my namesake, my rating remained a rock solid 6.7. I briefly considered substituting my own photo, but ultimately didn't think it was worth the risk.

I next considered several other means of shoring up my online presence with Avvo. It appeared that one's profile might be enhanced in several ways. Among other things, you can solicit endorsements from other lawyers. You can solicit reviews from your clients. You can add information about your cases or your publications. And you can describe your public presentations on legal topics. Having participated in no cases recently, there was little to report in that regard. Likewise, I had no clients to call upon for reviews. I do know a great many lawyers that I could have called upon for endorsements, but most of them would have insisted on giving their honest opinions. I did list the last three articles I published in the Bar *Journal* concerning the State Bar's finances. Unfortunately, that information didn't move the ratings "needle." Nor did mention of my membership in the North Carolina State Bar, the North Carolina Bar Association, and the National Association of Bar Executives. I did, however, get some traction in reference to presentations I made earlier in the year at three district bar meetings. My PowerPoint presentations entitled "The State Bar in a Nutshell" were evidently just what the algorithm ordered, and resulted in a materially

positive change in my rating. I went from a very creditable 6.7 to a well-deserved 7.4. Even more significant was the fact that by moving to a higher integer—7 as opposed to 6—I transcended mere goodness as a lawyer and entered the realm of very goodness, according to the Avvo scale. Although I didn't then press my luck (and risk my rating) by supplying additional information, one wonders what stratospheric ratings might have been achieved had I taken the time to enter into the computer the dozens of other presentations of the "Nutshell" I have made to various audiences over the years.

Although irreverence is a hardy perennial in my editorial garden, I know that it flourishes best alongside thoughtful perspective. That being the case, I freely confess that by stressing the absurdities associated with the claiming of my profile, I have failed to acknowledge the fact that the technology deployed and service provided by Avvo are being used satisfactorily by many lawyers and consumers of legal services. To the extent that such platforms effectively facilitate the provision of legal services of good quality to persons and entities that need them, they ought to be encouraged. As Mark Merritt notes in his current President's Message, "the consuming public wants to be able to use better and more readily available technology to procure legal services," and "the ability to use technology platforms to connect clients who have needs to lawyers who need work is a concept that our profession should embrace." I couldn't agree more.

But the question remains, can it be denied that one of North Carolina's top ten family lawyers with an Avvo rating of 7.4 is somehow less than a real lawyer? Not a chance. The proof is online. ■

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

#### **Endnote**

1. The study is ongoing although a proposed ethics opinion developed by the subcommittee concerning Avvo's offering of "fixed fee legal services from local lawyers" is being published for comment in this issue of the *Journal* as Proposed 2017 Formal Ethics Opinion 6. The proposed opinion is captioned, "Participation in Online Platform for Finding and Employing a Lawyer."

2. The judge is a man with whom I am well-acquainted and always happy to be confused.

# 2017 State of the North Carolina Judiciary

REMARKS BY CHIEF JUSTICE MARK MARTIN

*These remarks are adapted from the State of the Judiciary address that Chief Justice Mark Martin gave at the annual meeting of the North Carolina Bar Association in Asheville, North Carolina, on June 24, 2017.*

**W**hat an honor it is to be here before the North Carolina Bar Association to present the State of the Judiciary address.

Congratulations to President-elect Caryn McNeill and to all of the incoming Bar Association leadership.

I'd like to thank all of the new officers for being willing to take up the mantle of public service. I also want to thank my colleagues—Justice Jackson and Justice Ervin—and all of the current and former judges in this room. Let's give these judges a round of applause. If there was any doubt whether the judges support this association, I hope that the number of judges here today confirms it 110%.

It is my honor and privilege to report to this distinguished group on the state of the judiciary.

As we come together once again, I am pleased to reflect on the many improvements that we've made to our judicial system in recent years. North Carolina is now the ninth most populous state, and the demands on our judiciary are growing each and every day.

Our society is experiencing rapid growth. Our state, our court system, and our judicial officials are working hard to maintain the highest standards of access, fairness, and impartiality. The Judicial Branch has made great progress in its pursuit of justice for all. And now it is positioned to pursue more

reforms that will help our court system meet 21st century demands and expectations. It is both exciting and humbling to represent the Judicial Branch at such a pivotal time in the history of our courts. The state of our judiciary is strong, and, with your help, we can work together to make it even stronger.

But before we move forward, let's look back on what we've accomplished over the past few years. When I became chief justice, the Judicial Branch was in dire financial straits despite the incredible effort of everybody in this room. We had tried, year after year, to operate on a very small percentage of the state budget. But stakeholders throughout the Judicial Branch and the bar came together to support our courts and the fair and impartial administration of justice. Working together, we were successful. The members of this association played a big role in this success.

When I delivered my first State of the Judiciary address in 2015, I promised to promote justice for all. To do this, we convened a multi-disciplinary commission that comprehensively evaluated our justice system. In March, after 15 months of thorough study and deliberation, the Commission on the Administration of Law and Justice released its final report. The report identifies how to improve our modern court system, and how to maintain the public's faith in that system. These evidence-based recommendations will be our roadmap as we continue to pursue justice for all.

The NCBA has been a key partner in this process. In fact, remember that it was with you, at the Bar Center, that we began this project. You were there at the beginning. Now we'll need your help to ensure that the recommendations of the commission are



implemented.

When we reflect on the commission's recommendations, we see, at its core, that justice itself has three basic components:

- First, fairness: respect for due process and procedural protections, as well as a fair and just set of substantive laws;
- Second, access to justice: access to a lawyer, to information about the law and the legal system, and to the courts themselves; and
- Third, uniform treatment: courts should always treat like cases alike, and give equal treatment to all parties that appear before them.

Our judicial system strives to honor all of these values each and every day. When we in the Judicial Branch speak of the fair and impartial administration of justice—when

we speak of the rule of law—we mean adhering to these three values, in order to protect and preserve justice for all. We mean a court system that is open to all, that secures our rights and applies the law equally and fairly, and that treats everyone with equal dignity. A court system that enables the people to conduct their affairs with confidence that their agreements will be honored and without fear of arbitrary or unjust legal sanction. The rule of law, and the concept of justice for all, are what allow our society to be truly free.

I don't know about you, but I do not want the commission's report to gather dust. So we're already moving forward on the recommendations. This report and its recommendations are all about serving the people of our great state. So what do the people need?

They need a website that's accessible and user-friendly, so we're completely redesigning the NC Courts website, and we plan to unveil the new website by next summer.

They need access to the tools of citizenship, so we've launched a civics education initiative and a speakers bureau with volunteers throughout the state.

They need lawyers to represent them even when they can't pay, so we've established a *Pro Bono* Honor Society that recognizes lawyers who, pursuant to Rule 6.1 of the Rules of Professional Responsibility, provide at least 50 hours of *pro bono* service each year. And I just signed almost 200 certificates for the group of lawyers this year that did just that.

They need courts to protect them from domestic violence, so we've created a program that allows domestic violence victims to file protective orders and have court hearings online.

They need to be able to access their trial courts remotely—anytime, anywhere—so we're creating a statewide electronic filing system.

They need clear and consistent rules of practice, so we're creating a working group to simplify and unify local rules statewide.

They need judges who have the research help that they need to decide the cases that come before them, so we've launched a fellowship that will provide research support to our district and superior court judges.

They need specialty courts with judges who have expertise in resolving particular kinds of disputes, and I'm pleased to share that we've just opened our fourth Business

Court at the Wake Forest University School of Law. And we continue to address the needs of our veterans with our Veterans Treatment Courts.

Importantly, the people need to be safe, in terms of both their physical safety as well as their personal-data security. So I'm pleased to announce that I am forming the Courthouse and Cyber Security Task Force. This group will comprehensively review courthouse and cyber security procedures and make recommendations to improve them. Thousands of our residents visit our courthouses every day, and thousands more file documents that contain very personal information. We can't afford to cut any corners or neglect any precautions when it comes to their safety and the security of their data.

Critically, the people also need to be free from the tragic consequences of drug abuse and addiction. The Judicial Branch has joined the fight against drug overdose and opioid addiction, which claimed the lives of almost 1,500 North Carolinians just last year. This epidemic has hit our state hard, and the statistics are staggering. Drug overdose deaths have increased by 350% since 1999. Heroin-related deaths have increased by 884% since 2010. And drug overdoses now cause more deaths than either firearms or motor vehicle accidents, and result in over 20,000 ER visits per year. According to a CBS report, four North Carolina towns—Wilmington, Fayetteville, Hickory, and Jacksonville—are among the nation's top 20 areas that have been hardest hit by the opioid abuse epidemic. Many of you have witnessed the tragic consequences of this epidemic in your local communities. Now, the legal community must do its part to address this crisis.

I recently accepted an invitation to join the Regional Judicial Opioid Initiative, a working group of state court officials that was created to develop solutions to this problem. The Governor's Task Force on Mental Health and Substance Use began the effort to reduce drug abuse and increase treatment opportunities. The opioid initiative's work will help our courts and our state health officials as they build on the work of the task force. And it was my honor to serve alongside other members of the Judicial Branch in this important work. In fact, our state is sending a multi-agency delegation to an opioid policy conference in Indianapolis later this month.

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Our communities have too much at stake to remain passive in the face of this growing threat. Let's do all that we can to protect all North Carolinians from drug overdoses and prescription drug abuse.

Now, in addition to these other essential tasks, the people need us to implement one of the commission's most researched and most essential recommendations—raising the juvenile age from 16-years-old to 18-years-old.

As I stand here today, 44 states and the District of Columbia set the juvenile age at 18; five states set it at 17. That makes North Carolina the only state in the entire country with a juvenile age of 16. And that puts young people from our state at a huge competitive disadvantage compared with young

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people from the rest of the country as they compete in a global marketplace.

While juvenile proceedings are confidential, adult criminal proceedings and their consequences are a matter of public record. And a criminal record can affect eligibility for employment, for military service, and even for college financial aid, among other things.

The good news is, we can avoid these negative consequences while also reducing crime. National data suggests that recidivism rates among 16- and 17-year-olds whose cases are handled by the adult criminal justice system are more than twice as high as for those whose cases are handled in our juvenile courts. So working with our youth within the juvenile justice system will not only serve them, it will also promote public safety.

Both chambers of the General Assembly have made significant progress on this initiative this session and have included the raise-the-age proposal, as well as the necessary funding, in this year's budget bill. I applaud our legislature for its leadership on this issue, and I look forward to implementing this important reform. By investing in our children and ensuring that they graduate from high school and college instead of entering the adult criminal justice system, we'll secure a brighter future for them and a stronger and more robust economy for us all.

Many of you know that this was our top legislative priority for this session. And if I did not pause and recognize Judge Marion Warren and Tom Murry, the head of our legislative team, for all of their amazing work on this issue, I would fail indeed in this talk this morning.

Finally, what the people of our state need the most is a qualified and independent judiciary. So today I'm calling on the General Assembly to let the people of North Carolina decide whether to amend the state constitu-

tion to change how our judges are selected.

Now we know that we have amazing judges. So any merit selection program should grandfather in our current judges.

You know better than I do: there's never a good time to talk about merit selection. Critics will say that you're trying to help one political party or the other. But I've been working on this issue for a long time. It's a good government issue, not a political one. Over 20 years ago, then-Chief Justice Burley Mitchell asked Chief Judge Rusty Sherrill and me to go over to the General Assembly and support Senate Bill 971. It was 1995. We had the North Carolina Judicial Conference then, and Judge Sherrill and I were co-chairs of its legislative liaison committee.

Now, you know—because many of you were right there with us—that we were not successful. But I continue to believe that the judiciary should be as free as possible from the normal political considerations that are a natural part of the Executive and Legislative Branches of government.

Any merit selection proposal should necessarily have three basic components:

- First, a panel should evaluate judicial candidates in an objective and non-ideological way and rate them as Well Qualified, Qualified, or Not Qualified. Both the governor and the General Assembly should be able to appoint members of this critical panel;
- Second, an appropriate governmental authority with accountability to the people of North Carolina should appoint our state's judges; and
- Third, retention elections should be held at periodic intervals to ensure that the people of North Carolina continue to have a role in this process.

Let's step away from ordinary politics and let the people decide whether our judges should be chosen through a merit selection process rather than partisan elections. In sum, let's let the people decide whether the time for merit selection has come.

We celebrate the work of the Commission on the Administration of Law and Justice. And the Judicial Branch has found several other reasons for celebration over the past year. I would like to recognize Chief Judge McGee for her terrific work as chair of the anniversary commemoration committee. I was honored to attend a ceremony commemorating the 50th anniversary of the court of appeals just a few short weeks

ago. This year also marks the 240th anniversary of the superior court. And in 2019 we'll celebrate the 200th anniversary of the Supreme Court of North Carolina. As part of this celebration, the General Assembly has authorized the Supreme Court to leave Raleigh and hold sessions of Court over a three-year period anywhere in North Carolina. Isn't that amazing? Now, there will be one limitation: we'll only be able to go to locations that can actually accommodate seven justices on the bench. Imagine the opportunities here. This will give us an opportunity to both celebrate the rule of law and increase public awareness of how the law works. And recognizing all of these anniversaries will also give us a chance to think about the enduring nature of our courts. The effects of what we do today will live after us for generations to come.

I'd like to take a moment to celebrate Mel Wright. As you may have heard, Mel will be retiring as executive director of the Chief Justice's Commission on Professionalism after 18 years of distinguished service. We've all benefitted from Mel's hard work and from his dedication to the ideals of civility and professionalism. He truly embodies these ideals. So please join me in thanking Mel for his many years of public service.

And I'm pleased to welcome Lisa Sheppard, who will be taking over for Mel after a 30-year career in business and banking law. We're grateful to have Lisa join the Judicial Branch, and I hope that you'll have the chance to meet her as she starts in her role next month.

Make no mistake about it, this is a critical time for the bench, for the bar, and for our society as a whole. We attorneys—the guardians of the rule of law—are facing stark challenges, challenges that are bigger than any of us. How we respond to those challenges will be our collective legacy.

Now is the time for us to come together to enact the commission's recommendations. Now is the time to prepare our courts for the rest of the 21st century. There's no better time than now, and there is truly no one better suited to this task than we are. I hope that each of you will join the effort to ensure that justice for all prevails.

Thank you again for inviting me here today. I'm so thankful to each of you for all that you're doing to uphold our system of justice and the rule of law.

Thank you very much. ■

# The Role of Race in Jury Selection:

## *A Review of North Carolina Appellate Decisions*

BY JAMES E. COLEMAN JR. AND DAVID C. WEISS

Jury service reflects one of the most fundamental principles of American democracy—that our fates should lie in the hands of our fellow citizens. Moreover, “for most citizens the honor and privilege of jury duty is their most significant opportunity to participate in the democratic process.”<sup>1</sup> That is why discrimination in jury selection on grounds of race “causes harm to the litigants, the community, and the individual jurors who are wrongfully



excluded from participation in the judicial process.”<sup>2</sup> Ultimately, race discrimination in the selection of jurors “mars the integrity of the judicial system.”<sup>3</sup>

In 1986, the US Supreme Court held in *Batson v. Kentucky* that it violated the Equal Protection Clause of the Fourteenth Amendment to remove a potential juror because of race.<sup>4</sup> A year later, in *State v. Cofield*, the NC Supreme Court emphasized our state’s commitment to racial fairness in jury selection: “The people of North Carolina have declared...that they will not

tolerate the corruption of their juries by racism...and similar forms of irrational prejudice.”<sup>5</sup> These cases recognize the admirable goal of safeguarding equal treatment of citizens called for jury duty.

A 2016 study published in the *North Carolina Law Review* revealed that, in the three decades since *Batson*, the North Carolina Supreme Court has never found a

single instance of discrimination against a minority juror. See Daniel R. Pollitt & Brittany P. Warren, *Thirty Years of Disappointment: North Carolina’s Remarkable Appellate Batson Record*, 94 NC L. Rev. 1957 (2016).

The North Carolina Court of Appeals has reviewed 42 *Batson* cases since 1986, and found no violation in 39.<sup>6</sup>

In one case, the court of appeals found a constitutional violation because the prosecutor failed to offer any explanation for the strikes of two African-American jurors.<sup>7</sup> No North Carolina appellate court has found a violation involving African-American jurors in which the prosecutor offered a reason for a strike.

The other two court of appeals cases were “reverse Batson” cases, in which the appellate court upheld the trial courts’ finding that African-American defendants discriminated when their attorneys struck white jurors.<sup>8</sup> Thus, in two cases out of 114 where the appellate court heard reasons for the strikes and ruled they were discriminatory, the court found discrimination against white citizens, not against African-Americans, who have historically been excluded from jury service.

Among other southern states, appellate courts in South Carolina have found a dozen *Batson* violations since 1989, and those in Virginia have found six.<sup>9</sup> As of 2010, Alabama had over 80 appellate reversals because of racially-tainted jury selection, Florida had 33, Mississippi and Arkansas had ten each, Louisiana had 12, and Georgia had eight.<sup>10</sup>

The judicial task of enforcing *Batson* admittedly is a difficult and sensitive one. In a recent concurring opinion, Supreme Court of California Justice Goodwin H. Liu described the challenge well, noting that “brazenly unlawful [jury selection] practices are [likely] rare today.” Although the societal wounds caused by racial discrimination in jury selection are no less serious today, the detection of such discrimination has become even more challenging, for “[r]arely does a record contain direct evidence of purposeful discrimination,” and “courts cannot discern a prosecutor’s subjective intent with anything approaching certainty.” Nonetheless, Justice Liu emphasized that courts should rise to meet the challenge “in light of the serious harms” discriminatory exclusion of black jurors causes to litigants, the public, and the public’s confidence in our justice system.<sup>11</sup>

A comprehensive study by Michigan State University College of Law researchers highlighted the scope of the challenge. That study analyzed more than 7,400 peremptory strikes made by North Carolina prosecutors in 173 capital cases tried between 1990 and 2010.<sup>12</sup> The study showed prosecutors struck 53% of eligible African-American jurors and only 26% of all other eligible jurors.<sup>13</sup> The

researchers found that the probability of this disparity occurring in a race-neutral jury selection was less than one in ten trillion.<sup>14</sup> After adjusting for non-racial factors that might reasonably affect strike decisions—for example, reluctance to impose the death penalty—researchers found prosecutors struck black jurors at 2.5 times the rate they struck all other jurors.<sup>15</sup> Indeed, another report found that, in a state where people of color make up more than a third of the population, one fifth of North Carolina’s 150 death row prisoners were sentenced to death by all-white juries.<sup>16</sup>

Similar racial disparities have been found in non-capital cases. A recent study conducted by Wake Forest University School of Law professors released preliminary findings that in all non-capital felony trials in North Carolina from 2011 to 2012—which included data on 29,000 potential jurors—prosecutors struck non-white potential jurors at a disproportionate rate. In these cases, prosecutors struck 16% of non-white potential jurors, while they struck only eight percent of white potential jurors. Put another way, this study of 29,000 jurors found that prosecutors exclude black and other non-white jurors at twice the rate that they exclude white jurors. The study also found that in several large North Carolina cities, prosecutors exclude minority jurors nearly three times as often as white jurors.<sup>17</sup>

Likewise, a study of Durham County conducted in 1999 found the same patterns. Approximately 70% of African-Americans were dismissed by the state, while less than 20% of whites were struck by the prosecution.<sup>18</sup> As the federal courts’ *Reference Guide on Statistics* recognizes, when multiple studies document the same effect, “[c]onvergent results support the validity of generalizations.”<sup>19</sup>

Evidence of race discrimination in jury selection in North Carolina is not limited to statistics. In a 2002 capital case from Cumberland County, the prosecutor met with law enforcement officers and took notes about the jury pool. His notes described African-American prospective jurors in racial terms such as “blk. wino” or being from a “respectable blk family.” Another juror had the words “blk./high drug area” written next to her name.<sup>20</sup>

In a 1997 Martin County case, a prosecutor wrote that a potential white juror was “good” because she would “bring her own

rope.” Yet another white juror was marked with a “No” because, according to the prosecutor’s notes, she had a child by a “BM,” or black male.<sup>21</sup>

In a 1994 Davie County case, a prosecutor in a capital murder trial stood accused of striking a black potential juror because of her race. Asked to explain his reasons for the peremptory strike, the prosecutor told the judge, “The victim is a black female. That juror is a black female. I left one black person on the jury already.” The trial judge accepted this reasoning and overruled the *Batson* objection.<sup>22</sup>

At a 1994 seminar called Top Gun, prosecutors were given a list of race-neutral reasons to cite when *Batson* challenges were raised. This list titled “*Batson Justifications*,” included “attitude,” “body language,” and a “lack of eye contact with Prosecutor”—the types of justifications prosecutors routinely give for striking black jurors in North Carolina. In an amicus brief submitted to the US Supreme Court, a group of prominent former prosecutors described this as “district attorney offices train[ing] their prosecutors to deceive judges as to their true motivations.”<sup>23</sup> One state appellate court went so far as to call the *Batson* process a “charade” when these types of “pat race-neutral reasons” are used.<sup>24</sup>

The current *Batson* framework involves a three-step analysis. The first step requires the defendant to state a *prima facie* case of discrimination. The prosecution is then required to state a non-racial reason for the strike. At the third step, the court must determine, under all the circumstances, whether purposeful discrimination occurred. The ultimate burden of persuasion is on the objecting party.<sup>25</sup>

Many *Batson* challenges in North Carolina fail at the first step. The most common evidence used to establish a *prima facie* case is a numerical pattern of eliminating minority jurors. However, North Carolina courts routinely decline to find a *prima facie* case, even when prosecutors strike 50% or more of the qualified jurors of color. For example, in two cases the NC Supreme Court failed to find a *prima facie* case even when prosecutors struck 100% of the minority jurors.<sup>26</sup> In several other instances, the Court refused to find a *prima facie* case where 70% were struck.<sup>27</sup>

The state supreme court often uses a pattern of minority strikes as evidence that

peremptory challenges are not racially motivated. The NC Supreme Court has previously cited cases where prosecutors accepted 40 to 50%—and thus excluded 50 to 60%—of the eligible African-American jurors as “tending to refute an allegation of discrimination.”<sup>28</sup>

While holding defendants to an exceptionally high burden in proving a *prima facie* case, the courts have given a strong benefit of the doubt to prosecutors who come forward with purportedly race-neutral reasons for the challenged strike. The courts’ standard practice is to examine all of the reasons offered by the prosecution, and if at least one is race-neutral, the *Batson* challenge is overruled. For example, in a 1998 capital trial, the prosecutor struck an African-American man whom he claimed had a “rather militant animus,” gave “short” and “sharp answers,” and was not sufficiently “deferential” to the court. The prosecutor also expressed concern about the prospective juror’s reaction to overhearing comments by a “male and female white juror.” The trial judge rejected these reasons, finding first that the African-American man’s responses were “appropriate” and displayed “clarity and thoughtfulness.” Second, the trial judge stated that the overheard conversation was not an appropriate basis for exercising a peremptory strike. Despite refusing to find these reasons valid, let alone race-neutral, the trial judge overruled the *Batson* objection for other reasons the prosecutor proffered, namely the prospective juror’s prior DUI conviction and the criminal record of his father. On appeal, the NC Supreme Court acknowledged that the prosecutor passed one white juror with a DUI conviction and another who had been convicted of breaking and entering. Nonetheless, on a record with several clearly discredited reasons, the court declined to find a *Batson* violation.<sup>29</sup>

Along the same lines, the NC Supreme Court has declined to demand reasonable reasons for striking minority jurors. In one case, the Court dismissed a *Batson* argument in which the prosecutor claimed to have struck a black woman because she was “physically attractive.”<sup>30</sup> Indeed, the Court has admitted it would approve “implausible or even fantastic” reasons.<sup>31</sup>

In many cases, our appellate courts have offered their own race-neutral reason for the strike of an African-American juror, even when the prosecutor did not articulate it at

trial. In at least 17 of its 32 cases finding no *prima facie* case, the NC Supreme Court relied on a reason that was not advanced by the prosecutor at trial. In eight of its 14 cases finding no *prima facie* case, the NC Court of Appeals did the same. The US Supreme Court has condemned this practice, explaining that “[a] *Batson* challenge does not call for a mere exercise in thinking up any rational basis. If the stated reason does not hold up, its pretextual significance does not fade because a trial judge, or an appeals court, can imagine a reason that might not have been shown up as false.”<sup>32</sup>

In practice, North Carolina courts have also declined to consider the most important evidence that could establish a *Batson* violation: the treatment of similarly-situated white jurors. The courts’ practice has been to reject *Batson* claims even when the state struck African-American jurors while accepting white jurors sharing the same objectionable trait.<sup>33</sup>

The cases in which our courts have not found *Batson* violations include: *State v. Jackson*, where the prosecution explained that it struck two African-Americans because they were unemployed, but two unemployed whites were allowed to sit on the jury;<sup>34</sup> *State v. Lyons*, in which an African-American was struck because she was a nurse, while three white nurses were selected for the jury;<sup>35</sup> and *State v. Rouse*, where an African-American was struck for voicing moral reservations about imposing the death penalty in some cases, while three white jurors who said they would consider the death penalty only in select cases were seated.<sup>36</sup>

In such cases, our courts have indicated they will consider disparate treatment only if the black and white prospective jurors are identical in all respects. In a 2005 case, the US Supreme Court explained why this approach is wrong: “A *per se* rule that a defendant cannot win a *Batson* claim unless there is an identical white juror would leave *Batson* inoperable; potential jurors are not products of a set of cookie cutters.”<sup>37</sup>

Finally, North Carolina’s higher courts have consistently accepted prosecutors’ subjective characterizations of African-American jurors’ supposedly undesirable demeanor as justifications under *Batson*. Even when the trial judge made no findings concerning demeanor, the courts have left unchallenged prosecutors’ claims that jurors were struck because they “sat with [their] arms crossed,”

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had an “air of defiance,” were “nervous” or “head-strong,” did not have “good sense of herself,” or had “some reluctance” in their answers.<sup>38</sup> These reasons—evoking those recommended in the Top Gun training handout—are largely unreviewable because a prospective juror’s demeanor is not apparent on the record.

The present state of *Batson* in North Carolina is not sustainable. Courts have affirmed again and again that juries that reflect the entire population are the foundation of a criminal justice system built on the promise that every citizen has a right to be judged by a jury of peers. As Chief Justice Mark Martin acknowledged in his 2015 address to the general assembly, “[F]or the judicial branch, ensuring ‘justice for all’ is the most important thing that we do.”<sup>39</sup>

This current state of affairs also matters for a very practical reason. A monochrome jury loses key insights and perspectives. Research shows that juries with two or more members of color deliberate longer, discuss a wider range of evidence, and are more accurate in their statements about cases—regardless of the race of the defendant.<sup>40</sup> In one study, researchers from Duke University analyzed over 700 trials over a ten-year period, and found that where juries had one or more black jurors, black and white defendants had relatively equal conviction rates. But, the Duke researchers found all-white juries convicted black defendants 81% of the time and white defendants only 66% of the time.<sup>41</sup>

When the US Supreme Court finally acknowledged in *Batson* that it had failed to enforce the Constitution’s promise in *Swain v. Alabama*—which was *Batson*’s predecessor—it shifted course. The Court created the *Batson* framework in the first place because the earlier legal standard for proving racially-motivated jury selection “placed on defendants a crippling burden of proof [that left]

prosecutors' peremptory challenges...largely immune from constitutional scrutiny."<sup>42</sup>

In recent years, the US Supreme Court has repeatedly refined *Batson* to make it more effective. In 2002, 2005, and 2008 the Court issued a series of opinions making clear that appellate courts are required to conduct a comparative analysis of jurors, the very same analysis that North Carolina courts previously rejected.<sup>43</sup> Most recently, in *Foster v. Chatman*, the US Supreme Court reinforced the need for careful scrutiny of prosecutors' decisions to exclude people of color from jury service.<sup>44</sup> *Foster* specifically addressed a number of aspects of North Carolina's *Batson* jurisprudence. *Foster* examined the strikes of two African-Americans and found both of them to violate *Batson*. With regard to the first juror, the Court debunked three of 11 of the prosecutor's reasons. With regard to the second juror, the prosecutor offered eight reasons for the strike and the Court rejected five of them. The US Supreme Court's approach here calls into question our courts' practice of sustaining a strike if even one reason remains standing.<sup>45</sup> In addition, the US Supreme Court in *Foster* rejected "implausible" and "fantastic" reasons as "pretextual."<sup>46</sup>

When grappling with the proper application of *Batson*, our appellate courts should also ask how they might address limitations in the current *Batson* framework. Appellate courts in other states have begun to address this very question.

In 2013, the Supreme Court of Washington acknowledged the difficulty of applying *Batson* because "racism itself has changed," yet "implicit biases...endure despite our best efforts to eliminate them. Racism now lives not in the open, but beneath the surface..."<sup>47</sup> The Washington court concluded it must "strengthen [its] *Batson* protections" and observed it had the ability to do so because "[t]he *Batson* framework anticipates that state procedures will vary, explicitly granting states flexibility to fulfill the promise of equal protection."<sup>48</sup> In a July 2017 decision, the Supreme Court of Washington returned to this subject, noting its ongoing concern that the court's "*Batson* protections are not robust enough to effectively combat racial discrimination during jury selection."<sup>49</sup> The Washington court exercised its "broad discretion to alter the *Batson* framework" by adopting a rule that

"the trial court must recognize a *prima facie* case of discriminatory purpose when the sole member of a racially cognizable group has been struck from the jury."<sup>50</sup>

In his recent concurring opinion, Justice Liu of the California Supreme Court described an approach to *Batson*, grounded in US Supreme Court precedent, which seeks to provide meaningful oversight while also eschewing demonization of prosecutors, who typically discharge their duties in good faith. Justice Liu wrote that *Batson* is only a "probabilistic standard" which "is not designed to elicit a definitive finding of deceit or racism," but rather "defines a level of risk that courts cannot tolerate." Justice Liu emphasized that "the finding of a violation should [not] brand the prosecutor a liar or a bigot. Such loaded terms obscure the systemic values that the constitutional prohibition on racial discrimination in jury selection is designed to serve."<sup>51</sup>

In a June 2017 decision, the Supreme Court of Iowa joined the chorus of state appellate courts addressing the ongoing influence of racial bias in the courtroom. The Iowa court observed "there is general agreement that courts should address the problem of implicit bias in the courtroom." The court "strongly encourage[d] district courts to be proactive about addressing implicit bias," and approved an antidiscrimination jury instruction.<sup>52</sup> The Iowa court also changed its method for determining whether the racial composition of the jury pool violated the right to a jury drawn from a fair cross-section of the community. The court explained that its prior approach was "[a] test without teeth [that] leaves the right to an impartial jury for some minority populations without protection."<sup>53</sup> Although this decision does not address *Batson*, it illustrates the critical role state appellate courts can play in combating both explicit and implicit racial bias in criminal prosecutions.

In future cases, the North Carolina appellate courts should not hesitate to reexamine their own jurisprudence in light of these developments, and to reverse criminal convictions based on *Batson* violations. By redeeming *Batson's* promise, appellate courts can declare to all of our citizens that the historic exclusion of African-Americans from juries is truly receding into history. It is the only way the courts can afford minority defendants juries of their peers. And it is the only way appellate courts can make clear

that the consideration of race in jury selection will no longer be tolerated. ■

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## Endnotes

1. *Powers v. Ohio*, 499 US 400, 407 (1991).
2. *J.E.B. v. Alabama ex rel.*, 511 US 127, 140 (1994).
3. *Edmondson v. Leesville Concrete Company*, 500 US 614, 628 (1991).
4. 476 US 79 (1986).
5. 320 NC 297, 302 (1987).
6. *Pollett & Warren*, 94 NC L. Rev. at 1961-62.
7. *Id.* at 1962; *State v. Wright*, 189 NC App. 346, 353-54 (2008).
8. *Id.* at 1962-63; *State v. Hurd*, 784 S.E.2d 528 (2016); *State v. Cofield*, 129 NC App. 268 (1998).
9. See, e.g., *State v. Marble*, 311 SC 23 (1992); *Hopkins v. Commonwealth*, 53 VA App. 394 (2009).
10. See, *Equal Justice Initiative Report, Illegal Racial Discrimination in Jury Selection: A Continuing Legacy*, p. 19, found at [bit.ly/2w3963v](http://bit.ly/2w3963v) (hereafter cited as "EJI Report"). The EJI Report only counted *Batson* reversals in criminal cases. Tennessee has granted *Batson* relief only in civil cases. See, e.g., *Zakour v. UT Medical Group, Inc.*, 215 S.W.3d 763 (Tenn. 2007).
11. *People v. Gutierrez*, 2 Cal. 5th 1150, 1182-83 (2017) (Goodwin, J., concurring).
12. See Catherine M. Grosso & Barbara O'Brien, *A Stubborn Legacy: The Overwhelming Importance of Race in Jury Selection in 173 Post-Batson North Carolina Capital Trials*, 97 Iowa L. Rev. 1531 (2012). The MSU study was conducted in connection with the NC Racial Justice Act, which was enacted in 2009, amended in 2012, and repealed in 2013. S.L. 2009-464; NC Gen. Stat. §§ 15A-2010 to 2012 (modified by S.L. 2012-136, §§ 3 and 4; and repealed by S.L. 2013-154, § 5.(a)).
13. Grosso & O'Brien, 97 Iowa L. Rev. at 1549.
14. *Id.*
15. *Id.* at 1556.
16. Seth Kotch and Robert P. Mosteller, *The Racial Justice Act and the Long Struggle with Race and the Death Penalty in North Carolina*, 88 NC L. Rev. 2031, 2110-11, n. 356 (2010).
17. Ronald F. Wright, Kami Chavis, and Gregory Parks, *The Jury Sunshine Project: Jury Selection Data as a Political Issue* (2017), available on SSRN at



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- bit.ly/2uFF0nf at pp. 2, 21, 23-24, 26; Kami Chavis, *The Supreme Court Didn't Fix Racist Jury Selection: Timothy Foster Got Justice, But Prosecutors Still Have Wide Leeway to Exclude Black Jurors*, The Nation (May 31, 2016), bit.ly/2v0tJjY.
18. Mary R. Rose, *The Peremptory Challenge Accused of Race or Gender Discrimination? Some Data from One County*, 23 Law & Hum. Behav. 695, 698-99 (1999).
19. Kaye, David H., and Freedman, David A., Reference Guide on Statistics (June 9, 2011). Reference Manual on Scientific Evidence, 3d ed. 2011, p. 223, Washington DC: National Academy Press.
20. *State v. Golphin, Walters, and Augustine*, Nos. 97 CRS 47314-15, 98 CRS 34832, 35044, 01 CRS 65079, pp. 51-52 (Cumberland County Superior Court, Dec. 13, 2012) (found under "More resources" at bit.ly/2v0NMP2).
21. These notes are on file with the authors.
22. This Batson issue was not raised on direct appeal. See *State v. Gregory*, 342 NC 580 (1996). The transcript of the Batson colloquy is on file with the authors.
23. Brief of Amici Curiae of Joseph diGenova, et al., found at bit.ly/2wJ4Ffo, p. 8; *Foster v. Chatman*, 136 S.Ct. 1737 (2016).
24. *People v. Randall*, 283 Ill. App. 3d 1019, 1025 (1996).
25. *Miller-El v. Cockrell*, 537 US 322, 328-29 (2003) (summarizing Batson framework).
26. *State v. Chapman*, 359 NC 328, 341 (2005) (three of three jurors); *State v. Williams*, 343 NC 345, 359-60 (1996) (two of two jurors).
27. *State v. Beach*, 333 NC 733, 740 (1993) (nine of 13 jurors; 70%); *State v. Davis*, 325 NC 607, 618-19 (1989) (eight of 11 jurors; 72%); *State v. Robbins*, 319 NC 465, 491-92 (1987) (seven of nine jurors; 78%).
28. See, e.g., *State v. Taylor*, 362 NC 514, 529 (2008); *State v. Smith*, 328 NC 99, 121 (1991).
29. *State v. Golphin*, 352 NC 364, 429-33 (2000).
30. *State v. Barnes & Chambers*, 345 NC 184, 210-11 (1997).
31. *State v. Best*, 342 NC 502, 511 (1996).
32. *Miller-El v. Dretke*, 545 US 231, 252 (2005).
33. See, e.g., *State v. Williams*, 339 NC 1, 18 (1994) (holding "[d]isparate treatment of prospective jurors is not necessarily dispositive on the issue of discriminatory intent...Because the ultimate decision to accept or reject a given juror depends on consideration of many relevant characteristics, one or two characteristics between jurors will rarely be directly comparable."); see also Amanda S. Hitchcock, "*Deference Does Not By Definition Preclude Relief": The Impact of Miller-El v. Dretke on Batson Review in North Carolina Capital Appeals*", 84 NC L. Rev. 1328, 1344-56 (2006) (explaining how the NC Supreme Court historically declined to conduct the comparative juror analysis outlined in *Miller-El*).
34. 322 NC 251, 256-57 (1988).
35. 343 NC 1, 13-14 (1996).
36. 339 NC 59, 80 (1994).
37. *Miller-El*, 545 US at 247, n. 6.
38. *State v. White*, 349 NC 535, 549 (1998) ("sat with [their] arms crossed"); *State v. Bonnett*, 348 NC 417, 435 (1998) ("air of defiance"); *State v. Smith*, 328 NC 99, 125-26 (1991) ("nervousness"); *State v. Floyd*, 115 NC App. 412, 415 (1994) ("head-strong"); *State v. Waring*, 364 NC 443, 478 (2010) (does not have "good sense of herself"); *State v. Larrimore*, 340 NC 119, 134 (1995) ("some reluctance" in juror's answers).
39. Found at bit.ly/2w3iq7z.
40. See Brief of Scholars on Jury Deliberations as *Amici Curiae* In Support of Defendant Guy Tobias LeGrande at 13, found under "More resources" at bit.ly/2v0NMP2.
41. *Iowa v. Plain*, No. 16-0061, 2017 WL 2822482, at \*16 (Iowa June 30, 2017) (citing Shamena Anwar, et al., *The Impact of Jury Race in Criminal Trials*, 127 Q.J. Econ. 1017, 1027-28, 1032 (2012)).
42. *Batson*, 476 US at 92-93.
43. See *Miller-El v. Cockrell*, 534 US 1122 (2002); *Miller-El*, 545 US at 231; *Snyder v. Louisiana*, 552 US 472 (2008).
44. 136 S.Ct. 1737 (2016).
45. *Id.* at 1748-54.
46. *Id.* at 1752.
47. *State v. Saintalle*, 178 Wash.2d 34, 46 (2013).
48. *Id.* at 51.
49. *City of Seattle v. Erickson*, No. 93408-8, 2017 WL 2876250, at \*1 (Wash. July 6, 2017).
50. *Id.* at \*6.
51. *Gutierrez*, 2 Cal 5th at 1182-83.
52. *Iowa v. Plain*, No. 16-0061, 2017 WL 2822482, at \*7-8 (Iowa June 30, 2017).
53. *Id.* at 16.

# Books of Significance—*Simple Justice*

BY JON BUCHAN

*This article is the first in what we hope will be an ongoing series written by North Carolina attorneys. As such, we asked Jon Buchan to talk about one book that has had an impact.*

**D**uring the summer of 1976, after my first year in law school, I lived in Durham, working part-time as a reporter for *The Raleigh Times*, and part-time for Durham's Legal Services office. The city's sauna heat and cinnamon sweet smell of cured tobacco reminded me much of my growing up years in Mullins, South Carolina.

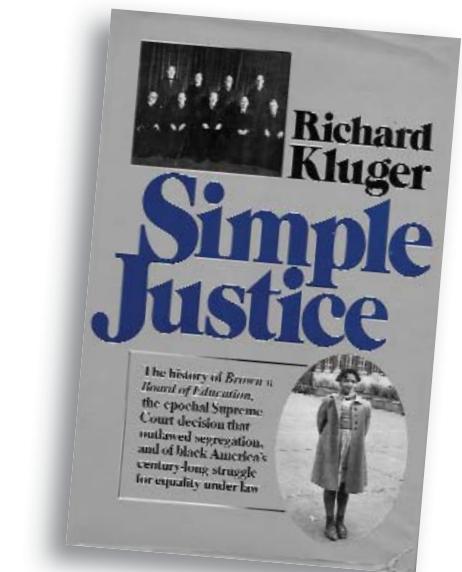
Fresh from Professor William Van Alstyne's constitutional law class, I dug into Richard Kluger's just-published *Simple Justice*, curious to learn more about the Supreme Court's 1954 tradition-shattering decision in *Brown v. Board of Education*. That brief, ten-page edict reversed the half-century "separate but equal" reign of *Plessy v. Ferguson* and mandated the desegregation of the nation's public schools—albeit at what turned out to be the glacial pace of "all deliberate speed."

Kluger modestly subtitled his book "The History of *Brown v. Board of Education* and Black America's Struggle for Equality." But his beautifully-written, intelligent, analytical, granular—almost loving—account of the decades of shrewd legal strategy and persistent personal courage that led up to that monumental victory is so much more than that. *Simple Justice* brings to life the human dimen-

sions of many of the key players who, at great personal risk, devoted their lives to that almost unattainable goal.

Forty years later, I can say that it's one of the best books I've ever read, helping me understand and appreciate the long, arduous legal efforts required to pry away the stubborn tentacles of state-mandated Jim Crow laws and segregated schools. It also taught me how determined, passionate lawyers can use and expand existing law, find and present critical facts, and pursue constitutional remedies in court that could eventually force necessary legal change that the democratic process has refused to make.

*Simple Justice* provides wonderful insight into the real lives and the high human stakes that led up to the Supreme Court's politically explosive opinion by a unanimous Court, carefully knitted together by the newly



appointed Chief Justice Earl Warren, a man with no judicial experience, but decades of political savvy.

The book focused me on the critical role a courageous group of black men and women had played in *Brown v. Board*. All were from Clarendon County, South Carolina, where seven in ten citizens were black. Determined to stand up for their school children, they first asked in 1948 for just a school bus or two—like those the white children had—to help them get to their all-black schools. That demand fell on the deaf white ears of the local school board. In 1949, led by local pastor J.A. DeLaine, and assisted by NAACP lawyer Thurgood Marshall, they filed a federal lawsuit—*Briggs v. Elliott*—seeking equal schools for their children.

Kluger describes how the white community struck back at those who joined as plain-

tiffs, firing them from their jobs as gas station attendants, maids, and teachers, and refusing to gin their sharecropped cotton. Eventually, DeLaine's house and his church were burned. He was shot at in the night, and he later fled across the state line to North Carolina, charged with a felony for firing back.

But *Briggs* worked its way through the federal courts and was eventually consolidated with cases from Kansas, Virginia, Delaware, and the District of Columbia for hearing and decision by the United States Supreme Court in what we now know as *Brown v. Board of Education*.

*Simple Justice* sets the stage for this epic legal battle with a brief but gripping account of the “original sin” of slavery and the post-Reconstruction racial backlash that ultimately led to the United States Supreme Court’s decision in *Plessy v. Ferguson*. In that case, the Supreme Court in 1896 held that state-mandated segregation of Louisiana railroad passenger cars did not violate the equal protection clause of the Fourteenth Amendment. As the Court remarkably said, “in the nature of things, [the Fourteenth Amendment] could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either.”

And for the next 58 years of Jim Crow rule, the legal myth of “separate but equal”—based “in the nature of things”—was the law of this land.

With a fine touch for significant detail, Kluger brings us onto the battlefields of this slow march for legal equality for blacks. He recounts the early fights, jurisdiction by jurisdiction, institution by institution, to expose to judges the myths that poorly funded state-run black law schools and black pharmacy schools were “equal” to their white counterparts, and that all-white political primaries afforded blacks an “equal” participation in the political process. He tells much of the story through rich mini-biographies of the larger than life individuals who planned, fought in, or judged these civil rights battles, such as:

- Charles Houston, who in 1929 became dean of the Howard University Law School—then described by Justice Louis Brandeis as a “fifth-rate” law school—and who “injected enormous momentum into a social movement that has not yet ended.” Houston cleaned house at the law school and

attracted top-flight black legal scholars such as William Hastie, a graduate of Amherst and Harvard Law School, to the faculty. Houston taught, with a tough style, eventual civil rights giants such as Oliver Hill and Thurgood Marshall. And he litigated many of the early key civil rights cases of the 1930s.

- Thurgood Marshall, a 1933 Howard Law School graduate who led the NAACP’s decades of landmark civil rights litigation. Marshall worked with Houston in a key case establishing in 1936 that there was no “separate but equal” state law school for blacks in Maryland, and persuading the Maryland courts to order the desegregation of the existing all-white school. As the lead lawyer in the *Brown v. Board* desegregation cases, Marshall made the strategic decision to move beyond arguing the “inequality” of the black schools and institutions, to making the bold and novel argument that “separate” could not, as a matter of law, be “equal.” Kluger captures well the eventual Supreme Court justice’s passion, wit, legal savvy, and physical courage, describing him as a “blend of militant radical-idealist and wily pragmatist.”

- Judge John J. Parker, a prominent North Carolina Republican (then as rare as “white elephants” in North Carolina, Kruger writes) who was appointed to the Fourth Circuit Court of Appeals in 1925 at the age of 40. Nominated in 1930 by President Herbert Hoover for a seat on the United States Supreme Court, he was opposed by the NAACP and organized labor—many thought unfairly—and his nomination was defeated in the Senate. Parker was highly respected by his legal peers, and was one of the three federal judges who served as the “trial judges” in *Briggs v. Elliott*. He felt bound by *Plessy* and voted with longtime seg-

regationist Judge George Bell Timmerman against the black plaintiffs in *Briggs*.

- Judge Waties Waring, a Charleston, South Carolina, patrician whose political awareness around racial issues, as reflected in his court rulings, grew after he was appointed a federal district judge. As one of the three trial judges in *Briggs*, he forcefully dissented. Waring bravely wrote that “segregation in education can never produce equality,” adding that segregation is an “evil that must be eradicated.” Attacks on Waring were so vicious that he was given 24-hour security. Rocks were thrown through his Charleston windows, and crosses were burned in his yard. He was ostracized in his hometown and later left the bench and moved to New York. (In 2014 a statue of Waring was erected on the grounds of the Charleston federal courthouse, honoring his courageous stands on racial issues.)

Kluger’s *Simple Justice* chronicles for us the lives of those individuals who had the vision and courage to stand on the right side of these civil rights issues, often in the face of hateful, threatening opposition. He also writes of many of the smart, gifted people who were comfortable apologists for racial segregation and die-hard advocates for the sad and dated doctrine of “separate but equal.” His account reminds us of the need to engage—as lawyers and citizens—in the important issues of our own times, to question tradition, and to challenge ourselves and others, every day, to try our best to stand on the right side of history. ■

*Jon Buchan is a civil litigator and mediator with EssexRichards in Charlotte. He is the author of Code of the Forest, a legal-political mystery set on the South Carolina coast.*

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# The Dispute Resolution Commission and the Evolving Face of Mediation in NC

BY GARY S. CASH

Just over 30 years ago, NC Supreme Court Chief Justice James G. Exum Jr. delivered an address that gave historic impetus to a reformation of the way in which we resolved legal disputes in our state. His “The Lawyer as Peacemaker” speech included a call to action: “The time has come for lawyers to begin to emphasize their



role as mediators, conciliators, and peacemakers... Lawyers must begin to take advantage of alternatives to litigation for dispute resolution..."

Exum's remarks contributed to a national tidal wave of legal change which followed the tumultuous social upheaval of the 1960s and 1970s when American society was becoming increasingly litigious and the burdens placed on our legal system were becoming increasingly overwhelming.

The time had come, many jurists said, for finding more efficient and less costly ways to address and settle conflict. Reformers suggested that fostering cooperation and consensus building between the parties to a dispute could empower them to settle their differences without litigation.

Since Chief Justice Exum's address, the

lawyers of this state have embraced the concept of alternatives to litigation, with a particular focus on mediation as the preferred alternative process. In 1983 the NC Bar Association formed its Alternatives to Litigation Task Force, a body which ultimately became the NCBA Dispute Resolution Committee. By the early 1990s, the work of that committee—which involved lawyers, judges, business leaders, AOC personnel, and many others—had led to the passage of legislation which created the Statewide Court-Ordered Arbitration Program, the NC Child Custody Mediation and Visitation Program, and the Mediated Settlement Conference

Program in civil superior court (MSC) pilot. The statutory foundations for the alternative dispute resolution movement in our state courts had thus been laid. In 1995 the NC Dispute Resolution Commission (DRC) was established by the NC General Assembly and given the primary charge of certifying and regulating our courts' mediators and their trainers.

## The DRC's 20th Year

In late 2015 the DRC celebrated its 20th anniversary, marking a significant milestone in its history. This event has inevitably led those of us at the commission to reflect upon the



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successful evolution of our dispute resolution processes and programs in our state's courts, as well as to critically evaluate the present and to consider the future. Are the DRC and the programs which it supports currently meeting their statutory mandates and beneficially serving our citizens, courts, and legal and mediator communities? What should be the commission's goals as we go forward?

## **Developments and Challenges along the Way**

The DRC was initially created as a nine-member body with its membership including judges, attorneys, mediators, and interested members of the public drawn from across the state. The DRC's first chair was NC Court of Appeals Judge Ralph A. Walker, and its first Annual Report was issued on August 15, 1996. Judge Walker remained at the helm for seven years, ensuring stability and consistency during the DRC's early, formative years. By the end of FY 1995/96 and the DRC's first year of operations, the MSC Program had been expanded to all NC Superior Court Judicial Districts. The program's rapid expansion was fueled in part by its party-pay component which eliminated the need for expenditure of tax dollars. The number of certified mediators grew rapidly as well that year and reached 525 as attorneys and others realized that the new program was here to stay and likely well on its way to becoming an integral part of our civil courts.

Over the last two decades, the number of certifications issued in all programs by the DRC has increased to almost 2,000, and the DRC has grown to 16 members. The commission has convened that membership, numerous ex-officio members, its DRC staff, representatives of the NCBA Dispute Resolution Section, legislators, court officials, and many others, all of whom have worked with great determination to support the growth and development of dispute resolution processes and programs in our courts. Additionally, it has aided a number of other branches of state government in their efforts to provide mediation to their constituencies.

## **Noteworthy Highlights of the DRC's Activities**

Taking seriously its charge to regulate mediators and to protect the public, one of the new DRC's first orders of business was to promulgate ethical Standards of Professional Conduct for Mediators, which were adopted

in 1996 by the NC Supreme Court.

In 1995 the Farm Mediation Program was established by statute to address agricultural disputes, especially disputes involving hog farms and the difficult issue of hog waste. The Farm Program statute served as a template for other mediation programs established thereafter by the General Assembly to address specific types of disputes, i.e., the Y2K Mediation Program (1999) and the Electric Supplier Territorial Dispute Mediation Program (2006).

In 1998 the DRC adopted its Advisory Opinion Policy to address rule interpretation questions and ethical dilemmas faced by certified mediators. Thirty-one opinions have been issued to date.

In 1997 the General Assembly established a pilot program for the pretrial mediated settlement of equitable distribution, alimony, and support disputes (FFS Program). The DRC helped design this new program and the DRC's proposed Rules were adopted by the Supreme Court on December 30, 1998. Legislation was enacted to provide for statewide expansion of this program in July 2001.

Since its creation, the DRC has received and investigated a number of formal complaints against certified mediators. The DRC has historically made a concerted effort to be a proactive regulator, seeking to educate mediators and encourage ethical conduct rather than resorting to discipline as a first line of defense. That said, when necessary it has imposed appropriate sanctions.

Since FY 2002/03 the DRC has recommended that certified mediators voluntarily complete annually at least three hours of continuing mediator education (CME). Mediators must report on CME taken on their annual certification renewal applications.

In FY 2002/03 the DRC and the NCBA's Dispute Resolution Section jointly published a resource book entitled *Alternative Dispute Resolution in North Carolina: A New Civil Procedure* (the "Green Book"). It was widely distributed across the state and even well beyond our borders. It was revised and reprinted in 2012.

In FY 2003/04 the DRC convened an ad hoc committee to consider the establishment of a Clerk Mediation Program. Upon the recommendation of the DRC and the NCBA Dispute Resolution Section, the Legislature created the new Clerk Program in 2005, and the DRC proposed program rules

which were adopted thereafter by the NC Supreme Court.

In FY 2005/06, at the request of three community mediation centers, the DRC established a new ad hoc committee to establish criteria whereby district criminal court mediators at those centers could become certified and regulated by the DRC. This effort culminated in the statutory creation in 2007 of the District Criminal Court Mediation Program. Currently, six dispute settlement centers participate in this Supreme Court sanctioned program.

For many years the DRC has distributed statistics regarding the operation of the state's court mediation programs annually to the courts, the Legislature, and others. In FY 2014/15, of 4,194 cases mediated in the MSC Program, 2,395 cases (57%) were resolved at mediation. If one considers cases that were reported as settled prior to mediation or during a recess, the percentage increases to over 65%. Similarly, in the FFS program, the percentages of cases mediated which settled were 70% and 71%, respectively. These results strongly suggest that our mediated settlement conference programs are fulfilling the statutorily stated goals of making civil litigation more economical, efficient, and satisfactory to the parties, their representatives, and the state.

## **The Landscape Today**

While these highlights are by no means the complete story, they illustrate the evolution of the dispute resolution landscape since the MSC Pilot Program in 1991. They also reflect the variety and complexity of issues that the DRC has tackled and the innovation undertaken during its 20 year history.

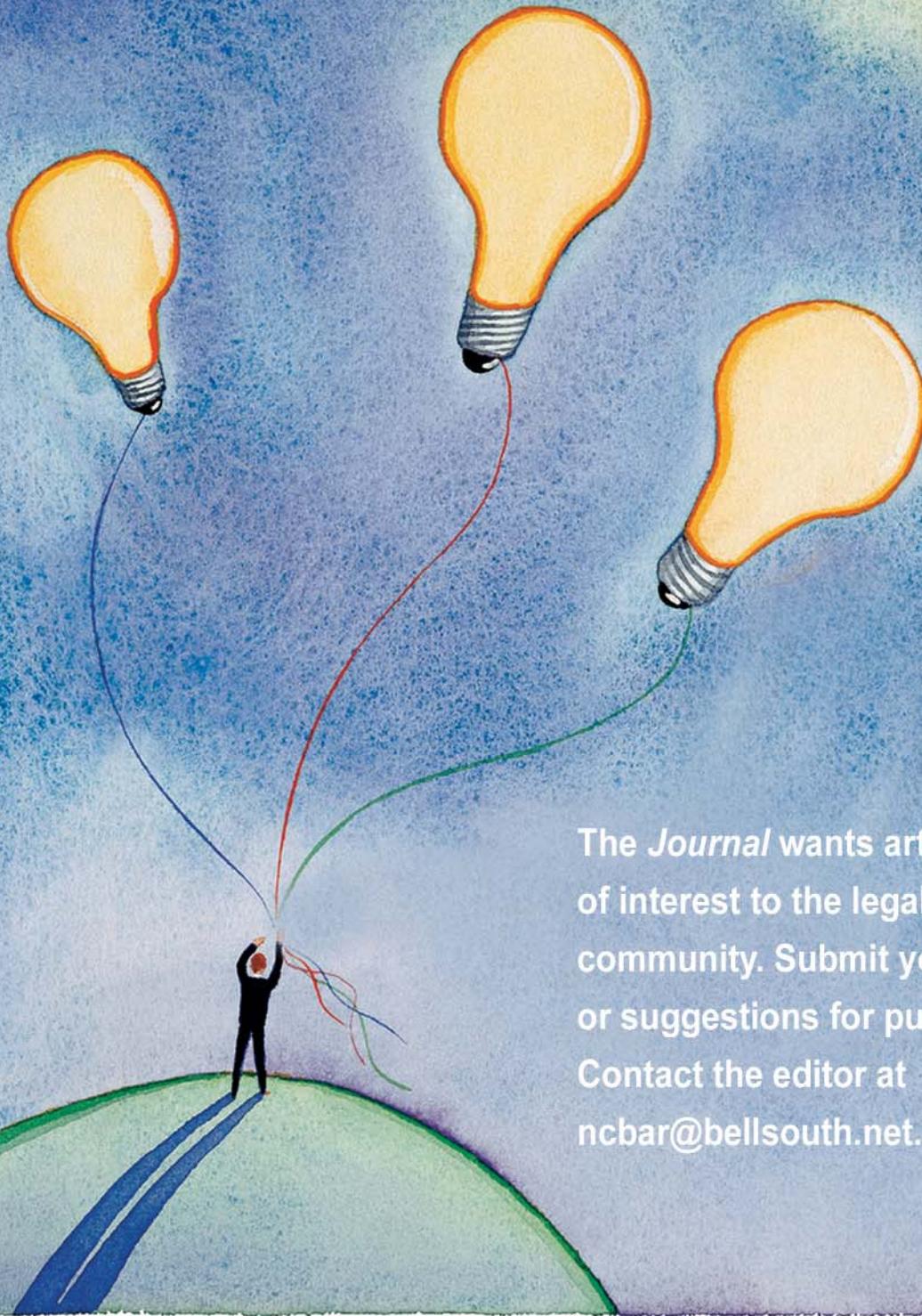
The DRC continues to be fully engaged in pursuing its statutory charges, and recently completed these outreach projects:

- DVD/Video Project. In collaboration with the NCBA's Dispute Resolution Section, the DRC produced and distributed both an English and Spanish language video about the district criminal court mediation program for use by North Carolina's district courts.

- Benchbooks. The DRC has written, published, and distributed *Benchbooks* for both the MSC and FFS Programs to all of North Carolina's senior resident superior court judges, chief district court judges, and their staff. These books offer a nuts-and-bolts guide to mediation and the operations of the

CONTINUED ON PAGE 41

## Share Your Thoughts and Ideas with the Bar



The *Journal* wants articles of interest to the legal community. Submit your work or suggestions for publication. Contact the editor at [ncbar@bellsouth.net](mailto:ncbar@bellsouth.net).

# Three Uncles at the Bar

MATTHEW PHILLIPS

*Eleven years ago, the Honorable L. Todd Burke called his courtroom to order and recognized a distinguished lawyer from Lumberton, North Carolina, who had been serving the state and the bar for 50 years and eight days. Horace E. Stacy Jr., stood and moved the admission of his great nephew to the court, and asked the judge's leave to explain the provenance of the Bible he would use to take the oath.*

**I** was sworn in to the North Carolina State Bar 11 years ago, but I started becoming a lawyer at least 18 years before that. My fourth grade teacher assigned students to write and deliver speeches throughout the year, and one of her assignments was

to talk about a famous person. She made the point that if there was someone notable in one's family, that would be a wonderful person to pick. I sheepishly asked my mother, pretty sure of a negative answer, if there was anyone famous in our family. She and my grandmother suggested that I call my great uncle and ask about Walter Parker Stacy.

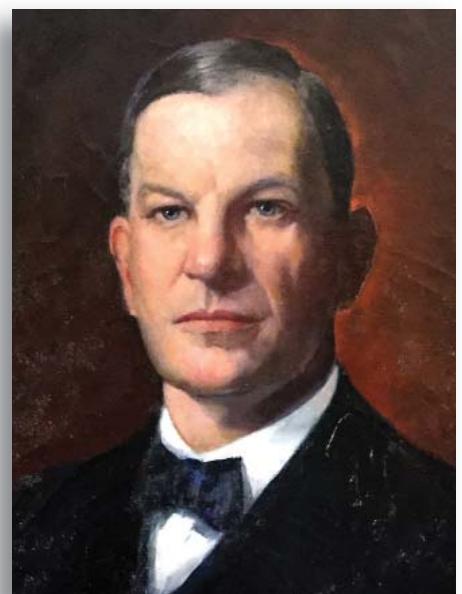
Uncle Wat's story quickly engaged me with my family's past, and an encounter eight years later called me to a future I wouldn't understand for a long time to come. Along the way, I learned what it means to be a lawyer and a professional.

## A Grand Portrait

In a few long phone conversations and subsequent letters, my grandmother's brother, Horace E. Stacy Jr., told me about *his* uncle, Walter Parker Stacy, who was the chief justice of the North Carolina Supreme Court from 1925 until his death in 1951. Chief

Justice Stacy remains the longest-serving chief justice in North Carolina history. His personal life, though, was tragic. He married relatively late in life, and his wife died just four years later. They had no children.

Celebrity could have found Uncle Wat very easily, had he not avoided it at every turn. An enterprising researcher at the North Carolina Department of Archives and History tried to assemble the chief justice's papers in the early 1970s, but the judge's long-time assistant wrote that Chief Justice Stacy's "thoughts were that his life's work could best be described and preserved in the



*Chief Justice Walter Parker Stacy Jr.*

North Carolina Supreme Court Reports....”<sup>1</sup> The marshal and librarian of the NC Supreme Court responded with little surprise, relating a memo in the Court files that said Chief Justice Stacy “remarked that the court should shun publicity, favorable or unfavorable, that the court’s job is the make history, not publicize itself.” The chief justice even recommended a comment for his obituary: “He didn’t care a damn for the trappings of his office.”<sup>2</sup> The comment was not included.

He was called upon by four US presidents—Coolidge, Hoover, Roosevelt, and Truman—to serve on labor dispute resolution commissions. In 1930 there were persistent rumors of his appointment to the

United States Supreme Court by President Hoover. Dow Jones tickers even reported the nomination, leading to numerous congratulatory telegrams in the court offices, but the rumor was no more than a representation of his extraordinary reputation after just five years leading the NC Court.<sup>3</sup>

For a precocious nine-year-old, the existence of such a relative was a fascinating discovery. I was able to understand the reputation and accomplishments of my great, great uncle more easily than the equally admirable lives closer to me, and I was intrigued by the possibility of carrying on a family legacy.

### The Intersection of Past and Future

Uncle Wat visited me again when I was about to start my senior year of high school. I attended the Boys' State program in North Carolina, which was then held on the campus of Wake Forest University. The week at Wake Forest marked the beginning of what is now a 20-year relationship with my educational and professional home. I decided to participate in the moot court program during the week. On our first day, I walked into the law school in the Worrell Professional Center and spotted a plaque on the wall.

The plaque bore some of the most gracious words about Wake Forest ever written, but the attribution rocked me back on my feet: Chief Justice Walter P. Stacy. Suddenly I felt that I belonged in this strange new place.

I found the right volume of the North Carolina Reports in the university's law library and looked up the full text of the decision containing the quote from the plaque. I'd like to say that it opened my eyes to a whole new fascinating world, but in truth I didn't understand it very well at all: something about Wake Forest and the Z. Smith Reynolds Foundation, and a contract to make gifts. My Uncle Horace later explained it to me, and I now refer to the case often with students when explaining the functioning of the court system.

The plaque and the fun of looking up Uncle Wat's opinions in the law library during the following week spurred the slow development of a plan to go to law school.

### Two Great Uncles

While Uncle Wat weaved in and out of my life as a source of inspiration, in important ways I started becoming a lawyer long before I knew of him: when I met two of my great uncles, Horace Stacy Jr., and Hugh

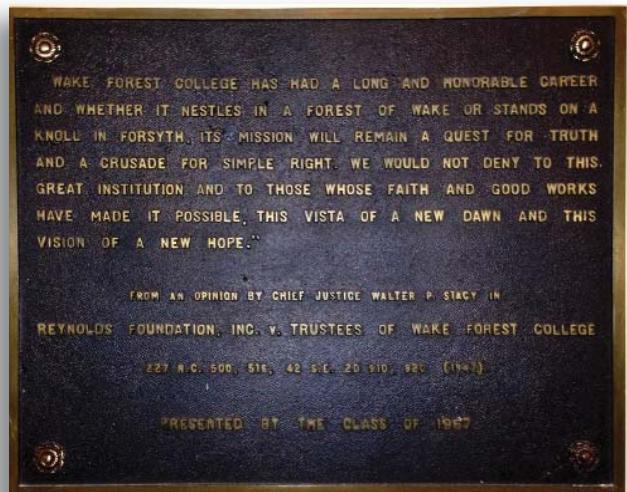
Reams. I didn't get to know either of my grandfathers very well—one died when I was a year old and the other had a severe stroke about the same time—so although I didn't get to see them very often, Uncle Hugh and Uncle Horace filled the role in important ways. They were both consummate southern gentlemen (Hugh was born in Ohio, but between Washington & Lee, Duke, and my great aunt Louise's extraordinary grace and charm, he converted into a southerner in all the critical ways), and they were both the epitome of the noble attorney.

### Becoming a Professional

Uncle Hugh had a gravelly voice that conveyed the depth behind everything he said and did. He had a fisherman's patience and a mischievous sense of humor, making him a favorite of children around the family. His eyes had a piercing quality, but they were animated by an enduring curiosity about other people. He was a careful professional, but he showed no restraint as he invested in the people he loved. Uncle Hugh was easy for me to fall in love with and adopt as a grandfather.

His home in St. Petersburg, Florida, was a long trip for my family, but it was my favorite place to travel. After one family vacation to Disney World, we spent a few days in St. Petersburg, and my brother and I told my parents that next time we'd rather skip Disney and just visit Aunt Louise and Uncle Hugh. That had a lot to do with him teaching us to fish off his Tampa Bay dock.

Between visits, Uncle Hugh and I exchanged letters across a period of several years. Another of his enduring curiosities was computers, and so our correspondence converted to email in the mid-90s before most of the world knew what email was. I told him in some of those letters about my interest in being a lawyer, and he was encouraging; however, I got the sense that how I worked was more important to him than what I did. That made it easier to tell him when I decided not to go to law school after college, but instead to enroll in the



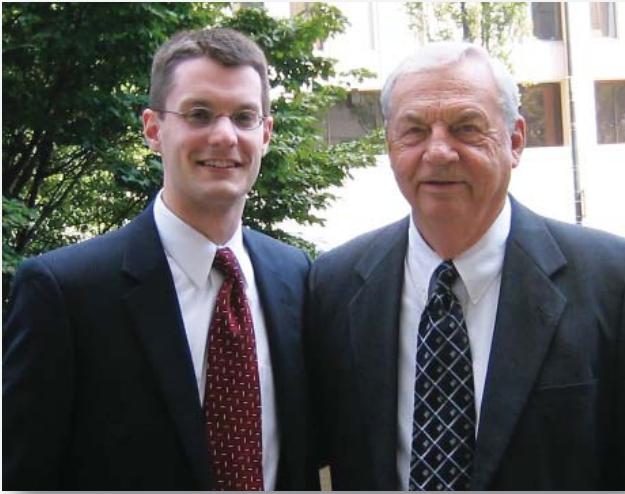
Plaque at the Worrell Professional Center

divinity school at Duke.

Like me, Uncle Hugh grew up with a father who modeled professionalism. Glenn Reams was a physician, and I remember Uncle Hugh telling me with deep pride about how seriously Dr. Reams took his role as a caretaker in his community. He used my new career direction to illustrate this when he told me that his father never once charged a member of the clergy for medical treatment, and that he had never charged a minister for legal work either. The micro lesson was one I would eventually honor as an attorney, but the macro lesson was about the value of professional courtesy and the deeply intertwined nature of faith and vocation. He also shared the lesson that his father had known you can't treat a patient well unless you fully understand their life. Of course, you can't represent a person before the court without a thorough understanding of their life and affairs, which was either the reason Uncle Hugh learned so much about others or the reason he was so successful as an attorney, given his natural sense curiosity.

### Admission to the Bar

Uncle Horace was a more subtle figure. (Actually, I never called him "Uncle Horace," but rather used the affectionate nickname "Bubber" that my grandmother gave him in childhood.) As far as I know, he stood every time a woman entered the room for 86 straight years. He was the most die-hard Carolina fan I've ever met, but I never heard him utter a negative word about another school. There is a dorm named after another one of his uncles at Chapel Hill, but he went



*The author with his Uncle Horace*

to great lengths to explain the family connections to Duke and Wake Forest at the relevant points in my life. It made a deep and early impression on me to see how much my father respected Uncle Horace (and Uncle Hugh for that matter). That told me he was the ideal of a good man and the kind of man I should be, and it was a reminder that, despite the jokes, a lot of people look up to lawyers.

In addition to introducing me to Uncle Wat, Uncle Horace introduced me to the broader subject of family history and tradition. He sent me clippings from the past and present, and in his last months he wrote out narratives about three of the Stacy brothers from his father's generation (including Uncle Wat). It was very late in his life that it dawned on me that he was trying to ensure an interest in the family's great stories that would survive him, and few legacies have meant as much to me.

After I passed the bar exam, Uncle Horace called to congratulate me, and he asked if he could present me to the court for admission. That required a separate ceremony, which he was able to arrange because of Judge Burke's generosity. He drove to Winston-Salem on September 18, 2006, and brought with him an 1895 Bible given to Uncle Wat by his father, a circuit-riding Methodist minister. Uncle Wat used the Bible for every oath of office he took—superior court judge, associate justice, and for each of five terms as chief justice—and eventually left it to his brother, my great-grandfather Horace E. Stacy Sr., who gave it to his son (my great-uncle). Uncle Bubber used it for his oath of admission to the

North Carolina State Bar in 1956. He insisted that I use it for my oath and inscribe it afterwards in the pattern of the others who held it. About a dozen lawyers from my firm came to witness the ceremony, and they were spellbound (along with the presiding judge) as my uncle, who had signed most of their bar certificates while chair of the Board of Law Examiners, told the story of the Bible and moved my admission.

My uncle didn't love me any more because I was a lawyer, but I do think he liked seeing a new Stacy family lawyer, continuing a tradition started in 1908. (There was actually a very short break in the line for six months in 1956 between the death of Horace E. Stacy Sr., and my Uncle Horace's admission to that bar, but my great-grandfather's partner left the name of the firm intact for that period in anticipation of the younger Stacy's arrival.)

### Bridges to the Past

Wilhelm Röpke wrote, "This feeling for the meaning and dignity of one's profession and for the place of work in society, whatever work it be, is today lost to a shockingly large number of people."<sup>4</sup> The theory of professions, and the great history of the legal profession in particular, suffer as resources because the stories of true professionals tend to fade from view. Their job, as Uncle Wat said, is not to publicize themselves, or even necessarily to record their experiences. Making new professionals is such a complex process and returns the investment so slowly that it is all

too easy for us to abandon the effort. I have had extraordinary mentors through my professional career, but the stories of—and relationships with—my uncles meant that nobody had to convince me of the law's nature as a high and noble calling. They were the personification of a complex idea.

I've been admitted to the bar for 11 years, but I only had a "real" law practice for the first two of those ten years. I took an administrative position at Wake Forest, then a faculty appointment, and so my practice has been in the classroom and in *pro bono* work with the Civil Air Patrol and North Carolina Legal Aid. Almost nothing I do would be the same without my identity as a lawyer, though, and that's a legacy from my three uncles for which I am enduringly grateful. ■

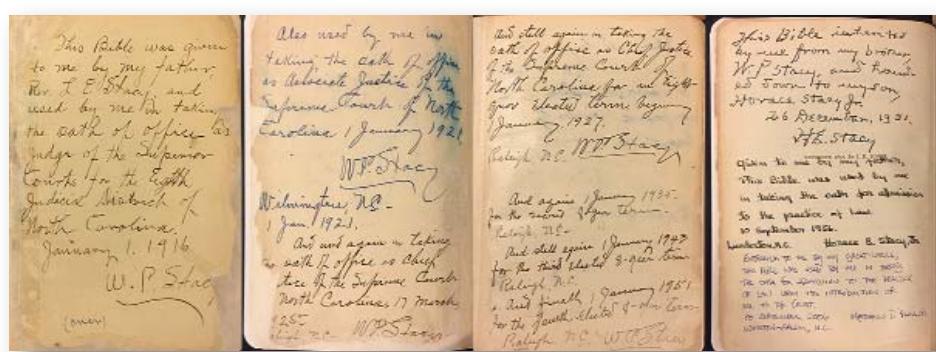
*Hugh E. Reams, Esq., was a celebrated member of the Florida State Bar and died in 2009. Horace E. Stacy Jr., Esq., was a member of the North Carolina Bar, member and chair of the Board of Law Examiners, and recipient of the Order of the Long Leaf Pine. He died in 2015.*

*Matthew Phillips is the John Hendley Fellow, an associate teaching professor of law & ethics, and director of the BB&T Center for the Study of Capitalism at Wake Forest University School of Business.*

### Endnotes

1. Letter from Esther Hart to William O. White Jr., dated 1 June 1970. Mr White later became a member of the North Carolina State Bar.
2. Letter from Raymond M. Taylor to William O. White Jr., dated February 4, 1971.
3. "Rumor of Judge Stacy appointment to Supreme Court causes excitement in Raleigh," Raleigh News & Observer, March 14, 1930.
4. Wilhelm Röpke, *A Humane Economy: The Social Framework of the Free Market* (Chicago: Henry Regnery Co., 1960), 114.

*1895 Bible given to Uncle Wat by his father, a circuit-riding Methodist minister.*



# 2017 Second Quarter Random Audit Report

BY ANNE PARKIN, FIELD AUDITOR

**E**ach quarter two judicial districts are selected for audits. The judicial district selection, as well as the list of lawyers selected in each district, are randomly generated. The audit findings below are being published to bring awareness to lawyers of the violations found and the percentage of each. The percentage is a tally of the total number of audits divided by the total number of each violation. You should take time to identify violations within your office and correct them immediately.

## Quarterly Audit Report - Judicial Districts 28 and 29B

Judicial District 28, composed of Buncombe County, and Judicial District 29B, composed of Henderson, Polk, and Transylvania Counties, were randomly selected for audit for the second quarter of 2017. A total of 52 audits were conducted.

Following are the areas of rule violations:

- (a) 71% failed to perform quarterly transaction reviews.
- (b) 60% failed to sign, date, and/or maintain reconciliation reports.
- (c) 46% failed to identify the client and source of funds, if the source was not the client, on the original deposit slip.
- (d) 33% failed to:
  - perform three-way reconciliations each quarter,
  - provide a copy of the bank directive regarding checks presented against insufficient funds.
- (e) 31% failed to escheat unidentified/abandoned funds as required by NC Gen. Stat. 116B-53.
- (f) 25%:
  - failed to identify the client on confirmations of funds received/disbursed by wire/electronic/online transfers,
  - failed to maintain images of cleared checks (or front and back images),
  - of lawyers/employees with check sign-

ing authority, had failed to take a required one-hour trust account management CLE course.

- (g) 23% advanced funds from the trust account resulting in negative balances.
- (h) 19% failed to perform bank statement reconciliations each month.
- (i) 15% failed to review bank statements and cancelled checks each month.
- (j) 13% failed to indicate on the face of each check the client from whose balance the funds were withdrawn.
- (k) 10% or less failed to:

- properly maintain a ledger for each person or entity from whom or for whom trust money was received,
- properly record the bank date of deposit on the client's ledger,
- provide written accountings to clients at the conclusion of representation or at least annually if funds were held more than 12 months,
- prevent bank service fees being paid with trust funds,
- properly maintain a ledger of lawyer's funds used to offset bank service fees,
- use business sized checks containing the Auxiliary On-Us field,
- remove earned fees or cost reimbursement promptly,
- promptly remit to clients funds in possession of the lawyer belonging to the clients, to which the clients were entitled,
- remove signature authority from employees responsible for performing monthly or quarterly reconciliations,
- properly retain electronic records.

Following are the areas of consistent rule compliance:

- 1) signed trust account checks (did not use a signature stamp or electronic signature),
- 2) properly deposited funds received with a mix of trust and non-trust funds into the trust account.

There were no deficiencies found in two

of the 52 audits that were conducted.

## Third Quarter Random Audits

Judicial districts randomly selected for audit for the third quarter of 2017 are 16B, composed of Robeson County, and 19B, composed of Montgomery and Randolph counties. ■

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# An Interview with Laura Burton, Board Certified Specialist in Immigration Law

BY LANICE HEIDBRINK, EXECUTIVE ASSISTANT FOR THE SPECIALIZATION PROGRAM

**L**aura Burton knew the importance of becoming board certified early in her career. She was certified in immigration law in 2003 and soon became a strong advocate for specialization not only in immigration law, but also in other areas of specialty certification. She began by serving on the Immigration Law Specialty Committee in 2004, and was appointed chair of the committee in 2009. She remained chair until her term expired in 2011.

Additionally, Burton was appointed to the Board of Legal Specialization in 2010 and served as chair of the board from July 2016 to July 2017.

A testament to Burton's dedication to the specialization program is the fact that she rarely missed a board meeting despite a life-changing accident in 2015. Hospitalization, several surgeries, and physical therapy were required after she was struck by a driver when crossing the street near her office in Greensboro.

Burton served as chair of the specialization board during some very exciting milestones. Under her leadership, the program reached 1,000 specialists, a goal set by Jim Angell, her predecessor as chair; specialization exams began to be administered digitally through Examsoft Software; and new specialties in utilities law and privacy and information security law were created.

**Q:** What originally motivated you to become a specialist?

When I spoke with other attorneys in the field, I realized that becoming a specialist would both help my practice, and allow me to more easily stay on top of the changes in the field. I have found this to be true over the past 14 years.



Burton

**Q:** How would you explain the benefits of specialization to someone who says "I've been practicing for many years in my area of practice, why do I need to get certified now? Certification is for lawyers who are only a few years out of law school."?

Certification is not just for lawyers who are a few years out of school. In fact, attorneys who have been practicing for a number of years tend to be better prepared to go through the certification process and to take the exam. Certification demonstrates a lawyer's achievements and competence in the specific field, and can help in promoting the lawyer's practice, regardless of the number of

years in practice. It is worth the time and effort (and day-long exam) to pursue certification in your field. Certification is a benefit to lawyers and clients alike.

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

I'm afraid that almost all topics immigration law are "hot" right now, and in that many changes can be expected in the short and long term that could affect clients in all areas of immigration law. Everything from deferred action for childhood arrivals (DACA), to employment visas, to enforcement is under scrutiny, and it is more important than ever for attorneys involved in the field to be aware of changes coming down the road.

**Q:** How has certification been helpful to your practice?

Certification is very important in immigration law. It is critical for members of the public to be certain that they are working with a lawyer who is very familiar with the field and does not simply "dabble" in immigration law. As with many areas of law, a little knowledge, without depth of experience, can

be more harmful than helpful. Certification allows potential clients to feel comfortable that they are choosing an attorney whose practice fully meets their immigration needs.

While it has not changed the way that I practice law, being a specialist has made me more aware than ever of the importance of staying on top of changes and new issues in the field. I also find that there is a collegial atmosphere amongst the specialists in my field, which will certainly have a positive impact for clients. Certification has made me more confident in my practice, and has attracted clients over the years who have found me through the specialization program.

**Q:** You just recently finished your term as chair of the Board of Legal Specialization, what will you miss most?

I enjoyed my term as chair. I will miss working closely with professionals and attorneys who share my commitment to the legal specialization program in North Carolina. This dedicated group works hard to promote the program and assist the public. They are also a lot of fun to work with and I will miss the camaraderie.

**Q:** What was your focus or initiative during your term as chair of the board?

During my term I focused on increasing the number of legal specialists in North Carolina in current specialty practice areas, as well as increasing the number of practice areas eligible for specialty certification.

**Q:** From your perspective as a board chair, finish this sentence: "I'm excited about the future of legal specialization because..."

...the more specific practice areas that are identified for specialty certification, the better it will be for the public as a whole in North Carolina. ■

*For more information on immigration law specialists or to learn how to become certified, visit our website at: nclawspecialists.gov.*

# The Road Less Traveled—North Carolina Splits from Other Jurisdictions on Fee-Splitting Issue

BY SUZANNE LEVER

I am sure many of you are aware of Avvo's online legal directory. However, you may not know that Avvo, as well as a handful of other platforms, is now offering fixed fee limited scope legal services online.

How do these online legal service platforms work? In the case of Avvo Legal Services, Avvo determines the fee that will be charged for each discrete service and charges participating lawyers a percentage of the fee. The percentage charged to the lawyer, which varies depending on the particular legal service, is called a "marketing fee." Avvo initially collects the entire legal fee from the consumer and deposits the funds in an Avvo bank account. On a monthly basis, Avvo pays the participating lawyer all legal fees generated by the lawyer in the preceding month. In a separate transaction, Avvo collects its marketing fees for these legal services by debiting the lawyer's operating account.

So basically, the business model for these online legal platforms involves the service collecting the legal fee from the client/consumer and then—wait for it—splitting the fee with the participating lawyer. Say what???

Now I know, and you know, that fee sharing is a no-no under the Rules of Professional Conduct. Rule 5.4(a) *clearly states* that a lawyer "shall not share legal fees with a non-lawyer, except" blah blah blah not relevant here. So what gives? Well, four jurisdictions give the thumbs down to this business model.

The four jurisdictions that have issued ethics opinions on the business model are Ohio, South Carolina, Pennsylvania, and New Jersey. Each of these jurisdictions concludes that lawyers cannot participate in the business model because, among other issues, the model involves fee-sharing prohibited by Rule 5.4(a). Ohio Board of Prof'l Conduct, Op. 2016-3 (2016), SC Bar Ethics Advisory Comm., Op. 16-06 (2016), PA Bar Ass'n. Comm. on Legal Ethics and Prof'l

Responsibility, Op. 2016-200 (2016), NJ Joint Opinion of NJ Advisory Comm. on Prof'l Ethics, NJ Comm. on Attorney Advertising, and NJ Comm. on the Unauthorized Practice of Law (ACPE Op. 732, CAA Op. 44, UPL Op. 54) (2017).<sup>1</sup>

In their evaluations of the fee-sharing issue, the four ethics committees conclude that the manner in which the amount of the "marketing fee" is established (a percentage of the legal fee) supports a finding of improper fee sharing. The committees reject any contention that there is no sharing of legal fees because the entire legal fee is paid to the lawyer in one transaction, and the service is paid its fee in another separate transaction. They also reject the argument that there is no sharing of legal fees because the payment to the service is referred to as a "marketing fee."

Makes sense. But wait. The structure, terminology, and amount of the fee paid to the service are all factors that relate to a determination of whether a lawyer is sharing a legal fee with a nonlawyer, rather than a determination of whether the purpose for the fee-sharing prohibition is implicated. Comment [1] to Rule 5.4 states that the purpose of "traditional limitations" on sharing fees is "to protect the lawyer's professional independence of judgment."

What do these four ethics opinions conclude as to the effect of the payments to Avvo or other businesses on the participating lawyers' independence of professional judgment? The primary purpose underlying the fee-sharing prohibition set out in Rule 5.4(a)—protection of a lawyer's independent professional judgment—is either not addressed in the opinions at all, not addressed in connection with the fee-splitting issue, or not deemed to be dispositive. *Please see "Things That Make You Go Hmm..." by C+C Music Factory (Columbia Records 1991).*

Not wanting to be left behind, North

Carolina has decided to issue its own opinion on Avvo's business model. At its meeting on July 27, 2017, the Ethics Committee voted to publish for comment Proposed 2017 Formal Ethics Opinion 6 (Participation in Online Platform for Finding and Employing a Lawyer). The full proposed opinion can be found on page 38 of the *Journal*.

The proposed opinion addresses many ethical issues implicated by the Avvo business model. In fact, 13 rules of professional conduct are cited in the proposed opinion, including Rule 5.4(a). (Sidebar Quiz: How many of you can name 13 Rules of Professional Conduct???)

In its discussion of fee-sharing, North Carolina falls in line with the other four opinions in concluding that the structure of the payments in the business model is irrelevant to the fee sharing issue, and also agrees that "the fact the marketing fee is a percentage of the legal fee implicates the fee-sharing prohibition." Now here is where we go rogue. Our proposed opinion focuses on the purpose for the fee-splitting prohibition—"to protect the lawyer's professional independence of judgment." The opinion references two current North Carolina ethics opinions approving payment arrangements similar to that of the Avvo business model. The payment arrangements in 2010 FEO 4, involving a barter exchange program, and 2011 FEO 10, involving an online group coupon, were approved because the nonlawyer receiving the payment exercised no influence over the professional judgment of the lawyer, and the fee was a reasonable charge for marketing or advertising services. Similarly,

Proposed 2017 Formal Ethics Opinion 6 concludes that, "if there is no interference by Avvo in the independent professional judgment of a participating lawyer, and the percentage marketing fees paid by the lawyer to Avvo are

CONTINUED ON PAGE 33

# Grievance Committee and DHC Actions

## Disbarments

**Michael S. Eldredge** of Kingsport, Tennessee, surrendered his law license and was disbarred by the State Bar Council at its July meeting. Eldredge acknowledged that he misappropriated entrusted funds totaling at least \$80,000.

**Christopher Marc O'Neal** of Wilmore, Kentucky, surrendered his law license and was disbarred by the State Bar Council at its July meeting. O'Neal acknowledged that he misappropriated entrusted funds totaling approximately \$14,500 for his own benefit and misappropriated entrusted funds in excess of \$100,000 for the benefit of clients who were not the beneficial owners of the funds.

**Marvin R. Sparrow** of Rutherfordton surrendered his law license and was disbarred by the Wake County Superior Court. Sparrow pled guilty and was convicted of three misdemeanor counts of assault on a female in Buncombe County Superior Court.

## Suspensions & Stayed Suspensions

Charlotte lawyer **Craig Asbill** neglected a

client's case, did not properly communicate with the client, and did not respond to and made false statements to the Grievance Committee. He did not attend the hearing. The Disciplinary Hearing Commission suspended him for four years. After serving two years of the suspension, he will be eligible to petition for a stay of the balance upon demonstrating compliance with numerous conditions.

The DHC found that **Mary March Exum** of Asheville misappropriated entrusted funds, improperly solicited professional employment from a potential client, made misleading statements about her legal services, withheld a client's requested file materials to coerce the client to reimburse her for expenses, and disbursed entrusted funds contrary to a perfected lien. She was suspended for five years. After serving two years of the suspension, Exum will be eligible to petition for a stay of the balance upon showing compliance with numerous conditions.

**David H. Harris** of Durham County engaged in a conflict of interest, failed to explain a matter to the extent reasonably necessary to allow his client to make an informed

decision, pursued a claim that lacked merit, and charged an excessive amount for fees and expenses. The DHC suspended him for two years. The suspension is stayed for two years upon Harris' compliance with numerous conditions.

**William McKeny** of Rockwell did not properly wind down his practice when he was suspended by the DHC, abandoned his clients, did not withdraw from pending cases, and did not refund unearned fees. He was suspended by the DHC for two years. The suspension is stayed for two years upon his compliance with numerous conditions.

**Robert G. Raynor** of New Bern was found during successive random audits to have violated trust account rules. The DHC imposed a one year suspension, stayed upon Raynor's compliance with numerous conditions.

**Douglas J. Tate** of Greenville, South Carolina, neglected and did not communicate with numerous clients, mishandled entrusted funds, and did not supervise an assistant who held herself out as an attorney. He was suspended by the DHC for one year. The suspension is stayed for two years upon Tate's compliance with numerous conditions.

## Censures

**Joseph Atwell** of Greensboro was censured by the Grievance Committee. He neglected an estate, did not appear at a show cause hearing, and delayed in complying with an order to turn over estate funds. He also did not respond timely to the State Bar, provided a misleading explanation about federal and state tax obligations for the trust he was administering, and included trust and estate funds on the same ledger.

**Jonathan A. Fine** of Durham was censured by the Grievance Committee. He engaged in the unauthorized practice of law by continuing to practice while he was administratively suspended and made misleading statements by holding out to the court and opposing counsel that he was eligible to practice law.

## Reprimands

**Kenneth Davies** of Charlotte was reprimanded.

## A Survey is Coming Your Way

The State Bar is in the process of evaluating the way the Bar communicates with North Carolina lawyers—both in terms of content and methods by which lawyers prefer to receive information. To that end, in the coming weeks you will receive a survey via email from the State Bar soliciting your feedback on preferences for communication from and with the State Bar. Questions will address a variety of issues, including:

- What sections of the State Bar *Journal* do you value most? Least?
- Would you prefer to receive a hard copy or electronic copy of the *Journal*?
- How do you prefer to receive news/information from the State Bar?
- Do you follow the State Bar's social media accounts (Twitter, Facebook, etc.)?

The goal of this initiative is to ensure that future communications by the State Bar to its membership are helpful and delivered in a manner that is both convenient and effective. Prior to receiving the survey, we ask that you give some thought to the questions listed above, as well as your own general preferences for interacting with and receiving information from the State Bar. All responses will remain anonymous, and your candor in answering these questions is greatly appreciated. We thank you in advance for taking the time to complete the survey and offer your feedback on this important issue.

manded by the Grievance Committee. He employed a disbarred lawyer as a paralegal and represented the disbarred lawyer's former client on legal matters about which the disbarred lawyer had represented the client.

**James Hord** of Charlotte was reprimanded by the Grievance Committee. Hord advised his bankruptcy clients to transfer a parcel of real property to joint ownership and then failed to disclose the transfer on the bankruptcy petition's Statement of Financial Affairs. Failure to disclose such a transfer occurring within one year of filing the petition is fraud on the bankruptcy court.

**Christopher D. Lane** of Clemmons was reprimanded by the Grievance Committee. He aided an out-of-state entity in the unauthorized practice of law by agreeing to provide legal services to North Carolina residents as the "Regional Counsel" of a California law firm.

**William Peregoy** of Wilmington was reprimanded by the Grievance Committee. He did not keep one client reasonably informed, did not promptly respond to the client, and did not act on the client's behalf until he learned that the client had filed a State Bar grievance. He did not keep a second client reasonably informed about the status of his legal matter and did not act with reasonable diligence.

#### Transfers to Disability Inactive Status

**Elisabeth Murray-Obertein** of Hendersonville and **John M. Rich** of Wake Forest were transferred to disability inactive status by the chair of the Grievance Committee.

**Jeanne P. Hall** of Brevard, **James I. Averitt** of Cary, and **Lisa M. Dukelow** of Durham were transferred to disability inactive status by the DHC.

#### Reinstatements

In March 2015, **Brad Harrison Ferguson** of Sylva was transferred to disability inactive status by the Haywood County Superior Court. He was reinstated to active status by the court.

**Willie D. Gilbert II** of Wilson was suspended by the DHC for five years in April 2010. The suspension was stayed on Gilbert's compliance with numerous conditions. In March 2014, the DHC concluded that Gilbert violated the conditions of the stay and entered an order lifting the stay and activating the suspension for three years. Gilbert was reinstated by the secretary.

## In Memoriam

**Wallace Ashley Jr.**  
Smithfield, NC

**Charles W. Barkley**  
Charlotte, NC

**Robert Ross Blackwell Jr.**  
Yanceyville, NC

**Burton Frederick Buchan Jr.**  
Davidson, NC

**Alfred P. Carlton Jr.**  
Raleigh, NC

**Alfred Eugene Cleveland III**  
Fayetteville, NC

**F. Leary Davis Jr.**  
Wendell, NC

**Lope Max Diaz II**  
Charlotte, NC

**Carol Lynn Gwaltney**  
Swannanoa, NC

**John Warren Hardy Sr.**  
Greensboro, NC

**Donald Ray House**  
Winston-Salem, NC

**George Martin Hunter**  
Charlotte, NC

**Robert Bruce Jervis**  
Durham, NC

**Russell J. Lanier Jr.**  
Wallace, NC

**Samuel Anderson McConkey Jr.**  
Morehead City, NC

**James Almond Merritt Jr.**  
Durham, NC

**Frederick Luke Musselwhite**  
Lumberton, NC

**Theofanis Xenophon Nixon**  
Charlotte, NC

**Robert Newton Page III**  
Aberdeen, NC

**Martha Thompson Parson**  
New Bern, NC

**Robert L. Peace**  
Raleigh, NC

**Wilton Rankin**  
Charlotte, NC

**James Dennis Rash**  
Charlotte, NC

**Dwight Hernard Wheless**  
Manteo, NC

**Benjamin Ross Wrenn**  
Reidsville, NC

**Terry Craig Wright**  
Whiteville, NC

**Charles Hill Yarborough Jr.**  
Louisburg, NC

**Stephen Thomas Yelverton**  
Washington, DC

In December 2013 the DHC suspended **William Trippe McKeny** of Salisbury for three years. McKeny mishandled entrusted funds and engaged in extensive trust account mismanagement. The DHC granted his petition for reinstatement upon his acceptance of addition discipline in 17 DHC 5 and upon his supervision by a practice monitor.

#### Stays of Existing Suspensions

In June 2016 the DHC suspended **Jane Dearwester Soboleski** of Asheville for three years for failing to reconcile the firm's trust accounts, failing to maintain accurate client ledgers, and failing to properly maintain and disburse entrusted funds. After serving six months of the suspension, Soboleski was eli-

gible to apply for a stay of the balance upon showing compliance with numerous conditions. The DHC granted her petition for a stay.

#### Orders of Reciprocal Discipline

An order of reciprocal discipline was issued in the matter of **Brenda Wagner** of Washington, DC, who the DC Bar admonished for client neglect, failure to communicate, and failure to attend court hearings.

#### Notice of Intent to Seek Reinstatement

Notice is hereby given that **Theophilus O. Stokes III** of Greensboro intends to file a

CONTINUED ON PAGE 48

# Three Months of Saturdays—One Busy Lawyer's Most Excellent Summer Sabbatical

BY CHRIS CONNELLY

**I**magine every day is Saturday. The week is over, the successes and failures of the week are yesterday, the prospect of another week—stress, demands, egos, self-importance—is days away. Do what you want, where and when you want. Sit back and watch the world go by, or maybe even choose to be part of it. From June 1 to August 31, 2016, that's exactly what I did. And it was probably the best decision of my career. I want to share how I did it so that, if inclined, you might try it, too.

As a busy criminal defense solo practitioner of 28+ years I decided to “tap out” for a sabbatical. No office, no court, no appointments; I would be available by email and phone only. All the travel that I had dreamed about but dismissed as “taking too much time” was suddenly possible. While my sabbatical included lots of world travel—fulfilling some of my lifelong dreams—I am convinced the mental health benefits of a staycation would be just as profound.

So, how does a fully-scheduled, solo-practitioner litigator get away? First and most importantly, you commit to yourself that you WILL do it, and then you plan months ahead. I asked a trusted colleague to cover emergencies and new cases. We worked out a revenue share based upon the service and advice that was necessary for him to provide. I was also fortunate to have experienced and trusted support staff to cover the daily housekeeping of scheduling matters and supporting lawyers who were covering me.

Sometimes I had to simply say to opposing counsel and court personnel “I am not available then.” Sometimes I asked opposing counsel to accommodate my schedule, explaining that I was planning to take a sabbatical and asking that cases might be continued until I return. I was humbled and grateful to experience little resistance. I saw the

decency of colleagues—people who want the same things as I do, things like some time to decompress and expand their horizons. A few may have even wished to take a sabbatical themselves, and I hope a few seeds were planted along this journey.

I had to accept that expenses would continue and revenue would be down. I was fortunate to have enough operating capital and personal savings to be able to not only continue to run my practice, but also to travel while away. I think that it all comes back to making the decision, with no excuses. To paraphrase a great movie where Kevin Costner said, “Build it and they will come,” I say, “Make the decision, and you will figure out the details.”

I first went to Dublin for the 1916 centennial celebration of my ancestors. I rose and grabbed a pint while watching folk musicians in pubs. I rode the Spanish Camino Santiago by horseback, riding through ancient Galician villages, overnighting in centuries-old monasteries, and arriving one morning in the Plaza of the Cathedral Santiago surrounded by reverent pilgrims who had walked from all over to the resting place of Christ’s apostle, James. I spent two weeks in Peru at my church’s mission visiting the homes of materially impoverished but spiritually wealthy people. I immersed myself in their lives, taking in their grace, gratitude, and joie de vivre. I traveled to Buenos Aires to



see the elegance of its people and architecture, and to study its rollicking history. I was able to spend time with family that showed up from afar. I read books. I stayed up late and slept in. Because of all my air travel, in two months I went from “Nobody” status to “Golden Child” with American Airlines. Most importantly, I had pursued a dream and returned mentally and emotionally refreshed.

Coming back in September was eye-opening. I saw my court, colleagues, and practice in a new way. Being away made the norms that we live under in the daily grind of our profession that much more palpable when I returned. With fresh eyes I saw clearly the burden that we impose upon ourselves with an overblown idea of our own self-importance. I saw the pain of the environment that we work in: people and their toxic problems—problems that have so metastasized that our clients must bring them to a courtroom. I also realized the legal world did fine without me, and I did fine without it. I could get right back into things when it was time. I came back recharged, with a diminished burden of self-importance that many of us wear as our mantle. I took more calculated risks in trying new strategies at trial or plea discussions, enjoyed the practice more, felt looser, and enjoyed

making more free time.

The most valuable experience was a week in Santa Barbara where I started my process of life coach training. As lawyers, we spend our careers in the people business—their problems, illnesses, addictions, egos. I asked myself, how can I use this unprecedented experience to open doors for others to find work/life balance? How can I help others build a path to try a similar journey?

Taking the gamble of a three-month sabbatical was the wisest career decision that I have made in 30 years. “Tapping out” for three months at this point added years to my professional life, wherever it may take me. I often hear others say, “I wish I could do that, but there’s no way because (fill-in-the-blank).” My answer to that self-imposed, self-fulfilling absolutism is a question: If a sick family member needed devoted time, would you make it happen? If we can make it happen for another’s illness, why can’t we do it for our own health?

“Whoa! I can’t handle that just yet!” some might say. Fair enough. There is much to be said for a mini-sabbatical. A young practition-

er may not want to get away just as their career is blossoming. A work-horse practitioner may want to “try it on for size” before making the plunge into a full blown sabbatical. Looking back, my own three month sabbatical was rooted in my decision ten years ago to take off a few hours here and there. Those few hours morphed into half-days and eventually full days. A mini-sabbatical may look different—maybe a long weekend away or even just an afternoon out. Your client can live without you for a few hours or a few days. Check in with yourself to examine whether your devotion to work may really be a disguised sense of your own self-importance or an underlying fear your clients may not need you. That trial that settled or appointment that cancelled? That’s the universe making room in your schedule for you to get away. Take it. And turn off the screens!

The AOC allows us three weeks of secured leave per year where our time off is sacrosanct. I hope that the AOC considers a corollary to allow three months of secured sabbatical time for every ten years of practice. Imagine the Bar that we could have if, just as we were hitting

peak stress, we step away, regroup, get in touch with our deepest selves, and remind ourselves of what is important. How much better could we serve clients and courts by having lawyers who are refreshed three weeks every year and three months every decade? How much addiction, stress, illness, unprofessionalism, and malpractice could be avoided? The question is not can we afford to take time off, but can we afford NOT to take it? ■

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*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 impair a lawyer’s ability to practice. If you would like more information, go to nclap.org or call: Cathy Killian (western areas of the state) at 704-910-2310, or Nicole Ellington (for eastern areas of the state) at 919-719-9267.*

## Legal Ethics (cont.)

reasonable costs of advertising...the lawyer is not prohibited from participating in [Avvo Legal Service] on the basis of the fee-sharing prohibition.” Mic drop.

To clarify the committee’s position, the Ethics Committee is considering an amendment to Rule 5.4(a). The amendment addresses the payment structure utilized in the Avvo business model. The proposed amendment is an additional exception to the prohibition on sharing legal fees set out in Rule 5.4(a) and allows a lawyer to pay a portion of a legal fee to a credit card processor, group advertising provider, or online platform for identifying and hiring a lawyer if the amount paid is for payment processing or for administrative or marketing services, and there is no interference with the lawyer’s independence of professional judgment or with the client-lawyer relationship. The full proposed rule amendment can be found on page 38 of the *Journal*.

The proposed amendment to Rule 5.4(a) makes sense, but I’m not sure it solves the conundrum presented by Rule 5.4(a) and

perhaps responsible for the inconsistent holdings in the ethics opinions. A literal application of Rule 5.4(a) would prohibit all payments by a lawyer to a nonlawyer employee or vendor if the source of the funds is legal fees previously earned by the lawyer. As already noted, comment [1] to Rule 5.4 states that the provisions of the rule “express traditional limitations on sharing fees.” These “traditional limitations” may be unnecessary and even unworkable in today’s legal marketplace. The stated purpose for the prohibition against fee-sharing is met by other rules of professional conduct. For example, Rule 2.1 specifically provides that, in representing a client, “a lawyer shall exercise independent, professional judgment and render candid advice.” Rule 5.4(c) prohibits a lawyer from allowing a person who recommends a lawyer to direct or regulate the lawyer’s professional judgment. Similarly, Rule 1.8(f) provides that a lawyer may not allow a third party payor to interfere with the lawyer’s independence of professional judgment or with the client-lawyer relationship. These three rules of professional conduct, among others, protect a lawyer’s professional

independence of judgment without establishing an unworkable restriction on the lawyer’s use of his own legal fees. Rule 5.4(a) states that a lawyer “shall not share legal fees with a nonlawyer.” Do lawyers who participate in Avvo Legal Services share legal fees with Avvo? Yes. Does it matter? I don’t think so.

If you have gotten this far I would like to emphasize two very important things about Proposed 2017 Formal Ethics Opinion 6: (1) it is a *proposed* opinion, and (2) it is being published *for comment*. If this proposed opinion makes you want to pack up and move to South Carolina, Ohio, Pennsylvania, or New Jersey, please unpack and send us your comments and concerns instead. ■

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

### Endnote

1. The New York State Bar Association released an opinion on the Avvo business model after this article was drafted. NY State Bar Ass’n. Comm. on Prof’l Ethics, Op. 1132 (8/8/17). The opinion does not address the fee-splitting issue, but concludes that the Avvo marketing fee includes an improper payment for a recommendation in violation of Rule 7.2(a).

# IOLTA Transitions Executive Directors

## Retirement of Executive Director

In August, Evelyn Pursley retired after 20 years of service to the State Bar's IOLTA program. Pursley has served as executive director of NC IOLTA since 1997. During her tenure, she worked with IOLTA's Board of Trustees to increase the number of lawyers participating in the program, and ultimately was successful in achieving a mandatory IOLTA program in 2007 and comparability in 2010, which maximizes interest income received. She also built a relationship with the Bankers' Association and promoted the use of cy pres and other court awards as an alternative source of funding. Pursley served as a leader for the legal services programs during years of reorganization, and encouraged the formation and continued collaboration of the programs through the Equal Justice Alliance. The IOLTA program and the State Bar Council congratulate Evelyn Pursley on her retirement and thank her for her dedicated service and leadership.

Mary Irvine, who began working with IOLTA, the Equal Justice Alliance, and the Equal Access to Justice Commission in 2014, has succeeded Ms. Pursley. Irvine brings significant experience in access to justice and philanthropy issues, having previously served as a program associate for both the UNC Center on Poverty, Work, and Opportunity and the North Carolina Network of Grantmakers. Irvine serves on the North Carolina Bar Association's *Pro Bono* Activities Committee and Foundation Oversight Committee, and the *Pro Bono* Alumni Board at UNC School of Law. Irvine has also served on boards of the UNC Law Alumni Association and the Orange County Rape Crisis Center, and previously volunteered as a guardian ad litem.

## Income

Income from IOLTA accounts is still relatively stagnant. A number of bank mergers over the past year have resulted in less favorable bank policies. However, recently one of our larger banks increased its interest rate on IOLTA accounts and we are hopeful to see more such increases. We will continue to work

with banks as the interest rate climate changes. In the second quarter of 2017, IOLTA interest income increased by 3.5% over 2016 2nd quarter income from IOLTA accounts.

## Grants

During this downturn in income from IOLTA accounts, IOLTA has relied heavily on cy pres and other court awards designated for the provision of civil legal aid to the poor. As has been reported, we received two separate distributions of funds from the Bank of America (BoA) settlement in 2015 and 2016 totaling \$12.8 million.

Using \$420,000 in funds from the first distribution of the BoA settlement to supplement available funds, IOLTA was able to make \$2 million in regular IOLTA grants in 2016. In 2017, regular IOLTA grants again exceeded \$2 million using the remainder of funds from the first BoA distribution.

The IOLTA trustees decided to open a separate grant cycle in 2016-2017 to begin to make grants with the additional BoA settlement funds received in 2016. Total grants of ~\$5.7 million over three years were made. That total includes a grant award of \$750,000 to the legal aid collaborative working on foreclosure prevention, and just under \$5 million in funds allocated for new and creative multi-year community redevelopment projects.

## State Funds

In addition to its own funds, NC IOLTA administers the state funding for legal aid on behalf of the State Bar. Total state funding distributed for the 2016-17 fiscal year was just over \$2.7 million. This legislative session the Access to Civil Justice Act was repealed and associated funding was eliminated. This amounts to a loss of \$1.7 million in funding for three organizations—Legal Aid of North Carolina, Legal Services of Southern Piedmont, and Pisgah Legal Services—to provide general civil legal services. NC IOLTA will continue to administer funding from filing fees specifically earmarked for domestic violence legal services, which total

approximately \$1 million annually.

The Equal Access to Justice Commission, Equal Justice Alliance, and other stakeholders will continue to work to demonstrate the need for state funding and improve this critical source of revenue for civil legal aid in North Carolina.

## IOLTA Leadership

The State Bar Council appointed Edward C. Winslow III as chair and Elizabeth L. Quick as vice-chair of the NC IOLTA Board of Trustees for 2017-18. Winslow previously served as managing partner at Brooks Pierce in Greensboro where he practices in the areas of banking and financial services, including representing bankers' associations and banks within and outside North Carolina. Winslow was recently appointed to the American Bar Association's Commission on IOLTA. Quick, who was also reappointed for a second three-year term, is a past-president of the North Carolina Bar Association. Quick's practice with Womble Carlyle in Winston-Salem focuses on estate planning, estate administration, and charitable giving. She has experience working with a number of charitable organizations and foundations, and has a strong interest in promoting philanthropy.

In addition to reappointing Quick, the council reappointed Sidney S. Eagles Jr. After many years in private practice, from 1983 to 2004, he served first as a judge and later as chief judge of the North Carolina Court of Appeals. Eagles has also served as counsel to the Speaker of the House and as a special deputy attorney general. He currently has an active mediation and arbitration practice.

The council also appointed Anita R. Brown-Graham. Brown-Graham rejoined the UNC School of Government in 2016 to lead a special initiative seeking to expand the school's capacity to work with public officials on policy issues that affect North Carolina communities. From 2007-2016 Brown-Graham served as director of the Institute for Emerging Issues (IEI) at NC State University. She also serves on a number of foundation boards. ■

# Committee Establishes Conditions for Participation in Avvo Legal Services

## Council Actions

At its meeting on July 28, 2017, the State Bar Council adopted the ethics opinions summarized below:

### 2017 Formal Ethics Opinion 3

#### *Advertisement with URL and No Other Identifying Information*

Opinion rules that a billboard advertisement need not contain the lawyer's name, firm name, or the firm's office address if the URL address on the advertisement lands on the lawyer's website where such information can be easily found.

### 2017 Formal Ethics Opinion 4

#### *Settlement Funds Subject to Statutory Lien*

Opinion rules that a lawyer is prohibited from disbursing settlement funds pursuant to the client's directive if the funds are subject to a perfected lien.

## Ethics Committee Actions

At its meeting on July 27, 2017, the Ethics Committee voted to continue to table proposed 2016 Formal Ethics Opinion 1, Contesting Opposing Counsel's Fee Request to Industrial Commission, pending the conclusion of appellate action in a case that is relevant to the proposed opinion. The committee also voted to revise and republish proposed 2017 Formal Ethics Opinion 2, and two new proposed opinions. All appear below.

The comments of readers on proposed opinions are welcomed. Comments received by October 12, 2017, will be considered at the next meeting of the Ethics Committee. Comments may be emailed to [ethicsadvice@ncbar.gov](mailto:ethicsadvice@ncbar.gov).

### Proposed 2017 Formal Ethics

#### Opinion 2

#### Maintaining Fiduciary Account in Accordance with Rule 1.15

**July 27, 2017**

*Proposed opinion rules that a lawyer representing an estate must maintain the checking account for the estate in accordance with Rule*

*1.15 consistent with the extent to which the lawyer has control over the account.*

#### Background:

On June 9, 2016, the North Carolina Supreme Court approved amendments to Rule 1.15, Safekeeping Property, and its subparts (frequently referred to as the "trust accounting rules"). The following opinion concerns a lawyer's obligations with respect to a fiduciary account, such as an estate account. Inquiries are answered based upon the rule as amended.

#### Inquiry #1:

A will names Lawyer as executor. After A dies, Lawyer opens a client file for the estate in his law office and begins serving as the personal representative for the estate. Lawyer intends to seek compensation for his services. Lawyer opens a checking account for the estate, makes himself the signatory on the account, and manages the checking account throughout the administration of the estate. What are Lawyer's management obligations for the account under Rule 1.15?

#### Opinion #1:

The checking account must be established as a lawyer's fiduciary account and managed in accordance with the provisions of Rule 1.15 and its subparts.

As the personal representative for the estate, Lawyer will serve in the role of a fiduciary and provide professional fiduciary services. The phrase "professional fiduciary services" is defined and explained in Rule 1.15-1(l) and cmt. [6] as service by a lawyer in any one of the various fiduciary roles undertaken by a lawyer that is not, of itself, the practice of law, but is frequently undertaken in conjunction with the practice of law. This includes service as a trustee, guardian, personal representative of an estate, attorney-in-fact, and escrow agent, as well as service in other fiduciary roles "customary to the practice of law." Rule 1.15, cmt. [6].

The funds Lawyer receives for the benefit

## 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.

of the estate are fiduciary funds and must be deposited in a fiduciary account. Fiduciary funds, another term defined in Rule 1.15-1, denotes funds belonging to someone other than the lawyer that are received by or placed under the control of the lawyer in connection with the performance of professional fiduciary services. Rule 1.15-1(g). A "fiduciary account," also defined in Rule 1.15, is "an account, designated as such, maintained by a lawyer solely for the deposit of fiduciary funds or other entrusted property of a particular person or entity." Rule 1.15-1(f).

Any property belonging to the estate received by or placed under the control of the lawyer in connection with the lawyer's furnishing of legal services or professional fiduciary services must be handled and maintained in accordance with all of the applicable provisions of Rule 1.15, including but not limited to:

- Rule 1.15-2: General Rules
- Rule 1.15-3(a): Check Format
- Rule 1.15-3(b) or (c)(as appropriate): Minimum Records
- Rule 1.15-3(f): Accountings for Fiduciary Property
- Rule 1.15-3(g): Minimum Record Keeping Period
- Rule 1.15-3(i): Reviews

*See Rule 1.15, cmts. [2], and [6]-[9].*

These duties include promptly depositing all fiduciary funds received by or placed under the control of the lawyer in a fiduciary account. Rule 1.15-2(c). They also include (1) review of the monthly bank statements and canceled checks for the account each month (the “monthly review”); (2) for each quarter, review of the statement of costs and receipts, client ledger, and cancelled checks of a random sample of representative transactions completed during the quarter (the “quarterly review”); (3) resolution within ten days of any discrepancies found during the monthly or quarterly reviews; and (4) preparation of a signed and dated report on each monthly and quarterly review. Rule 1.15-3(i). This list is not exhaustive and Lawyer is obligated to review Rules 1.15-2 and 1.15-3 to ensure compliance.

#### Inquiry #2:

Lawyer represents Estate of B and the personal representative of Estate of B in her official capacity. Lawyer opens a checking account for the estate and designates the personal representative as the signatory on the account. The personal representative will receive the bank statements. Lawyer, however, intends to retain possession of the checkbook, preparing checks for the personal representative’s signature as needed and depositing estate funds into the account when obtained. What are Lawyer’s obligations for the account under Rule 1.15?

#### Opinion #2:

The requirements of Rule 1.15-2 and 1.15-3 apply only to the extent that the lawyer has control over the estate account. In the instant inquiry, Lawyer has possession of the checkbook, but does not have signatory authority. Therefore, Lawyer is not obligated to follow the requirements of Rule 1.15 and its subparts that apply to the maintenance and disbursement of funds by one having signatory authority over the account, or with the review and reconciliation requirements of Rule 1.15-3. Lawyer, however, is obligated to follow the requirements of Rule 1.15 as applicable to items over which Lawyer has possession or control, such as properly safeguarding checks received for the estate, properly safeguarding the checkbook for the estate account, and not using any debit card received for the estate account to withdraw funds from the estate account.

For example, if Lawyer receives a check or other entrusted property for the benefit of the

estate, Lawyer must comply with the provisions of Rule 1.15 governing the handling of entrusted funds, including Rule 1.15-2(a), which sets forth the duty to identify, hold, and maintain entrusted property separate from the property of the lawyer and to deposit, disburse, and distribute only in accordance with Rule 1.15. This would include labeling a check or funds as property of the estate, and placing the check or funds in a suitable place of safekeeping until deposited in the estate account. Notice must be promptly given to the personal representative if the personal representative is responsible for depositing funds to the account.

Lawyer represents the estate and the personal representative in her official capacity. RPC 137. Therefore, Lawyer has a duty to provide competent and diligent representation. Rule 1.1 and Rule 1.3. Competent and diligent representation requires Lawyer to advise the personal representative of her fiduciary responsibilities relative to the safekeeping of the funds of the estate and her duty to administer the estate in compliance with the law. *See generally* 2002 FEO 3 (lawyer for estate may seek removal of personal representative if the personal representative’s breach of fiduciary duties constitutes grounds for removal under the law). To ensure that the estate account is properly managed, checks are not written against insufficient funds, and estate funds are protected from theft, competent and diligent representation dictates that Lawyer periodically meet with the personal representative to review the estate account documents, including the bank statements and canceled checks. If Lawyer prepares checks for the personal representative’s signature, Lawyer must conduct a periodic review of the balance for the estate account sufficient to guard against the preparation of a check for the personal representative’s signature that would exceed the balance of the account.

#### Inquiry #3:

Lawyer represents Estate of C and the personal representative of the Estate of C in her official capacity. Lawyer opens the checking account for the estate. Lawyer and the personal representative are designated as signatories on the estate account. Lawyer has the checkbook for the account and receives the bank statements. Although Lawyer is the person primarily responsible for depositing funds into the estate account and writing checks, the personal representative may also deposit funds

into the estate account and write checks. What are Lawyer’s duties with regard to the estate account?

#### Opinion #3:

As stated in Opinion #2, the requirements of Rule 1.15-2 and Rule 1.15-3 apply only to the extent the lawyer has control over the estate account. Because Lawyer has signatory authority, has possession of the checkbook, and receives the bank statements, Lawyer has control of the estate account and is, therefore, obligated to follow the requirements of Rule 1.15-2 and Rule 1.15-3. Lawyer must open the estate account as a lawyer’s fiduciary account and review the estate account in accordance with Rule 1.15-3(i): Reviews. Furthermore, Lawyer must advise the personal representative of her fiduciary responsibilities relative to the safekeeping of the funds of the estate and her duty to administer the estate in compliance with the law. *See* Opinion #2.

#### Inquiry #4:

Lawyer represents Estate of D and the personal representative of Estate of D in her official capacity. The personal representative opens the checking account for the estate and manages the account, including the preparation of checks at Lawyer’s direction. What are Lawyer’s obligations for the account under Rule 1.15?

#### Opinion #4:

Lawyer is not obligated to follow Rule 1.15. *See* Opinion #2.

#### Inquiry #5:

Lawyer represents Estate of E and the personal representative of Estate of E in her official capacity. The personal representative opens a checking account for the estate and manages the account, including receipt of the bank statements and the preparation of checks. The personal representative is the only signatory on the estate checking account. The personal representative, however, asks Lawyer’s paralegal to take possession of the checkbook. Each month, the personal representative goes to Lawyer’s law firm, writes checks, and gives the bills and the checks to paralegal. Paralegal then mails out the checks. What are Lawyer’s obligations to the estate account under these circumstances?

#### Opinion #5:

*See* Opinion #2. Additionally, under Rule

5.3(b), Lawyer must make reasonable efforts to ensure that the paralegal's conduct is compatible with the professional obligations of Lawyer. This includes making reasonable efforts to ensure that the paralegal understands and complies with the professional obligation of Lawyer to safeguard the checkbook under Rule 1.15-2(d) as well as with the professional obligation of Lawyer under Rule 8.4(b) and (c) not to misappropriate fiduciary funds by means of forged checks or other methods.

#### Inquiry #6:

Did the June 2016 amendments to Rule 1.15 change or add to the obligations of a lawyer with respect to a fiduciary account, or otherwise change the answers to Inquiries #1 and #2 above?

#### Opinion #6:

Yes. The 2016 amendments found in Rule 1.15-3(i) now require monthly and quarterly reviews for fiduciary accounts as well as general trust accounts.

#### Inquiry #7:

In the representations described in Inquiries #1 and #2 above, may Lawyer delegate the management of the fiduciary account to a nonlawyer assistant?

#### Opinion #7:

Day-to-day management of the account may be delegated to a nonlawyer assistant. However, the responsibility for conducting the monthly and quarterly reviews required by Rule 1.15-3(i) may not be delegated. The rule specifies that "the lawyer" shall review the records. To fulfill the intended purpose of this provision, the lawyer, rather than an assistant, must conduct these reviews. Lawyer must periodically review underlying bank records, independently of any records prepared or provided by the assistant, to ensure that the non-lawyer's conduct is compatible with the professional obligations of the lawyer. As explained in comment [23] to Rule 1.15:

The mandatory monthly and quarterly reviews and oversight measures in Rule 1.15-3(i) facilitate early detection of internal theft and early detection and correction of errors. They are minimum fraud prevention measures necessary for the protection of funds on deposit in a firm trust or fiduciary account from theft by any person with access to the account. Internal theft from trust accounts by insiders at a law

firm can only be timely detected if the records of the firm's trust accounts are routinely reviewed. For this reason, Rule 1.15-3(i)(1) requires monthly reviews of the bank statements and cancelled checks for all general, dedicated, and fiduciary accounts.

Although Lawyer may delegate day-to-day management of the account to a nonlawyer assistant, Lawyer remains professionally responsible for compliance with the requirements of Rule 1.15 and its subparts. Therefore, the assistant must be appropriately instructed, trained, and supervised concerning the requirements of the rule. Rule 5.3.

#### Inquiry #8:

If Lawyer delegates the day-to-day management of a fiduciary account to a nonlawyer assistant, may that assistant be a signatory on the account?

#### Opinion #8:

The trust accounting rules do not prohibit this. However, the practice increases the risk of internal fraud. *See, e.g.*, Rule 1.15-2(s) (prohibiting an assistant responsible for reconciling a trust account from being a signatory on the account). A lawyer should not permit an assistant to be a signatory on a fiduciary account unless the lawyer or law firm has established fraud prevention procedures that will protect the fiduciary funds from internal theft. *See Rule 1.15, cmt. [25].*

### Proposed 2017 Formal Ethics

#### Opinion 5

#### Agreement Not to Solicit or Hire Lawyers from Another Firm As Part of Merger Negotiations

July 27, 2017

*Proposed opinion rules that an agreement between law firms engaged in merger negotiations not to solicit or hire lawyers from the other firm for a relatively short period of time after expiration of the term of the agreement is permissible because it is a de minimis restriction on lawyer mobility that does not impair client choice and is reasonable under the circumstances.*

#### Inquiry:

Law Firm A entered into an agreement with Law Firm B to explore merger of the two law firms. In addition to provisions addressing non-disclosure of confidential client and proprietary firm information, the agreement included the following provision:

**Non-Solicitation.** During the term of this Agreement and, should Law Firm A and Law Firm B decide not to merge, for a period of two (2) years after termination of this Agreement (the "Non-Solicitation Period"), (i) Law Firm A agrees that it shall not induce or solicit any of the partners, associates, or other employees of Law Firm B to join Law Firm A; and (ii) Law Firm B agrees that it shall not induce or solicit any of the partners, associates, or other employees of Law Firm A to join Law Firm B. The foregoing restriction shall not apply to (i) associates or other employees who are hired through a party's recruiting efforts resulting from the placement of general media advertisements or the retention of "head-hunters" (provided that the headhunters are not specifically directed to solicit associates or other employees from the other party), or (ii) the hiring by a party of the other party's associates or other employees who make unsolicited contacts seeking employment so long as such individuals did not directly participate in meetings, negotiations, or similar discussions between the parties concerning the terms of the potential merger. Each party agrees not to hire or engage as partners or counsel any individual who is currently a partner or counsel with the other party to this Agreement for a period of two years from the termination of this Agreement.

The term of the agreement is one year, but is subject to early termination based upon ten days' notice by a party. Therefore, the potential period of restriction may be as long as three years.

Attorney X is a partner in Law Firm A and is interested in joining Law Firm B. She did not participate in meetings, negotiations, or discussions between the law firms relative to the agreement or to a potential merger with Law Firm B. Nevertheless, the managing lawyers for Law Firm B have refused to talk to her about becoming a partner because the period of restriction has not expired. Law Firm B will talk to Attorney X about joining the firm if she obtains a waiver of the restriction from Law Firm A.

Is this provision of the agreement prohibited under Rule 5.6(a)?

#### Opinion:

No, because it imposes a *de minimis* restriction on the mobility of the lawyers in the firms, does not impair client choice, and is rea-

sonable under the circumstances.

Rule 5.6(a) prohibits a lawyer from participating in offering or making a partnership, shareholder, operating, employment, or other similar type of agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement. As explained in 2012 FEO 12, “[t]his prohibition on restrictive covenants protects the freedom of clients to choose a lawyer and promotes lawyer mobility and professional autonomy.” Rule 5.6, cmt. [1].” Ethics opinions interpreting the rule usually address the former concern. For example, three State Bar opinions evaluate whether financial disincentives upon departure from a law firm are disguised penalties for competition because “firm” clients will follow the departing lawyer. See 2007 FEO 6, 2008 FEO 8, and 2012 FEO 12. There are no opinions that provide insight into agreements that solely restrict the mobility of lawyers as does the agreement at issue. Therefore, this is a matter of first impression.

Restrictive covenants are not, however, foreign to the Rules of Professional Conduct. Rule 1.17, Sale of a Law Practice, permits a lawyer to sell a law practice or an area of law practice, including good will, if a number of conditions are satisfied, including the following: “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 practice..” Rule 1.17(a). Where a reasonable business purpose exists, the Rules permit some limitations on lawyer mobility.

Similarly, 2007 FEO 6 and 2008 FEO 8 recognize that a financial disincentive upon the departure of a lawyer may be permissible. Those opinions permit partnership, shareholder, or other similar agreements to include a post-departure repurchase, buy-out, or fee division provision if the provision is fair, takes into account the loss in firm value generated by the lawyer’s departure, and is not based solely upon loss in value due to the loss of client billings. Again, if there is a reasonable business purpose, a restriction that impacts lawyer mobility may be permissible.

The non-solicitation provision in this inquiry is primarily a restriction on the law firms that are a party to the agreement in that it restricts the recruiting activities of the firms. To the extent that the provision restricts the mobility of lawyers in the two firms, the restriction is for a relatively short, defined peri-

od of time and only with regard to employment with one other law firm; the lawyers in the firms are free to seek employment with any other law firm. In addition, the provision does not prevent or inhibit a client from following a lawyer who departs one of the firms for employment with a firm not subject to the agreement. Thus, the provision imposes a *de minimis* restriction on lawyer mobility and does not impair client choice.

As noted in the Scope section of the Rules, “[t]he Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself.” Rule 0.2, cmt. [1]. It is surmised that the non-solicitation provision was included in the agreement to foster the trust necessary for both firms to disclose financial information about the productivity of the lawyers in the firms without fear that, should the merger negotiations be abandoned, the other firm would attempt to lure highly productive lawyers or “rainmaker” lawyers away from the other firm. The provision was reasonable<sup>1</sup> under the circumstances and, given its limited duration and effect, does not violate Rule 5.6(a).

No opinion is expressed on the legal enforceability of the provision in this inquiry or other similar provisions.

### **Endnote**

1. Whether a restriction on lawyer mobility in an agreement between law firms engaged in merger negotiations is reasonable will depend on various factors, including the specific terms of the restriction, the number of law firms involved in the merger negotiations, and the likelihood of employment opportunities with law firms not involved in the merger negotiations.

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## **Proposed 2017 Formal Ethics Opinion 6 Participation in Online Platform for Finding and Employing a Lawyer July 27, 2017**

*Proposed opinion rules that a lawyer may participate in an online platform for finding and employing lawyers subject to certain conditions.*

### **Introduction:**

Avvo, Inc. operates an online platform for accessing legal services. Its website includes a directory of United States lawyers that was derived from public records and the membership lists of licensing agencies. Lawyers listed in the directory are rated by Avvo using a rating system developed by the company.

Lawyers do not pay to be included in the directory, and consumers do not pay to obtain access to the directory.

Avvo also offers “fixed fee legal services from local lawyers” on its website. Known as Avvo Legal Services (ALS), this service allows consumers to select and employ a lawyer to perform an “unbundled” or discrete legal service. Lawyers in private practice agree to participate in the program and to comply with Avvo’s terms of service. Avvo determines the legal services that will be offered and the fee that will be charged for each service. It charges participating lawyers a percentage of the legal fee earned by the lawyer for each service. This charge to the lawyer is called a “marketing fee.” The marketing fees vary depending upon the legal service.

Legal services available on the ALS platform include advice sessions, document reviews, document drafting, and, in some practice areas, a “start to finish” service such as a simple divorce. The legal fee for each service is displayed on the website together with a description of the legal service that identifies “what’s included” and “what’s not included.” After a consumer selects a legal service, the consumer clicks on the “choose a lawyer” button and is prompted to provide a zip code. The profiles of participating lawyers in or near the provided zip code appear. The consumer can then “select” one of the lawyers from the list to perform the legal service. After a lawyer is selected, the charge for the service is displayed. The page also displays the following “important information:”

- Additional legal services—if you want additional legal services beyond the purchased service, you can make arrangements directly with the attorney.
- Attorney-client relationship—Once your phone call begins, everything you discuss is protected by attorney-client privilege, meaning what you share is confidential; this relationship does not exist until your call takes place.
- Representation—the attorney-client relationship may not be formed if the attorney is unable to help you. This can happen if the lawyer feels they [sic] are not qualified to answer your questions or if there’s a conflict of interest.
- Representation agreement—for some legal services, the attorney could require that you sign a representation agreement before proceeding with the service.
- Attorney advertising—Attorneys partic-

ipating in Avvo Legal Services pay Avvo a marketing fee for each legal service provided.

The consumer then provides the information necessary to pay online by credit card. Once the credit card information is confirmed by Avvo, the consumer is advised that the selected lawyer will call the consumer within a specified period of time. Avvo provides the potential client's identifying information and a description of the legal matter to the chosen lawyer. The lawyer is also given a tracking phone number to use to call the consumer. When the lawyer places the phone call over this designated line, Avvo tracks the call to confirm that the call was completed and its length. Avvo states that it does not monitor the content of the phone call and has no ability to do so. Upon confirmation that the phone call has occurred for a designated length of time, the consumer's credit card is charged the full amount for the legal service purchased. Avvo represents that it will refund the fee paid by a consumer if the legal services are not delivered or the consumer is not satisfied with the service.

The credit card funds are deposited in an Avvo bank account. On a monthly basis, Avvo pays the participating lawyer for all ALS legal fees generated by the lawyer in the preceding month. The lawyer designates the bank account (trust or operating account) into which the fees will be deposited. Also on a monthly basis, Avvo collects its marketing fees for the legal services provided by the lawyer in the preceding month by debiting the operating account designated by the lawyer.

#### **Inquiry:**

May a lawyer participate in ALS or other similar online platforms for consumers to identify, select, and employ a lawyer?

#### **Opinion:**

Yes, subject to certain conditions which are addressed below. Although this opinion references Avvo or ALS throughout, it is applicable to any other similar online platform for marketing legal services.

#### ***Unauthorized Practice of Law***

NC Gen. Stat. § 84-5 makes it unlawful for a corporation to practice law or to "hold itself out to the public or advertise as being entitled to practice law." Rule 5.5(f) prohibits a lawyer from assisting in the unauthorized practice of law by another. Therefore, a lawyer participating in ALS must determine that

Avvo is not engaged in the practice of law and is not holding itself out as able to do so. To this end, Avvo's advertising and website must make abundantly clear that Avvo does not provide legal services to others and that its only role is as a marketing agent or platform for the purchase of legal services from independent lawyers. In addition, there may be no limitations placed on the consumer's right to engage a participating lawyer to provide different or additional legal services outside of the ALS platform.

#### ***Lawyer Referral Service***

Rule 7.2(d) prohibits a lawyer from participating in a lawyer referral service that is operated for a profit or that collects any sums from clients or potential clients for use of the service. If ALS, which is operated for a profit, is a lawyer referral service, North Carolina lawyers may not participate. A lawyer referral service is defined in 2010 FEO 4 as "a service that purports to screen the lawyers who participate and to match prospective clients with suitable participating lawyers" (citing 2004 FEO 1). The opinion holds that a for-profit barter exchange is not a lawyer referral service, and North Carolina lawyers may participate where the barter service "provides a complete, impartial list of all participating lawyers, does not purport to recommend or select a lawyer for an exchange member seeking legal services, and does not restrict the number of participating lawyers." Similarly, ALS is not a lawyer referral service if, after indicating the type of service desired, the consumer has the ability to select a lawyer from the list of all participating lawyers in a particular geographic area who are willing to provide the selected service. As long as ALS does not exercise discretion to match prospective clients with participating lawyers, the requirements of Rule 7.2(d) are not implicated.

#### ***Independent Professional Judgment and Non-interference in the Professional Relationship***

The exercise of independent professional judgment by a lawyer is an essential feature of the client-lawyer relationship. See e.g., Rule 1.8(f) and Rule 5.4(c). If a third party interferes in the lawyer's professional judgment, the lawyer is not fulfilling his duty to the client to provide competent, independent legal advice, free of conflicts of interest, and the third party may be engaged in the unauthorized practice of law. Comment [11] to Rule 1.8, which addresses third party payment for a lawyer's services, is instructive:

Because third-party payers frequently have interests that differ from those of the client, including interests in minimizing the amount spent on the representation and in learning how the representation is progressing, lawyers are prohibited from accepting or continuing such representations unless the lawyer determines that there will be no interference with the lawyer's independent professional judgment and there is informed consent from the client. *See also* Rule 5.4(c) (prohibiting interference with a lawyer's professional judgment by one who recommends, employs, or pays the lawyer to render legal services for another).

Rule 1.8(f), cmt. [11].

Similarly, Avvo has business interests that differ from the interests of the consumers who use its website. Therefore, once a consumer selects a lawyer using the ALS platform, there can be no interference by Avvo in the lawyer's professional judgment or with the professional relationship between the consumer (now client) and the lawyer. For example, Avvo may not limit a participating lawyer's freedom to advise a consumer that the legal service selected on the ALS platform is not appropriate given the consumer's stated legal problem. Similarly, Avvo may not limit the lawyer's authority to recommend different or additional legal services not offered on the ALS platform. In addition, Avvo may not make recommendations to the lawyer relative to the legal representation of the client, including the nature and extent of the legal services that the lawyer determines are appropriate, and may not have a policy or practice of threatening to remove or removing a lawyer from the list of participating lawyers for the exercise of independent professional judgment as described above.

Non-interference is particularly important with regard to confidential communications between the lawyer and the client, including the transmission via Avvo's website of documents by the consumer to the lawyer and the use of the tracking phone line. Rule 1.6(a) requires a lawyer to maintain the confidentiality of any information learned during the professional relationship. To preserve confidentiality, Avvo may not be a party to client-lawyer communications about the substance of the representation.

It is recommended that Avvo's non-interference in a participating lawyer's professional judgment or with client-lawyer relationship be confirmed in writing.

### *Determination of the Amount of the Legal Fee and Resolution of Fee Disputes*

Rule 1.5(a) requires a lawyer to charge and collect only legal fees that are not illegal or “clearly excessive.” The rule lists non-exclusive factors to be considered when determining whether a fee is clearly excessive. Thus, a lawyer must exercise professional judgment when establishing an hourly rate or setting a fee for a particular legal service.

Although Avvo establishes the fees for all of the legal services offered on the ALS platform, to comply with Rule 1.5, a participating lawyer is still obliged to evaluate the fee that will be charged for any legal service that the lawyer agrees to provide via ALS. If a participating lawyer determines that a fee charged by Avvo for a particular legal service is clearly excessive, the lawyer must decline to offer that legal service until Avvo reduces the fee to an amount that complies with the lawyer’s duty under Rule 1.5(a). Similarly, if a participating lawyer determines that there are statutory limitations on a particular legal fee or prior approval of a tribunal is required, the lawyer must decline to offer the legal service unless the statutory limitations are satisfied or payment of the fee is deferred until the approval of the tribunal is obtained.

Rule 1.5(f) requires a lawyer having a dispute with a client regarding a fee for legal services to advise his client of the North Carolina State Bar’s program of fee dispute resolution and to participate in good faith in the resolution process if the client submits a proper request. Avvo may not participate in a fee dispute between the lawyer and the client. However, Avvo’s response to complaints about its process for enabling consumers to identify and hire a lawyer does not implicate this prohibition. Moreover, if Avvo provides a “money-back guarantee” of its service, a refund by Avvo of the fee paid by a consumer may resolve the dispute with the lawyer and is permissible.

### *Collection and Disbursement of the Legal Fee*

The ALS model calls for the consumer’s credit card to be charged for the full amount of the fee for a chosen legal service as soon as the tracked phone call between the participating lawyer and the consumer (now client) is complete. The money remains in Avvo’s bank account until the following month when the legal fee is transferred by Avvo to an account designated by the lawyer.

Rule 1.15-2(a) requires an unearned legal

fee to be deposited to a lawyer’s trust account and withdrawn from the trust account once the fee is earned. To comply with Rule 1.15-2(a), a trust account must be the designated repository for a legal fee collected and forwarded to a participating lawyer by Avvo unless the lawyer is confident that the legal services will be complete and the fee earned by the time that the fee is transferred by Avvo to the lawyer’s account. In the alternative, the ALS website must fully disclose that the fee is a flat fee for legal services that is earned by the lawyer immediately (and in advance of the full provision of legal services). *See* 2008 FEO 10.

Nothing in the Rules of Professional Conduct requires a lawyer to collect a fee directly from a client or prohibits the use of an intermediary to collect a fee. Nevertheless, a lawyer may not participate in or facilitate the collection of fees by an intermediary that is unreliable or untrustworthy. *See* Rule 8.4(g). Therefore, before participating in ALS, or a similar online platform that collects legal fees from consumers and holds them for a period of time, the lawyer must make a reasonable investigation into the reliability, stability, and viability of the operating company, to determine whether reasonable measures are being taken to segregate and safeguard consumer funds against loss or theft and, should consumer funds be lost inadvertently, that the company has the resources to compensate the consumer. Further, the funds, once collected, must be transferred to the lawyer’s designated account within a reasonable period of time so as to minimize the risk of loss while the funds are in the possession of another, and to enable the collection of interest on the funds for the IOLTA program or the client as appropriate. *See* 27 N.C.A.C. 1B, Sect. 1300. If the lawyer cannot, in good faith, conclude that payments for legal services will not be at risk, the lawyer may not participate in the online platform.

### *Sharing a Legal Fee with Nonlawyer*

Rule 5.4(a) sets forth the “traditional limitations” on sharing legal fees with a non-lawyer which limitations are “to protect the lawyer’s professional independence of judgment.” Rule 5.4, cmt. [1]. Although Avvo has taken care to separate the transfer of the intact legal fee for a particular legal service to the lawyer from the payment of the marketing fee to Avvo from the lawyer’s operating account, the fact that the marketing fee is a percentage of the legal fee implicates the fee-sharing prohibition. Nevertheless, similar arrangements have been approved when the

nonlawyer exercised no influence over the professional judgment of the lawyer and the fee was a reasonable charge for marketing or advertising services.

In 2010 FEO 4, the fee structure of a barter exchange was found not to constitute fee-sharing in the following passage:

The manager of the barter exchange charges a cash transaction fee of 10% on the gross value of each purchase from a member through the exchange. The transaction fee is paid by the recipient of the services; the lawyer is not required to give 10% of his fee to the exchange manager...The use of credit cards to pay for legal services has long been allowed, although credit card banks routinely charge a “discount fee” that is a percentage of the legal fee charged to the credit card. *See* CPR 129 (lawyers may accept payment of legal fees by credit card). Paying a percentage fee to a barter exchange manager is no different than paying a discount fee to a credit card bank. The fee is a surcharge on the transaction and is not fee sharing with a nonlawyer.

In 2011 FEO 10, participation in an online group coupon website was permitted although the website company retained a portion of the fee paid by a purchaser for an anticipated legal service. The opinion holds that the fee retained by the website company was the cost of advertising on the website and did not violate Rule 5.4(a). Stating that “the purpose for the fee-splitting prohibition [protection of independent professional judgment] is not confounded by this arrangement,” the opinion explains:

There is no interaction between the website company and the lawyer relative to the legal representation of purchasers at any time after the fee is paid online other than the transfer of the proceeds of the “daily deal” to the lawyer. Rule 7.2(b)(1) allows a lawyer to pay the reasonable cost of advertisements. As long as the percentage charged against the revenues generated is reasonable compensation for the advertising service, a lawyer may participate.

Similarly, if there is no interference by Avvo in the independent professional judgment of a participating lawyer and the percentage marketing fees paid by the lawyer to Avvo are reasonable costs of advertising as allowed by Rule 7.2(b)(1), the lawyer is not prohibited from participating in ALS on the

basis of the fee-sharing prohibition.

#### *Truthful and Non-Misleading Communications*

Rule 7.1 prohibits a lawyer from making a false or misleading communication about the lawyer or the lawyer's services. If a lawyer participating in ALS provides information to Avvo for inclusion in the lawyer's profile or the lawyer exercises any control over the content of the lawyer's profile or of the website, the lawyer is professionally responsible for that content. The lawyer may not submit untruthful or misleading information to the website. A participating lawyer is responsible for monitoring information on the Avvo website about the lawyer and his services. If Avvo posts information about the lawyer or the lawyer's services that the lawyer knows is false or misleading, the lawyer must demand its removal or, if given the opportunity, post a disclaimer or corrective information. If neither is possible, the lawyer must cease to participate in ALS.

Similarly, if Avvo posts false or misleading generic statements about all participating lawyers, the lawyer must demand that the statement be clarified, corrected, or removed as appropriate to render the statement truthful and not misleading. If Avvo is unwilling to do so, the lawyer may not participate in ALS.

With regard to user-generated content (i.e., online reviews), a lawyer may not solicit or submit false or "fake" reviews for inclusion in his profile.

"Satisfaction guaranteed" is prominently displayed on the website landing page for ALS. Because it is impossible to guarantee the outcome of a legal matter, an outcome guarantee by a lawyer is prohibited under Rule 7.1(a) as a misleading communication. However, it appears that Avvo guarantees consumer "satisfaction" with its process for identifying and hiring a lawyer; Avvo does not guarantee a particular outcome or resolution of the consumer's legal matter. If Avvo abides by its rep-

resentation and, without dispute, refunds a consumer's fee payment upon receiving a complaint of dissatisfaction with the service, the guarantee does not constitute a false representation by an agent of the lawyer about the lawyer's services.

#### *Conflicts of Interest and Other Professional Duties*

The fact that a client-lawyer relationship is initiated via ALS does not relieve the lawyer of the responsibility for complying with all of the lawyer's duties to a client including, but not limited to the following: (1) ensuring the limited scope of the representation is reasonable under the circumstances (Rule 1.2(c)); (2) checking for conflicts of interest upon initial contact with a prospective client (Rules 1.7, 1.8, and 1.9); (3) keeping the client reasonably informed about the status of the matter (Rule 1.4); and (4) protecting confidential client information from unauthorized disclosure (Rule 1.6). ■

## Dispute Resolution (cont.)

MSC and FFS Programs. AOC reports that large numbers of sitting judges and court staff, mediators, and lawyers—all a part of the "baby boomer" generation—will be retiring during the next ten years. These publications will serve as a resource for new judges and court staff who will be replacing these retirees, and who may be less familiar with the DRC's programs.

• Mediator Agreement Drafting and *Pro Se* Parties. In 2013 the DRC considered the complex issue of mediator drafting when a *pro se* party is participating in a mediation and an agreement is reached. This exploration led to the adoption of NC State Bar Formal Ethics Opinion 2 issued in 2012, and resulted in the adoption of two Advisory Opinions (AO No. 28 and AO No. 31) by the DRC. The DRC also recently published a *Guide to Mediation for Parties Not Represented by Attorneys*, which is included in the *Benchbooks* and posted on the DRC website.

### Moving Forward—Seeking a Vision for Tomorrow

During its first 20 years, the DRC established a framework for certification and regulation, initiated new court mediation programs, drafted multiple sets of rules and the

Standards of Conduct for Professional Mediators, promoted mediation, and worked diligently to support judges and court staff in their efforts to implement their programs. The court programs have yielded excellent results and, with the passage of time, now sell themselves due to their success. The early years of frantic program expansion appear to be behind us, and we are now tweaking certification and regulatory frameworks rather than creating them out of whole cloth.

Significant commitment and tireless work by many have allowed the DRC to accomplish all that it has. In just two decades the mediation programs in our courts have gone from experimental to institutionalized. Much credit for this success is due to our state's lawyers, judges, and mediators, who, along with court staff and other dedicated professionals, have woven the tapestry of alternative dispute resolution in North Carolina from its beginnings. I sincerely thank each of you as a member of our Bar for your contribution to this effort.

Now is an opportune time to take stock of where we are, to develop a future vision of mediation and other dispute resolution efforts in the courts and elsewhere in our state, and to determine how the commission can participate in realizing that vision.

The next 20 years for the DRC can be a time of building on program successes, of con-

tinuing its dedication to the integrity of the mediation process and to the high ethical standards of its mediators and trainers, and of promoting further innovation in the use of alternatives to litigation. The commission pledges to continue this work, and we hope that you will add your voices to our discussions, your answers to our questions, and your ideas to our proposals.

This will be demanding work, but such an effort is consistent with a challenge made by Judge Walker: "We are ordering our citizens to participate in mediation and to pay for the opportunity. That makes it incumbent upon us to always be evaluating our programs and be looking for ways to improve them. I would hope the Dispute Resolution Commission would take an active role in championing such efforts."

I believe that if we continue to collaborate, the pathway to the future will bring further integration of mediation and other dispute resolution techniques into our justice system and other facets of our society, thereby benefiting those whom we each serve foremost, the people of the great state of North Carolina. ■

*Gary Cash is the chair of the North Carolina Dispute Resolution Commission. He wishes to express his sincere gratitude to DRC Executive Director Leslie Ratliff for her invaluable assistance in preparing this article for publication.*

# Amendments Pending Approval by the Supreme Court

At its meetings on April 21, 2017, and July 28, 2017, the North Carolina State Bar Council voted to adopt the following rule amendments for transmission to the North Carolina Supreme Court for approval (for the complete text of the proposed rule amendments see the Spring 2017 and Summer 2017 editions of the *Journal* or visit the State Bar website):

## **Proposed Amendments to the Rule on Prehearing Procedure in Proceedings Before the DHC**

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

The proposed amendments require a settlement conference with the parties before a DHC panel may reject a proposed settlement agreement.

## **Proposed Amendment to IOLTA's Fiscal Responsibility Rule**

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

The proposed amendment clarifies that the funds of IOLTA may only be used for the purposes specified in the IOLTA rules.

## **Proposed Amendment to the Rule on Uses of the Client Security Fund**

27 N.C.A.C. 1D, Section .1400, Rules Governing the Administration of the Client Security Fund of the North Carolina State Bar

The proposed amendment clarifies that the Client Security Fund may only be used for the purposes specified in the Client Security Fund rules.

## **Proposed Amendments to The Plan of Legal Specialization**

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

A proposed new rule in The Plan of Legal Specialization allows certified specialists with special circumstances to be placed on inactive status for a period of time and to regain their status as certified specialists upon satisfying

certain conditions. A proposed amendment to the rule on the annual meeting of the Board of Legal Specialization changes the date for the meeting to the date of the board's spring retreat.

## **Proposed Standards for New Specialty in Privacy and Information Security Law**

27 N.C.A.C. 1D, Section .3300, Certification Standards for the Privacy and Information Security Law Specialty

A proposed new section of the specialization rules creates a specialty in privacy and information security law, and establishes the standards for certification in that specialty.

## **Proposed New Retired Status Rule in The Plan for Certification of Paralegals**

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

The proposed new rule creates a retired status for certified paralegals subject to certain conditions.

## **Proposed Amendments to the Rules of Professional Conduct**

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

Proposed amendments to Rule 1.3, Diligence, and Rule 8.4, Misconduct, of the Rules of Professional Conduct, clarify the standards for imposition of professional discipline under each rule. The proposed amendments to the comments to Rule 7.2, Advertising, and Rule 7.3, Direct Contact with Potential Clients, explain the terms "electronic communication(s)" and "real-time electronic contact" as used in the rules, and alert lawyers to state and federal regulation of electronic communications.

## **Proposed Amendments to the Rules Governing Admission to the Practice of Law**

The Board of Law Examiners' comprehensive rewrite of the Rules Governing the Admission to the Practice of Law includes

## **Highlights**

- Electronic signatures allowed on trust account checks under proposed amendment to Rule 1.15-2.
- Comprehensive re-write to Rule 3.5 provides better guidance on the prohibition on *ex parte* communications with a judge.
- New exception to fee-sharing prohibition in Rule 5.4 explicitly permits payment of a portion of a fee to credit card processors and other businesses.

## **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. Unless otherwise noted, proposed additions to rules are printed in bold and underlined; deletions are interlined.

## **Comments**

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

proposed amendments expressly adopting the Uniform Bar Examination as the official bar examination for general applicants to the North Carolina Bar.

# Proposed Amendments for Publication

At its meeting on July 28, 2017, the council voted to publish the following proposed amendments to the governing rules of the State Bar for comment from the members of the Bar:

## Proposed Amendments to the Rule on Standing Committees of the Council

27 N.C.A.C. 1A, Section .0700, Standing Committees of the Council

The proposed amendments eliminate the Technology and Social Media Committee and establish the Communications Committee as a standing committee of the State Bar Council.

## Rule .0701, Standing Committees and Boards

(a) Standing Committees. Promptly after his or her election, the president shall appoint members to the standing committees identified below to serve for one year beginning January 1 of the year succeeding his or her election.....

(1) Executive Committee...

(8) ~~Technology and Social Media Communications Committee. It shall be the duty of the Communications Committee to develop and coordinate official North Carolina State Bar communications to its membership and to third parties, including the use of printed publications, emerging technology, and social media. It shall be the duty of this committee to stay abreast of technological developments that might enable the North Carolina State Bar to better serve and communicate with its members and the public, and to develop processes, procedures and policies for the deployment and use of social media and other means of disseminating official information.~~

## Proposed Amendments to the Plan for Certification of Paralegals

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

The proposed amendments allow applicants for paralegal certification who hold national certifications from qualified national paralegal organizations (including the

CLA/CP certification from the National Association of Paralegals and the PACE-Registered Paralegal Certification from the National Federation of Paralegal Associations) to sit for the certification exam although the applicants have not satisfied the educational requirement for certification. The proposed amendments also delete a provision that allowed alternative qualifications for certification during the first two years of the program. Another proposed amendment requires certain qualified paralegal studies programs to include the equivalent of one semester's credit in legal ethics.

## Rule .0119 Standards for Certification of Paralegals

(a) To qualify for certification as a paralegal, an applicant must pay any required fee, and comply with the following standards:

(1) Education...

~~(2) National Certification. If an applicant has obtained and thereafter maintains in active status at all times prior to application (i) the designation Certified Legal Assistant (CLA)/Certified Paralegal (CP) from the National Association of Legal Assistants; (ii) the designation PACE-Registered Paralegal (RP)/Certified Registered Paralegal (CRP) from the National Federation of Paralegal Associations; or (iii) another national paralegal credential approved by the board, the applicant is not required to satisfy the educational standard in paragraph (a)(1).~~

(3) Examination...

~~(b) Alternative Qualification Period. For a period not to exceed two years after the date that applications for certification are first accepted by the board, an applicant may qualify by satisfying one of the following:~~

~~(1) earned a high school diploma, or its equivalent, worked as a paralegal and/or a paralegal educator in North Carolina for not less than 5000 hours during the five years prior to application, and, during the 12 months prior to application, completed three hours of continuing legal education in professional responsibility, as approved by the board;~~

~~(2) obtained and maintained at all times prior to application the designation Certified Legal Assistant (CLA)/Certified~~

~~Paralegal (CP), PACE Registered Paralegal (RP), or other national paralegal credential approved by the board and worked as a paralegal and /or a paralegal educator in North Carolina for not less than 2000 hours during the two years prior to application; or~~

~~(3) worked as a paralegal and/or a paralegal educator in North Carolina for not less than 2000 hours during the two years prior to application and fulfilled one of the following educational requirements:~~

~~(A) as set forth in Rule .0119(a)(1), or~~

~~(B) earned an associate's or bachelor's degree in any discipline from any institution of post secondary education that is accredited by an accrediting body recognized by the United States Department of Education and successfully completed at least the equivalent of 18 semester credits at a qualified paralegal studies program, any portion of which credits may also satisfy the requirements for the associate's or bachelor's degree.~~

~~(C) Notwithstanding an applicant's satisfaction of the standards set forth in Rule .0119(a) or (b), no individual may be certified as a paralegal if:~~

~~(D) ...~~

~~(E) Qualified Paralegal Studies Program. A qualified paralegal studies program is a program of paralegal or legal assistant studies that is an institutional member of the Southern Association of Colleges and Schools or other regional or national accrediting agency recognized by the United States Department of Education, and is either~~

~~(1) approved by the American Bar Association;~~

~~(2) an institutional member of the American Association for Paralegal Education; or~~

~~(3) offers at least the equivalent of 18 semester credits of coursework in paralegal studies as prescribed by the American Bar Association Guidelines for the Approval of Paralegal Education including the equivalent of one semester credit in legal ethics.~~

~~(F) ...~~

## **Proposed Amendments to the Rules of Professional Conduct**

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

Amendments to three Rules of Professional Conduct are proposed.

Proposed amendments to Rule 1.15, Safekeeping Property, specify that certain restrictions on the authority to sign trust account checks also apply to the initiation of electronic transfers from trust accounts. The proposed amendments define “electronic transfer” and make clear that lawyers are permitted to sign trust account checks using a “digital signature” as defined in the Code of Federal Regulations. In addition, a proposed new comment explains the due diligence required if a lawyer uses an intermediary (such as a bank, credit card processor, or litigation funding entity) to collect a fee.

The proposed comprehensive revision of Rule 3.5, Impartiality and Decorum of the Tribunal, improves the clarity of the rule overall and provides better guidance on the prohibition on *ex parte* communications with a judge.

The proposed amendments to Rule 5.4, Professional Independence of Lawyer, add an exception to the prohibition on fee sharing and a new comment to the rule. The exception allows a lawyer to pay a portion of a legal fee to a credit card processor, group advertising provider, or online platform for hiring a lawyer if the business relationship will not interfere with the lawyer’s professional judgment. The proposed comment lists factors to be considered when evaluating whether a business relationship under this exception will interfere with the lawyer’s professional judgment.

### **Rule 1.15, Safekeeping Property**

#### **Rule 1.15-1, Definitions**

(a) ...

(e) “Electronic transfer” denotes a paperless transfer of funds.

[Re-lettering remaining paragraphs.]

#### **Rule 1.15-2, General Rules**

(a) ...

(s) Signature on Trust Checks Check Signing and Electronic Transfer Authority.

(1) Every trust account check drawn on a trust account must be signed by a lawyer, or by an employee who is not responsible for performing monthly or quarterly reconciliations and who is

supervised by a lawyer. Prior to exercising signature authority, a lawyer or supervised employee shall take a one hour trust account management continuing legal education (CLE) course approved by the State Bar for this purpose. The CLE course must be taken at least once for every law firm at which the lawyer or the supervised employee is given signature authority.

(2) Every electronic transfer from a trust account must be initiated by a lawyer, or by an employee who is not responsible for performing monthly or quarterly reconciliations and who is supervised by a lawyer.

(3) Prior to exercising signature or electronic transfer authority, a lawyer or supervised employee shall take a one-hour trust account management continuing legal education (CLE) course approved by the State Bar for this purpose. The CLE course must be taken at least once for every law firm at which the lawyer or the supervised employee is given signature or transfer authority.

(4) Trust account checks may not be signed using signature stamps, preprinted signature lines on checks, or electronic signatures other than “digital signatures” as defined in 21 CFR 11.3(b)(5).

(t) ...

#### **Rule 1.15, Safekeeping Property**

##### **Comment to Rule 1.15 and All Subparts**

[1] ....

*Prepaid Legal Fees*

[12] ....

[13] Client or third-party funds on occasion pass through, or are originated by, intermediaries before deposit to a trust or fiduciary account. Such intermediaries include banks, credit card processors, litigation funding entities, and online legal service platforms. A lawyer may use an intermediary to collect a fee. However, the lawyer may not participate in or facilitate the collection of a fee by an intermediary that is unreliable or untrustworthy. Therefore, the lawyer has an obligation to make a reasonable investigation into the reliability, stability, and viability of an intermediary to determine whether reasonable measures are being taken to segregate and safeguard client funds against loss or theft and, should such funds be lost, that the intermediary has the resources to compensate the client. Absent other indicia of fraud (such as the

use of non-industry standard methods for collection of credit card information), a lawyer’s diligence obligation is satisfied if the intermediary collects client funds using a credit or debit card. Unearned fees, if collected by an intermediary, must be transferred to the lawyer’s designated trust or fiduciary account within a reasonable period of time so as to minimize the risk of loss while the funds are in the possession of another and to enable the collection of interest on the funds for the IOLTA program or the client as appropriate. See 27 N.C.A.C. 1B, Sect. 1.300.

*Abandoned Property*

[13] [14] ...

[Renumbering remaining paragraphs.]

#### **Rule 3.5 Impartiality and Decorum of the Tribunal**

(a) A lawyer representing a party in a matter pending before a tribunal shall not:

(1) seek to influence a judge, juror, member of the jury venire prospective juror, or other official by means prohibited by law;

(2) communicate *ex parte* with a juror or member of the jury venire prospective juror except as permitted by law;

(3) unless authorized to do so by law or court order, communicate ex parte with the judge or other official regarding a matter pending before the judge or official; communicate ex parte with a judge or other official except:

(A) in the course of official proceedings;

(B) in writing, if a copy of the writing is furnished simultaneously to the opposing party;

(C) orally, upon adequate notice to opposing party; or

(D) as otherwise permitted by law;

(4) ...

(b) All restrictions imposed by this rule also apply to communications with, or investigations of, family members of the family of a juror or of a member of the jury venire prospective juror.

(c) A lawyer shall reveal promptly to the court improper conduct by a juror or a member of the jury venire, prospective juror, and improper conduct or by another person toward a juror, a member of the jury venire prospective juror or a member of the family members of a juror or of a member of the jury venire prospective juror’s family.

(d) For purposes of this rule:

(1) Ex parte communication means a

communication on behalf of a party to a matter pending before a tribunal that occurs in the absence of an opposing party, without notice to that party, and outside the record.

(2) A matter is “pending” before a particular tribunal when that tribunal has been selected to determine the matter or when it is reasonably foreseeable that the tribunal will be so selected.

**Comment**

[1] ...

[2] To safeguard the impartiality that is essential to the judicial process, jurors and members of the jury venire prospective jurors should be protected against extraneous influences. When impartiality is present, public confidence in the judicial system is enhanced. There should be no extrajudicial communication with members of the jury venire prospective jurors prior to trial or with jurors during trial by or on behalf of a lawyer connected with the case. Furthermore, a lawyer who is not connected with the case should not communicate with a juror or a member of the jury venire prospective juror about the case.

[3] ...

[4] Vexatious or harassing investigations of jurors or members of the jury venire prospective jurors seriously impair the effectiveness of our jury system. For this reason, a lawyer or anyone on the lawyer’s behalf who conducts an investigation of jurors or members of the jury venire prospective jurors should act with circumspection and restraint.

[5] Communications with, or investigations of, members of the families of jurors or the families of members of the jury venire prospective jurors by a lawyer or by anyone on the lawyer’s behalf are subject to the restrictions imposed upon the lawyer with respect to the lawyer’s communications with, or investigations of, jurors or members of the jury venire prospective jurors.

**Rule 5.4 Professional Independence of Lawyer**

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

- (1) ...;
- (4) ...; and
- (5) ...; and

(6) a lawyer or law firm may pay a portion of a legal fee to a credit card processor, group advertising provider, or online platform for identifying and hiring a

lawyer if the amount paid is for payment processing or for administrative or marketing services, and there is no interference with the lawyer’s independence of professional judgment or with the client-lawyer relationship.

(b) ...

**Comment**

[1] ...

[2] A determination under paragraph (a)(6) of this rule as to whether an advertising provider or online marketing platform for hiring a lawyer (jointly “platform”) will interfere with the professional independence of judgment of a lawyer requires consideration of a number of factors. These factors include, but are not limited to, the following: (a) the percentage of the fee or the amount the platform charges the lawyer; (b) the percentage of the fee or the amount that the lawyer receives from clients obtained through the platform; (c) representations made to prospective clients and to clients by the platform; (d) whether the platform communicates directly with clients and to what degree; and (e) the nature of the relationship between the lawyer and the platform. A relationship wherein the platform, rather than the lawyer, is in charge of communications with a client indicates interference with the lawyer’s professional judgment. The lawyer should have unfettered discretion as to whether to accept clients from the platform, the nature and extent of the legal services the lawyer provides to clients obtained through the platform, and whether to participate or continue participating in the platform. The lawyer may not permit the platform to direct or control the lawyer’s legal services and may not assist the platform to engage in the practice of law, in violation of Rule 5.5(a).

[2][3] ...

[Renumbering remaining paragraphs.]

**Republication of Proposed Amendments to Rule 1.15-3**

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

The version of the proposed amendments to Rule 1.15-3, a subpart of Rule 1.15, Safekeeping Property, that was published in the Summer 2017 edition of the *Journal* contained a substantive error. Therefore, a corrected version is published below. The proposed amendments reduce the number of

quarterly reviews of fiduciary accounts that must be performed by lawyers who manage more than ten fiduciary accounts on the assumption that the accounts are managed in the same manner, and reviews of a random sample of the accounts is sufficient to facilitate the early detection of internal theft and correction of errors.

**Rule 1.15-3 Records and Accountings**

(a) Check Format.

...

(i) Reviews.

(1) ...

(2) Each quarter, for each general trust account; and dedicated trust account, and fiduciary account, the lawyer shall review the statement of costs and receipts, client ledger, and cancelled checks of a random sample of representative transactions completed during the quarter to verify that the disbursements were properly made. The transactions reviewed must involve multiple disbursements unless no such transactions are processed through the account, in which case a single disbursement is considered a transaction for the purpose of this paragraph. A sample of three representative transactions shall satisfy this requirement, but a larger sample may be advisable.

(3) Each quarter, for each fiduciary account, the lawyer shall engage in a review as described in Rule 1.15-3(i)(2); however, if the lawyer manages more than ten fiduciary accounts, the lawyer may perform reviews on a random sample of at least ten fiduciary accounts in lieu of performing reviews on all such accounts.

(3)(4) ...

[Renumbering remaining paragraphs.] ■

**Thank You to Our Meeting Sponsors**

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# Client Security Fund Reimburses Victims

At its July 27, 2017, meeting, the North Carolina State Bar Client Security Fund Board of Trustees approved payments of \$173,361.67 to 19 applicants who suffered financial losses due to the misconduct of North Carolina lawyers.

The payments authorized were:

1. An award of \$996.67 to a former client of Mildred A. Akachukwu of Durham. The board determined that Akachukwu was retained to handle a client's personal injury claim from an auto accident. Akachukwu settled the matter and retained funds to pay the client's medical providers. Akachukwu failed to make all the proper disbursements to the medical providers. Due to misappropriation, Akachukwu's trust account balance is insufficient to pay all her client obligations. Akachukwu was disbarred on March 30, 2011.

2. An award of \$5,000 to a former client of Adam L. Baker of Raleigh. The board determined that Baker was retained to handle a client's criminal charges in both Franklin and Wake counties. Baker was paid separate fees per county. Baker provided some valuable legal service for the fee paid in the Franklin County matters, but knew or should have known that he could not provide any service to the client in the Wake County matter prior to his license being suspended for his failure to complete his CLE requirements. Baker was disbarred on February 13, 2017.

3. An award of \$4,500 to a former client of Adam L. Baker. The board determined that Baker was retained to defend a client in a civil lawsuit. The client paid Baker's fee, but Baker failed to report receipt of the funds to his firm and failed to put the funds into a trust account. Baker did not provide the legal services prior to his license being administratively suspended prior to his disbarment.

4. An award of \$500 to a former client of Adam L. Baker. The board determined that Baker was retained to represent a client in his divorce and to resolve some parking tick-

ets. The client paid \$500 towards the \$1,000 quoted fee. Baker failed to provide any valuable legal services for the fee paid.

5. An award of \$5,000 to a former client of Adam L. Baker. The board determined that Baker was retained to represent a client on a DWI charge. Baker failed to provide any valuable legal services for the fee paid.

6. An award of \$3,000 to an applicant who suffered a loss because of Dee W. Bray Jr. of Fayetteville. The board determined that Bray was retained to represent the applicant's son who was charged with first degree murder. The applicant made payments towards a \$25,000 fee. Shortly thereafter, Bray was placed on disability inactive status by the senior resident judge prior to performing any legal services on the client's behalf for the fee paid. Bray was placed on disability inactive status on February 2, 2017.

7. An award of \$275 to an applicant who suffered a loss because of Paige C. Cabe of Sanford. The board determined that Cabe was retained to handle the applicant's son's speeding ticket. Cabe failed to provide any valuable legal services for the fee paid. A judge reported Cabe to the State Bar, but Cabe failed to respond to the communications she received from the State Bar.

8. An award of \$2,000 to a former client of Wayne E. Crumwell of Reidsville. The board determined that Crumwell was retained to handle a client's Chapter 7 Bankruptcy. Crumwell died on November 6, 2016, before providing any valuable legal services for the fee paid.

9. An award of \$3,500 to a former client of Wayne E. Crumwell. The board determined that Crumwell was retained to handle a client's Chapter 7 Bankruptcy. Crumwell died before providing any valuable legal services for the fee paid.

10. An award of \$3,300 to a former client of Wayne E. Crumwell. The board determined that Crumwell was retained to handle a client's Chapter 13 Bankruptcy. Crumwell died before providing any valua-

able legal services for the fee paid.

11. An award of \$1,645 to a former client of Wayne E. Crumwell. The board determined that Crumwell was retained to resolve a client's traffic cases in five counties. Crumwell was paid fees, costs, and fines for the cases. Crumwell failed to place any of the money he received from his client into his trust account. Crumwell resolved the charges in two counties and paid the costs, but failed to resolve all the client's matters prior to his death.

12. An award of \$3,180 to a former client of Michael S. Eldredge formerly of Lexington. The board determined that Eldredge was retained to handle a client's custody matter. Eldredge failed to file anything or provide any valuable legal services for the fee paid. Eldredge surrendered his license to the council and his disbarment became effective August 17, 2017. The board previously reimbursed two other Eldredge clients a total of \$65,910.

13. An award of \$6,340 to a former client of Christopher E. Greene of Charlotte. The board determined that Greene was retained to represent a client and her two children in filing Green Card applications, and to represent her husband in filing an I-929. Greene told the client that the applications had been filed with the USCIS, but the client later learned the applications were never sent to USCIS. Greene failed to provide any valuable legal services to the client's family for the fee paid. Greene surrendered his law license. Greene was disbarred on February 11, 2017.

14. An award of \$1,125 to an applicant who suffered a loss because of Charles R. Gurley of Goldsboro. The board determined that an applicant retained Gurley to represent her son on two traffic tickets. Gurley failed to provide any valuable legal services for the fee paid.

15. An award of an additional \$6,500 to a former client of Steven Troy Harris of

CONTINUED ON PAGE 48

# John B. McMillan Distinguished Service Award

## M. Keith Kapp

M. Keith Kapp received the North Carolina State Bar's Distinguished Service Award at the Wake County Bar Association's luncheon on June 6th. State Bar President Mark Merritt presented the award.

Mr. Kapp is a native of Forsyth County. He earned an AB degree with honors in history from the University of North Carolina in 1976. He matriculated as a Morehead Scholar and was selected for membership in Phi Beta Kappa, the Order of the Old Well, and the Order of the Grail. He received his JD degree with honors in 1979, also from UNC. Keith was named the Outstanding Law Student in the Southeast by Phi Delta Phi law fraternity. He served on the staff of the International Law Journal, and was inducted into the Order of the Golden Fleece.

Following law school, he moved to Raleigh to clerk for Judge Earl Vaughn of the NC Court of Appeals and then for Justice J. Frank Huskins of the NC Supreme Court. In 1981 he joined the Maupin Taylor and Ellis law firm, which later merged with Williams Mullins. He became a partner, board member, and eventually managing director of Williams Mullins.

Mr. Kapp has provided invaluable service to the North Carolina State Bar. He served as the president of the State Bar from 2012 to 2013. In addition to his role as an officer, Keith's service to the State Bar included nine years as a State Bar councilor representing Wake County's 10th Judicial District, two years as chair of the Ethics Committee, and two years as chair of the Facilities Committee.

Kapp has also been active in a number of voluntary bars. He served on the North Carolina Bar Association's Board of Governors in the 1980s. He is a past member of the NCBA's Appellate Rules Committee and is active on the Professionalism Committee and in the Antitrust and Administrative Law Sections. He served as the president of the Wake County Bar

Association from 1996-1997. He is a member of the North Carolina Association of Defense Attorneys, and a member of the Antitrust Section and Forum on Franchising Section of the ABA, an organization he also served as a member of its House of Delegates. Additionally, he is a founding director of the NC Volunteer Lawyers for the Arts.

In addition to his service to the legal profession, Mr. Kapp's has provided extensive service to his community, including the Moravian Ministries Foundation, the Raleigh Kiwanis Club, and the Raleigh Little Theatre. In 2011, the Leadership Raleigh program of the Raleigh Chamber of Commerce recognized his exceptional community involvement by naming Kapp to the Leadership Raleigh Hall of Fame.

Mr. Kapp is the embodiment of the high ideals of the legal profession and demonstrates consistent excellence in the practice of law. He is a deserving recipient of the John B. McMillan Distinguished Service Award.

## Melvin F. Wright Jr.

Melvin F. Wright Jr. received the John B. McMillan Distinguished Service Award in Asheville, North Carolina, on July 27, 2017. State Bar President Mark Merritt presented the award.

Wright is, in every conceivable way, a most deserving recipient of the John B. McMillan Distinguished Service Award. He served in the military from 1967 to 1970, and was honorably discharged from active duty in 1970 as a first lieutenant. For his service in Vietnam, he was awarded the Bronze Star and Air Medal.

Mr. Wright's contributions to the legal community are far too numerous to list. However, his service as the first and only executive director of the Chief Justice's Commission on Professionalism is perhaps most noteworthy. His effectiveness in that role has resulted in a substantial increase in the degree of professionalism within the Bar as a whole.

Wright has served as an adjunct professor at both the University of North Carolina

School of Law and the Norman A. Wiggins School of Law at Campbell University. He has participated as a presenter in countless continuing legal education programs designed to instill and promote the values of professionalism. In addition, he has been frequently published in the North Carolina State Bar *Journal* and in various other publications on the subject of professionalism. He served as an advisory member to various committees of the State Bar charged with determining critical issues of professional responsibility and explicating the reasons for those determinations.

Mr. Wright has served as president of the Forsyth County Bar Association and the 21st Judicial District Bar. He has also chaired the National Consortium on Professionalism Initiatives, the American Bar Association's Standing Committee on Professionalism, and the Professionalism Committees of the North Carolina Bar Association and the Wake County Bar Association.

Wright has committed large amounts of his time to assist lawyers suffering from addiction and mental illness through his work with the State Bar's Lawyer Assistance Program and the North Carolina Bar Association's BarCARES Program. He has also worked closely with the North Carolina Bar Association's Transitioning Lawyers Commission in an effort to ensure that senior members of the Bar might discontinue the active practice of law, when necessary, with dignity and grace.

## Nominations Sought

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.

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

# Willoughby Nominated as Vice-President



Raleigh Attorney C. Colon Willoughby was selected by the State Bar's Nominating Committee to stand for election to the office of vice-president of the North Carolina State Bar.

The election will take place in October at the State Bar's annual meeting. Raleigh attorney John M. Silverstein will assume the office of president, and Winston-Salem attorney G. Gray Wilson will also stand for election to the office of president-elect.

Willoughby is a partner with the Raleigh firm McGuireWoods, where he focuses his practice on government, regulatory, and criminal investigations. Prior to joining McGuireWoods, he worked as a mortgage banker, as a member of the faculty at Peace College, as a private practitioner, and served as the elected district attorney in Wake County

for 27 years.

His other professional activities have included serving as president of the Wake County Academy of Trial Lawyers, director of the Wake County Bar Association, president of North Carolina Conference of District Attorneys, a member of the Board of Directors of the National District Attorney's Association.

Willoughby served as a State Bar councilor from 1998-2006, and was elected again in 2014. During his time as a councilor he has

served as chair of the Authorized Practice Committee, and as vice-chair of the Grievance Committee.

Willoughby has been extensively involved in the community. He has served on the Board of Governors of Summit House, Inc., as director of Artspace, Inc., as a member of the Raleigh Rotary Club, on the Triangle YMCA Board of Directors, and on the Board of Directors for NCLEAF. He also is an active member of White Memorial Presbyterian Church, where he serves as an Elder. ■

## The Disciplinary Department (cont.)

petition for reinstatement before the Disciplinary Hearing Commission of The North Carolina State Bar. Stokes was disbarred effective January 12, 2011, and surrendered his license on February 27, 2012, for a plea

and finding of guilty to two misdemeanor offenses of receiving stolen goods in the Guilford County Superior Court on December 9, 2010.

Individuals who wish to note their concurrence with or opposition to this petition should file written notice with the secretary of the State Bar, PO Box 25908, Raleigh, NC 27611, before November 1, 2017. ■

## Client Security Fund (cont.)

Durham. The board determined that Harris was retained to handle a client's domestic matter. Because Harris knew or should have known that his license was administratively suspended prior to accepting \$2,500 to handle a separate matter for the client, the board previously reimbursed the client that amount. Upon reconsideration of the client's claim for the initial fee paid, the board determined that the parties had agreed upon what portion of that initial fee was earned and what portion could not be earned due to the suspension of Harris' license. The board reimbursed the amount initially paid to Harris that he did not earn due to his administrative suspension. Harris was suspended on November 12, 2015. The board previously reimbursed two other

Harris clients a total of \$6,500.

16. An award of \$18,500 to a former client of Steven Troy Harris. The board determined that Harris was retained to handle a client's civil action and the client's stepson's custody matter. Harris provided no valuable legal services in either case for the fee paid prior to his license being suspended.

17. An award of \$100,000 to an applicant who suffered a loss because of John G. McCormick of Chapel Hill. The board determined that McCormick closed five real estate transactions for clients who had purchased homes from the applicant in 2006. McCormick retained the sales proceeds from those closings and held them in a fiduciary capacity. Instead of disbursing the funds to the applicant, McCormick misappropriated the funds for his own use. McCormick was disbarred on May 11, 2007. The board previously reimbursed 15

other McCormick clients a total of \$320,094.50.

18. An award of \$3,000 to a former client of David Sutton of Winterville. The board determined that Sutton was retained to file civil actions for a client. Sutton failed to provide any valuable legal services to the client for the fee paid prior to his license being suspended by order of the Disciplinary Hearing Commission in November 2014.

19. An award of \$5,000 to a former client of Lyle Yurko formerly of Charlotte. The board determined that Yurko was retained to file an MAR for a client convicted of second degree murder and other charges. Yurko failed to provide any valuable legal services for the fee paid prior to disappearing and abandoning his practice. The board previously reimbursed 13 other Yurko clients a total of \$106,330. ■

# Law School Briefs

## Campbell University School of Law

**Campbell Law confers 141 degrees at 2017 graduation**—Campbell Law School conferred 141 juris doctor degrees at its 39th annual hooding and graduation ceremony on May 12 at Memorial Auditorium at the Duke Energy Center for the Performing Arts. North Carolina Attorney General Josh Stein delivered the commencement address.

**Morse wins Top Gun National Mock Trial Championship**—Jacob Morse, a 2017 Campbell Law graduate, won the Top Gun National Mock Trial Competition on Sunday, June 4, at Baylor Law School in Waco, Texas. In addition to collecting a \$10,000 prize, Morse ends his tenure at Campbell Law as the top student advocate in the country.

Morse, who also competed at Top Gun in 2016, recently graduated cum laude and was the law school's first ever Leadership Scholar Award recipient. He now joins an illustrious list of recent Top Gun national champions, including past winners from Yale Law School (2016) and New York University (2015).

**Former law dean Davis endows leadership scholarship**—Founding Campbell Law Dean F. Leary Davis Jr. and his wife Joy have given and pledged \$150,000 to endow a competitive scholarship. The gift renames and endows a full-tuition award now known as the Leary & Joy Davis Leadership Scholarship.

**Professor Bolitho named counsel to the deputy attorney general of the US**—Campbell Law Assistant Professor Zachary Bolitho has been appointed to a position in the US Department of Justice. Bolitho will take leave from the Campbell Law faculty to serve as counsel to Deputy Attorney General Rod Rosenstein. The deputy attorney general is second in command at the US Department of Justice behind Attorney General Jeff Sessions. Bolitho will advise Deputy Attorney General Rosenstein on a number of legal and policy issues.

## Charlotte School of Law

On Monday, June 19, 2017, Associate

Professor Paul Meggett was named interim dean at Charlotte School of Law. Dean Meggett is an alumnus of North Carolina State University and the University of North Carolina School of Law.

Prior to joining the faculty in August 2011, Dean Meggett spent 12 years as associate general counsel for the University of North Carolina Health Care System and assistant university counsel for the University of North Carolina at Chapel Hill. Dean Meggett also taught as an adjunct professor of law for six years at the University of North Carolina School of Law. Dean Meggett began his legal career clerking for Chief Justice Burley B. Mitchell Jr. (retired) of the North Carolina Supreme Court. Dean Meggett also has a deep commitment to and a long history of community service both inside and outside the legal profession. The Charlotte School of Law faculty, staff, and administration stand ready, willing, and able to help him move the school forward.

Commenting on his new role, Dean Meggett said, "Although we face some daunting challenges, I am excited by the passion and commitment of the faculty, staff, and administration to work towards a stronger law school of which our students, alumni, the legal profession, and the Charlotte community can be proud."

## Duke Law School

**Levi to step down as Duke Law dean in 2018**—David F. Levi has announced that he will step down as dean of Duke Law School in June 2018. Levi, who became dean in 2007, has presided over major expansions of faculty, research, academic programs, and fundraising at Duke Law, including the recently completed Duke Forward campaign. Levi, who has taught courses on judicial behavior, legal history, and reforming the civil justice system in North Carolina, is active in numerous law reform initiatives, and recently co-chaired the North Carolina Commission on the Administration of Law and Justice. He became president of the American Law Institute in May.

## Civil Justice Clinic crafts Eviction Diversion Program for Durham County

Faculty and students in Duke Law School's Civil Justice Clinic have crafted an Eviction Diversion Program to help stem the tide of evictions in Durham County. The program has been accepted by county court and social service administrators as a pilot program to begin in late summer. The program is designed to help tenants, who uncharacteristically miss a rent payment, remain in their homes while landlords secure judicially supported guarantees of rent payment and avoid the costs of litigation and finding new tenants. As designed, the program could be used to divert eviction at three different points—when the tenant receives a late notice, at the time of a summary ejectment filing, and after an adverse judgement—with resources available at each stage to help facilitate a negotiated resolution between the landlord and the tenant. Clinical Professor Charles Holton, who directs the Civil Justice Clinic, and 2017 graduate Ben Wasserman crafted the program with input from lawyers at Legal Aid of North Carolina. Supervising Attorney Jesse McCoy II will play a substantial role in implementing the program.

## Elon University School of Law

**Former NC Supreme Court Chief Justice retires from Elon Law**—The Honorable James G. Exum Jr., who stepped away from teaching this spring after serving as distinguished professor of the judicial process, was recognized during a May 10 awards luncheon that celebrated Elon University educators, mentors, and retiring professors. A founding member of the Elon University School of Law Board of Advisors, Exum was among the first faculty to teach Elon Law students upon the school's open in 2006, drawing from his wealth of knowledge gleaned from the state's highest court.

**Elon Law names new director of first-year writing program**—A nationally recognized expert in legal writing has joined the Elon Law faculty as director of the school's Legal Method & Communication Program.

Professor Sue Liemer will lead efforts to further develop and implement an integrated, immersive, and iterative writing and research curriculum coordinated with Elon Law faculty colleagues who teach doctrinal courses. Liemer served from 1998-2000 as president of the Association of Legal Writing Directors and served a four-year term on the Board of Directors of the Legal Writing Institute. She created and co-edited the Legal Writing Professors' Blog, twice listed in the *ABA Journal's* top law blogs.

**Elon Law Review editor-in-chief honored with top school award**—An Elon Law graduate in the Class of May 2017 known for “all of the time, heart, and soul she has put into this law school” was honored at commencement with the school’s most prestigious student award. Ragan Hope Riddle received the David Gergen Award for Leadership & Professionalism when she was recognized in front of family and classmates just moments after delivering the ceremony’s student address. Riddle will clerk this fall for the Honorable Paul Newby of the North Carolina Supreme Court.

## North Carolina Central School of Law

On June 10, 2017, Professor Charles E. Smith was showered by well-wishers during his retirement celebration. Dean Phyllis Craig-Taylor and the Office of Development and Alumni Relations welcomed the exuberant guests who filled the venue to capacity. Professor Brenda Reddix-Smalls, director of the Intellectual Property Law Institute (IPLI), lauded her predecessor for establishing the IPLI and sparking student interest in the field of intellectual property law. Professor Smith has been a trailblazer for African American lawyers in this field.

Guest speakers included former students Stephen Redmon ‘87, senior legal advisor and organizational transformation coach, US Department of Veterans Affairs, Washington, DC; Dale Davis ‘04, executive counsel, GE Power, Greenville, South Carolina; and Robert Raynor Jr. ‘81, a practicing attorney in New Bern, North Carolina. The speakers described Professor Smith as visionary, selfless, and generous with his time and wisdom. Those sentiments were echoed in remarks from Dean Craig-Taylor and Professors Irving Joyner and Fred Williams. Professor Smith’s family and friends enjoyed an entertaining, festive evening filled with expressions of gratitude

for his longstanding dedication to NCCU and the practice of law.

On June 20, 2017, the 13th Annual North Carolina Minority Farmers & Land Owners Conference was held at NCCU School of Law. NCCU alumni, faculty, and staff participated in a free Wills and Advance Directives Clinic. Conference attendees were able to consult with volunteer attorneys and obtain a will, durable power of attorney, and health care power of attorney. The forms were executed before a notary, allowing participants to leave with completed documents.

## University of North Carolina School of Law

**International Jurist Magazine recognizes UNC School of Law's LL.M. program as best in academics, experience, and value**—The one-year degree program for international lawyers received an A+ rating for academics, an A+ for best law school experience, and an A for best value law school.

**Carolina Law raises \$1.2M for Annual Fund**—Making history for the second year in a row, the Carolina Law Annual Fund received more than \$1.2 million for the 2017 fiscal year. This represents more than a 20% increase over last year’s record-setting total. The generous gifts from alumni, faculty, staff, and friends will go towards providing student scholarships, supporting faculty excellence, and strengthening experiential learning opportunities for the upcoming academic year.

**Moot Court Teams Make Carolina Law History**—Elaine Hillgrove 2L and Natalia Zbonack 2L won first place in the ABA’s Region 4 Client Counseling Competition; Amanda Aragon 2L, Jenica Hughes 3L, and Rachel Procaccini 2L won first place at the National Energy and Sustainability Moot Court Competition; Nick Hanna 3L and Josephine Kim 3L became the first team to become national finalists in the ABA’s Negotiation Competition; Evan King 2L and Gigi Warner 2L were the first LAMBDA Appellate Advocacy Team to compete in UCLA’s Williams Institute Moot Court Competition; and Emon Northe 2L and Chelsea Barnes 2L were the first appellate advocacy team to compete in the National Black Law Students Association’s Frederick Douglass Moot Court Competition.

**National mortgage settlements digital archive finds new home at Carolina Law**—Joseph A. Smith Jr., who served as the North

Carolina commissioner of banks for nearly ten years, selected Carolina Law as the new home for the digital depository, which contains primary legal documents related to the late 2000s housing crisis. “I wanted the documents in a place committed to learning and scholarship,” says Smith.

## Wake Forest University School of Law

As part of its fully online master of studies in law (MSL) degree and certificate program, Wake Forest Law is offering an innovative telemedicine course that is the first of its kind to be taught in a law school, according to the American Telemedicine Association. Recent studies show the telemedicine course, which will be available beginning in August 2017, is not only innovative, but necessary. Healthcare providers are investing in telehealth, which was valued as a \$18.2 billion global market in 2016 and is estimated to reach \$38 billion by 2022, according to a Zion Market Research study. At the helm of this field is trailblazer MSL Adjunct Instructor Bryan Arkwright, a managing consultant at Schumacher Clinical Consulting. “Digital health, telemedicine, and mHealth apps are driving tremendous change and growth in the healthcare industry in the US and globally,” he says. “However, the number of dedicated courses across higher learning institutions is low. Wake Forest Law’s MSL course is unique at a time when knowledge of telemedicine is in high demand.” The online telemedicine course explores the legal landscape within the rapidly growing global industry. Students learn to recognize the risks inherent in the provision of telehealth services, and analyze how each of the relevant stakeholders can mitigate risk while improving patient care and access.

**Francie Scott (JD ‘04) has been promoted to fill the new position of assistant dean for career and professional development**—Scott was named interim director of the Office of Career and Professional Development in May following the departure of Kim Fields, who served as director of the department for 16 years and resigned to spend more time with her family. Scott has counseled students on all aspects of professional development and career planning. As director of professional development, she helped create the law school’s innovative Professional Development course, which addresses career planning, professional identity, and job search skills. ■



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